

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:

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DANIEL DOMENICO.

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SUPREME COURT

APR 11 2008

OF THE STATE OF COLORADO
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Case No. 08SA91

OPENING BRIEF OF PETITIONER

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1. Transcript of the Title Board Hearing, February 20, 2008 on Proposed Initiative for 2007-2008 #57
2. Transcript of the Title Board Rehearing, March 5, 2008 on Proposed Initiative for 2007-2008 #57
3. Text for Proposed Initiative for 2007-2008 #57
4. Title Set for Proposed Initiative for 2007-2008 #57

On behalf of 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 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities") (hereinafter "Initiative").

ISSUES 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. § 1-40-106.5, in dramatically expanding the nature of criminal laws for criminal liability of business entities to their directors, officers, employees and any other person authorized to act on behalf of the business entity; allowing any Colorado resident to bring a civil claim against any business entity, its directors, officers, employees or anyone acting on its behalf for civil damages for any conduct that falls within the scope of Colo. Rev. Stat. § 18-1-606; and, requiring that any award of damages be paid to the Colorado's general fund, which are then exempt from the revenue and spending limits.

2. Whether the title, ballot title, and submission clause of the Initiative are confusing, misleading, and use an impermissible catch phrase with the use of the term "criminal conduct."

STATEMENT OF THE CASE

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

On February 20, 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, a registered elector, timely filed a Motion for Rehearing pursuant to Colo. Rev. Stat. §1-40-108(1) on February 27, 2008. On March 5, 2008, the Title Board denied Petitioner's motion on a vote of 2 to 1; whereupon Petitioner initiated this original proceeding for review of the Title Board's action, pursuant to C.R.S. § 1-40-107(2),

B. Statement of the Facts

The Initiative seeks to amend Colo. Rev. Stat. § 18-1-606 regarding criminal liability of business entities, to their directors, officers, employees, and any other person authorized to act on behalf of the business entity; to expand the types of criminal liability to acts that are traditionally found in the realm of tort and civil statutory law; to allow any Colorado resident to bring a civil claim against any business entity, its directors, officers, every employee, or anyone acting on its behalf for civil damages for any conduct that falls within the scope of Colo. Rev. Stat. § 18-1-606; and, to require that any award of damages be paid to the

Colorado's general fund, making the money exempt from the revenue and spending limits.

SUMMARY OF THE 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 title of the Initiative states that it is “[a]n amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses. . . .” The Initiative is subtly worded and actually covers four distinct subjects, however. First, it expands criminal liability for certain criminal actions of business entities to all of a business entity’s individual employees, officers, directors, high managerial employees, owners, and any other person who is authorized to act on behalf of a business entity (“Covered Persons”) liable for the companies’ actions. *See* Final Text of Initiative, proposed C.R.S. § 18-1-606(1), 2(a), attached hereto as Attachment 3 and incorporated herein by this reference. Second, the Initiative adds 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). Third, it provides residents of Colorado a civil remedy for the business entities’ or the Covered Persons’ conduct, even where the resident has suffered no harm from the action or the inaction. *See* Proposed C.R.S. § 18-1-

606(5)(a). Fourth, the awards of damages are to be paid to the state's general fund, free of the limits set forth in the Colorado statutes and TABOR, and a successful plaintiff may be awarded attorneys' fees and costs. *See* Proposed C.R.S. § 18-1-606(5)(b) and (d) .

The actions of the Title Board should be reversed because the Title is unclear, inaccurate, incomplete, confusing, and misleading in failing to supply necessary definitions and in failing 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. The Title is unclear and incomplete in not revealing that potential defendants will be required to make their full disclosures to the attorney general, prior to being charged, in order to gain an affirmative defense; in failing to inform the voters that all awards of damages are paid to the governmental entity and are then exempted from revenue and spending limits; and in failing to disclose from whom a successful plaintiff is to collect fees and costs.

ARGUMENT

I. THE PROPOSED INITIATIVE VIOLATES SINGLE SUBJECT REQUIREMENT

The Initiative is complex and subtly worded. Despite the statements of the proponents that the change to the statute is a narrow one, concerning a single

theme, a plain reading of the text of the Initiative reveals that it cannot unite multiple subjects from a complex theme into a single subject without inviting voter surprise and fraud.

A. Standard of Review

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. *See In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000) (“Implementing provisions that are directly tied to an initiative’s central focus are not separate subjects.”) The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative’s numerous measures and “to prevent surprise and fraud from being practiced upon voters.” *See* C.R.S. § 1-40-106.5(e)(I, II).

At first glance, the concept of a single subject requirement appears straightforward. An initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms, however. *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)*, 4 P.3d 1094, 1097 (Colo. 2000) (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). "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) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 124-25 (Colo. 1995)).

"The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (holding that there were "at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of

the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits”). [hereinafter, *In re Initiative #55*]. “An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007). In light of the foregoing, this Court has stated, “We must examine sufficiently an initiative’s central theme to determine whether it contains hidden purposes under a broad theme.” *Id.*

B. The Initiative Is Subtly Worded and Embraces Four Distinct Complex Subjects that Cannot be Merged under Colorado Law

The title of the Initiative is stated in its first fourteen words: “An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses. . . .” The Initiative covers four distinct subjects. First, it expands criminal liability for certain criminal actions of a business entity to all of its individual employees, officers, directors, high managerial employees, owners, and any other person who is authorized to act on behalf of a business entity (“Covered Persons”) liable for the companies’ actions. *See* Final Text of Initiative, Proposed C.R.S. § 18-1-606(1), 2(a). Second, 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). Third, it provides residents of Colorado a civil remedy for the business entities’ or the Covered Persons’ conduct, even where the resident has suffered no harm from the action or the inaction. *See* Proposed C.R.S. § 18-1-606(5)(a). Fourth, the awards of damages from which will be paid to the state’s general fund, and are to be free of the limits set forth in the Colorado statutes and TABOR, and a successful plaintiff may be awarded fees and costs. *See* Proposed C.R.S. § 18-1-606(5)(b) and (d) .

1. Criminal liability expanded to all employees and agents of business entities

The first two clauses of the Title state that the subject of the Initiative is to extend criminal liability to businesses and their employees and agents: “criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity’s directors, officers, and employees and agents who formulate a business’s policies or supervise employees.” *Id.* The final clause of the Title provides an affirmative defense to criminal or civil charges arising from the covered persons’ actions. *See* Title at ll. 10–12. The Title and Submission Clause are attached hereto as Attachment 4 and are incorporated herein by this reference. Were extending criminal liability to businesses and its employees and providing an affirmative defense for the alleged crimes the single purpose of the Initiative, the

voters would not be at risk of surprise. This is not the sole subject of the Initiative, however. The citizens of Colorado risk the inadvertent passage of an initiative that presents a number of provisions that are “coiled up in the folds of a complex initiative.” *In re Title, Ballot Title and Submission Clause 2007-2008*, #17, *supra*, 172 P.3d at 875).

2. Initiative adds new crimes in criminalizing “failure to perform duties required by law”

The third clause sets forth the general categories of actions and inactions for which the Covered Persons can be held criminally liable. The plain language of the title includes the failure “to perform duties required by law.”¹ This clause expands crimes to actions which have traditionally been civil wrongs.

“Duties that are required by law” include torts, *see* 7 COPRAC § 10.36 (comparing torts, which arise from duties imposed by law, to contractual obligations, which arise from the parties’ mutual promises); 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, *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

¹ The Title further provides for violations where “management engages in, authorizes, solicits, requests, commands or knowingly tolerates the business’s criminal conduct”.

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 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 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 criminal actions under the Initiative, when committed by business entities and their employees.

Relating to this clause, the Initiative endows certain of these new crimes—specifically, crimes of omission—with strict liability. *See* Proposed C.R.S. § 18-1-606(1)(a) (“The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law . . .”). The Initiative does not require that the individual charged with a crime either had knowledge of the specific duty to be performed or that he had knowledge that the business entity failed to perform that duty. The lack of a requirement of scienter brings these new crimes created by the Initiative into the scope of strict liability.

Generally, Colorado courts apply strict liability to abnormally dangerous activities, *see e.g., Cook v. Rockwell Int'l Corp.*, 181 F.R.D. 473 (D. Colo. 1998) (regarding release of hazardous sub; product liability, *see e.g., Simon v. Coppola*, 876 P.2d 10 (Colo. App. 1993); certain offenses that require only a voluntary performance of an act, *see C.R.S. § 18-1-502; People v. Manzo*, 144 P.3d 551 (Colo. 2006) (holding leaving scene of accident with serious injury does not require culpable mental state); and public welfare offenses which are meant to “enforce compliance with regulatory schemes and seek to protect public health, safety, and welfare.” *People v. Ellison*, 14 P.3d 1034, 1037–38 (Colo. 2000). The Initiative title does not limit agents’ and high managerial agents’ criminal liability for traditionally, civil wrongs to these types of offenses. In fact, there are no limits placed on a failure to perform traditionally civil duties for which a covered person could be held strictly liable.

3. Initiative provides residents of Colorado a civil remedy for business entities’ or the Covered Persons’ conduct, even where resident has suffered no harm from the action or the inaction

The fourth clause sets forth another purpose, to create a new private right of action: a right for any Colorado resident to bring “an action for civil damages against a business or its agents for such criminal conduct,” whether or not he has

been harmed. The Initiative allows any “Colorado resident” to seek “civil damages” against any business entity, employee of the business entity, or anyone affiliated with the business entity that violates the broad conduct that subjects the party to criminal liability. *See* Proposed C.R.S. § 18-1-606(5)(a) . The Initiative does not define “civil damages” or “resident.” *See id.*

This clause of the Title, *see* ll. 6–8, and subsection (5)(a) of the Initiative change the established requirements of standing to bring a claim in court. The Title and Initiative do not require the plaintiff to have suffered any harm from the defendant’s actions or failures to act. *See id.* Generally, to establish standing to sue, the plaintiff must show (1) an injury in fact (2) to a legally protected interest, (3) resulting from the defendant’s actions. *See Wimberly v. Ettenberg*, 194 Colo. 163, 168, 570 P.2d 535, 539 (1977). The Initiative is distinguishable from traditional private rights of action in allowing a person to bring an action without requiring any injury to arise from the allegedly wrongful conduct of the business, its employees, or agents. *Cf. Coors v. Security Life of Denver Co.*, 91 P.3d 393, 398 (Colo. App. 2003) (considering actions under Colo. Consumer Protection Act) (citing Colo. Rev. Stat. §6-1-101 *et. seq.*).²

² An extension of the single subject/clear title limitation applicable to bills, Colorado Constitution prohibits voter initiatives from containing multiple subjects. Here, the civil private

4. Initiative requires all awards of damages be paid to state's general fund, free of limits set forth in Colorado Statutes and TABOR, and providing award of attorneys' fees and costs to a successful plaintiff

The fifth clause of the Title creates a new revenue source for the state's general fund from the damages of a successful civil suit brought by a resident of the state: "[R]equiring that awards in civil actions be paid to the general fund of the State of Colorado." *Id.* at ll. 8–9. These funds will be exempt from all revenues and spending limits set forth in C.R.S. § 24-75-201.1 and the limits of TABOR.

Further prejudicing businesses and their unsuspecting employees is a one-sided attorney fees provision. Under the American Rule, "attorney fees cannot be recovered absent an express statute, court rule, or private contract providing for them." *See Hawes v. Colo. Div. of Ins.*, 65 P.3d 1008, 1015 (Colo. 2003); *see also, Krystkowiak v. W.O. Brisben Cos., Inc.*, 90 P.3d 859 (Colo. 2004); C.R.S. § 13-17-101, *et seq.* The Initiative provides fees for the successful party only where the successful party is the resident-plaintiff. If the business entity-defendant were to prevail, it could not receive its fees or costs. Thus, the resident-plaintiff faces no risk in filing a complaint against a business entity or one of its employees, beyond his own attorney's fees and costs. Even in the event that the claims are found to be

right of action fails to fall under the title of Colo. Rev. Stat. § 18-1-606 Criminal Liability for Business Entities.

frivolous, the resident-plaintiff may simply be denied the possibility of collecting his fees. This contravenes C.R.C.P. 11 and C.R.S. § 13-17-101, *et seq.*

Where legitimate claims exist, the Initiative may adversely affect injured parties. A race to the courthouse and trial may ensue, allowing the State of Colorado or resident-plaintiffs to collect damages, in lieu of persons suffering actual injuries from the wrongful actions or inaction of a business entity or its employees. *See* Title at ll. 8–9. Were more than one case for the same harms to be filed, there is the risk of inconsistent judgments. Potential plaintiffs who have suffered harm may discover the trial court’s doors closed to them because a resident-plaintiff has already brought a successful claim, which has triggered the doctrine of *res judicata*. The costs of defending lawsuits brought pursuant to the Initiative are likely to drive many defendant companies out of business or into bankruptcy.

II. THE INITIATIVE IS CONFUSING, UNFAIR, MISLEADING, AND LIKELY TO SURPRISE THE VOTERS

The Title Board’s chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). “In fixing titles and summary, the Board’s duty is ‘to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.’” *Id.* (quoting

In re Proposed Initiative for 1999-2000 No. 29, 972 P.2d 257, 266 (Colo. 1999)); see also, *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant, provision that was disguised by other elements of the proposal. 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). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. See *id.* ; see also, *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 # 256*, 12 P.3d 246, 256 (Colo. 2000); *In re Ballot Title 1997-1998 #62, supra*, 961 P.2d at 1082.

The Court has stated that it will "characterize the proposal sufficiently to enable review of the Title Board's action." *In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000) (citing *In re Ballot Title 1999-2000 # # 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000)). This Court must examine "an initiative to determine whether or not the constitutional prohibition against initiative proposals

containing multiple subjects has been violated.” *In re Initiative #30*, 959 P.2d 822, 825 (Colo. 1998). Titles must “unambiguously state the principle of the provision sought to be added, amended or repealed.” *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000) (citing *In re Ballot Title 1999-2000 # 104*, 987 P.2d 249, 254 (Colo. 1999)).

In *In re Ballot Title 1999-2000 #258(A)*, *supra*, the titles were materially defective for failure to include a key feature of the initiative, which resulted in misleading and confusing the voters. The approved title for Initiative 258(A) failed to articulate that school districts and schools could not be required to offer bilingual programs. *See id.* at 1099. In considering the language of the title for Initiative 258(A), voters could conclude that parents of non-English speaking students would have a meaningful choice between an English immersion program and a bilingual program. *See id.* This Court concluded that a misinterpretation of the title could cause voters to favor the proposal as assuring both programs, which it did not. *See id.* at 1099.

A. The Title is Misleading, Confusing and Unfair

The Title is misleading, confusing, and unfair in numerous ways. The Initiative’s Title provides that it seeks, “[a]n amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses.” Title at l. 1. This

is misleading for several reasons. The Title does not reveal that the Initiative actually concerns both criminal and civil liability. The Initiative reaches beyond “criminal conduct;” 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). The Initiative creates criminal conduct from the failure to perform these duties. In addition, the Initiative 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. See discussion in Part I(B)(2), *supra*. 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. Taking all of these factors into account, the voters are likely to be misled regarding the acts to which the proposed statute applies.

In addition, the Title is inaccurate and misleading in failing to properly define the parties that are specifically affected by the civil provisions. 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. In other words, while one can presume that a violation of a criminal statute would create criminal liability, it fails to state which “duties that are required by law,” and potentially many civil wrongs, fall within the purview of this measure.

The Initiative is unclear in failing to define important terms. The Title states that it allows “any Colorado resident to bring an action for civil damages against a

business or its agent for such criminal conduct.” Title at ll. 6–8. It fails to indicate that “resident” is not defined and could include any person residing in the state such as a business entity, a legal alien, or an illegal alien; and it does not define “civil damages.”

The Initiative’s 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. *See* Proposed C.R.S. § 18-1-606(4); *see also*, Title ll. 10–12 and Submission Clause ll. 10–12.

The Title provides that the plaintiff may “bring an action for civil damages against a business or its agent for such criminal conduct.” *See* Initiative at Paragraph 5(a); *see also*, Submission Clause at ll. 6–7. Voters are likely to conclude that they will be able to collect damages from actions that they bring under the proposed statute. This is misleading. The plaintiff cannot collect the damages for which he brought the action. Any monetary damages must be paid to the general fund of the State of Colorado. *See* Proposed C.R.S. § 18-1-606(5)(e); Title at ll. 8–9; and Submission Clause at l. 8. 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 creates a new revenue source for the state that is free from the limits of previously passed legislation.

The Initiative provides that the successful resident-plaintiff is “entitled to reasonable attorney fees and costs.” *Id.* at 5(e). The Initiative is silent as to who must pay the fees and costs. It is unclear whether the defendant or the State of Colorado is responsible to pay them.

B. The Title, Ballot Title and Submission Clause Contain an Impermissible Catch Phrase, “Criminal Conduct”

Titles may not contain a catch phrase that unfairly prejudices the proposal in its favor. This contravenes Colo. Rev. Stat. § 1-40-106(3)(a). *See In re Ballot Title 1999-2000 # # 227 & 228*, 3 P.3d 1, 6–7 (Colo.2000). Catch phrases are words that work to a proposal’s favor without contributing to voter understanding. *See In re Ballot Title 1999-2000 #258(A)*, *supra*. (holding that the words “as rapidly and effectively as possible” in relation to teaching children English was an improper catch phrase). By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges, not on the content of the proposal itself, but merely on the wording of each phrase. *In re Ballot Title 1997-1998 # 105*, 961 P.2d 1092, 1100 (Colo. 1998). “It is well established that the use of [a] catch phrase or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board.” *In re*

Ballot Title 1999-2000 #258(A), supra, 4 P.3d at 1100; *In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995). This rule recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion. *Id.*

Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiative, thereby further prejudicing voter understanding of the issues actually presented. *See Say v. Baker*, 322 P.2d 317, 320 (Colo. 1958). They encourage prejudice in favor of the issue and distract voters from consideration of the proposal's merits and masking the true policy question. *See id.*

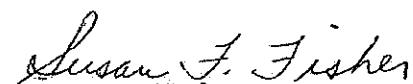
The Initiative contains the words "criminal conduct," which are likely to work to the proposal's favor without contributing to voter understanding. *See Title at I. 7; Submission Clause at II. 6 & 7; see also, In re Ballot Title 1999-2000 #258(A), supra*. The vast majority of voters, if not all voters, are against criminal conduct in business. "Criminal conduct" provokes thoughts of such acts as murder, embezzlement, fraud, theft, and arson. Thoughts of these crimes overwhelm the mind, preventing consideration of whether unidentified "duties required by law" should be considered crimes.

CONCLUSION

For the reasons set forth in this Opening Brief, 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 #57 to its proponents.

Respectfully submitted this 1st day of April, 2008.

FAIRFIELD AND WOODS, P.C.

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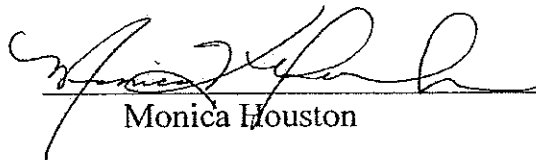
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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 2008, a true and correct copy of the foregoing **OPENING BRIEF OF PETITIONER** was hand delivered to the following:

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Monica Houston

COPY

REPORTER'S TRANSCRIPT

TRANSCRIPT OF
INITIATIVE TITLE SETTING REVIEW BOARD

February 20, 2008

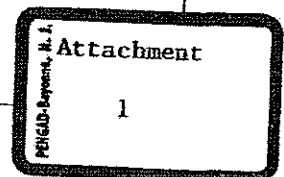
PROCEEDINGS had before the Title Setting Board at 1700 Broadway, Secretary of State's Blue Spruce Conference Room, Denver, Colorado 80202, commencing at the hour of 9:03 a.m., reported by Kirsten M. Thorngate, Registered Professional Reporter and Notary Public within Colorado.

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PROCEEDINGS

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MR. HOBBS: Good morning. Let's go ahead and get started. This is a meeting of the Title Setting Board pursuant to Article 40 of Title 1 of the Colorado Revised Statutes. The date is February 20, 2008, and the time is 9:04 a.m. We're meeting in the Secretary of States's Blue Spruce Conference Room, 1700 Broadway, Suite 270, Denver, Colorado.

The Title Setting Board today consists of the following: My name is Bill Hobbs. I'm the Deputy Secretary of State here on behalf Secretary of State Mike Coffman. To my right is Dan Domenico, Solicitor General, here on behalf of Attorney General John Suthers. To my left is Dan Cartin, Deputy Director of the Office of Legislative Legal Services, who is the designee of the Director of the Office of Legislative Legal Services, who is Charlie Pike.

Today we have four proposed initiatives: two for this morning's session and two this afternoon. And I should also introduce -- excuse me. To my far right is Cesi Gomez from the secretary of state's office.

Just by way of procedure, there's sign-up sheets on the table by the door in the back of the room. Anybody who wishes to testify, please sign up. The meeting is recorded, and it's also broadcast over the

1 Internet. The procedures that we follow when the -- for
2 each agenda item, the board members first will be given
3 an opportunity to ask questions of the proponents. It's
4 important that we understand -- make sure that we
5 understand each proposal.

6 Second, the board will determine if it has
7 jurisdiction to set a title, and that necessarily
8 requires determining whether each measure complies with
9 the single-subject requirement of the Constitution. And
10 then third, if the board determines that it does have
11 jurisdiction to set a title, then it will proceed to
12 consider setting the titles using a staff-prepared draft,
13 which is also -- a copy of which is the on the tables by
14 the back door.

15 Generally we take the testimony first and
16 then have discussion and vote. A decision is reached by
17 two out of the three members of the board, and anyone who
18 is dissatisfied with the decision of the board today can
19 file a motion for rehearing within seven days of today.

20 With that, I would like to turn to the first
21 agenda item, which is 2007-2008 Number 57, Criminal and
22 Civil Liability of Businesses and Individuals for
23 Business Activities. And if we could hear from the
24 proponents first.

25 I believe, Mr. Grueskin, you represent

1 proponents. If you could introduce yourself for the
2 record, please.

3 MR. GRUESKIN: Thank you, Mr. Hobbs. My
4 name is Mark Grueskin, and our firm is counsel for the
5 proponents. I don't think I'm as sick as Mr. Domenico,
6 but I'm a little hoarse, so . . .

7 MR. HOBBS: Do you have any general remarks
8 before I ask if there's questions? Anything you think we
9 need to know before we proceed?

10 MR. GRUESKIN: No. I don't have anything.

11 MR. HOBBS: Are there any questions from
12 board members about Number 57? I think I have one or two
13 questions, just looking at the text. Subsection (4) says
14 that it's a complete affirmative defense for an
15 individual charged -- that he or she reported the matter
16 to the attorney general's office. And I'm assuming
17 that's a complete affirmative defense both to a criminal
18 charge as well as to the civil damages that are also
19 provided for?

20 MR. GRUESKIN: That's correct.

21 MR. DOMENICO: I have a question. What do
22 you expect the attorney general to do with these reports?

23 MR. GRUESKIN: In terms of the reports?

24 MR. DOMENICO: Well, under Subsection (4).

25 MR. GRUESKIN: Well, it seems that once the

1 attorney general has that information, the attorney
2 general can determine whether or not to pursue a sort of
3 action under the laws of Colorado.

4 MR. HOBBS: Subsection (5)(d) says that
5 moneys from the civil damages are exempt from -- I think
6 this is the 6 percent general fund appropriation limit.
7 What's the purpose of that? I mean, this maybe gets into
8 the single-subject discussion, but how is that related?

9 MR. GRUESKIN: That was a change made based
10 upon recommendation at the review and comment hearing.
11 The original thought was that these moneys ought to be
12 able to be acquired without being subject to any sort of
13 TABOR limits. And at the comment hearing, the staff
14 indicated that they were already exempt, but that if that
15 kind of flexibility was to be built into the measure,
16 that this would be better change.

17 MR. HOBBS: Is there something -- I didn't
18 look for this. Is there something already in the 6
19 percent limit that exempts damages or things like this?

20 MR. GRUESKIN: I don't have any answer to
21 you. The staff did not raise that.

22 MR. HOBBS: Okay. Other questions from
23 proponents? Mr. Cartin.

24 MR. CARTIN: Thank you, Mr. Chairman. Mr.
25 Grueskin, on the -- the amendment to 18-1-606, Subsection

1 (1), a new language is -- "business entity," and then the
2 new language, "agent, or high managerial agent are guilty
3 of an offense."

4 MR. GRUESKIN: Yes.

5 MR. CARTIN: And then paragraph (1)(a)
6 provides, "The conduct constituting the offense consists
7 of an omission to discharge a specific duty of
8 affirmative performance imposed on the business entity by
9 law." And I guess my first question -- I'll just kind of
10 go down the line here. My first question was, was it
11 unnecess -- I guess I'm wondering why the new language
12 hasn't been inserted as well after "business entity" in
13 (1)(a), or if that's unnecessary to conform it to the
14 change in the introductory paragraph.

15 And then in (1)(b), the language states, as
16 we go forward a little bit, "authorized to manage the
17 affairs of the business entity or by a high managerial
18 agent acting within the scope of his or her employment or
19 in behalf of the business entity." And there it mentions
20 the high managerial agent, but it does not mention an
21 agent.

22 And then finally, in the penalty provisions
23 in Subsection (3), the next-to-last and the last sentence
24 state, "For an offense committed on or after July 1,
25 2003, a business entity shall be subject to the payment

1 of a fine." And the next sentence says, "An offense
2 committed by a business entity that would be a
3 misdemeanor or petty offense committed by an individual
4 shall be subject to the business entity to the payment of
5 a fine."

6 And again, I just wondered why -- whether it
7 was necessary to conform that language in Subsection (3)
8 to the change in Subsection (1) as well. So, for
9 example, in the next-to-last sentence, it would read,
10 "For an offense committed on or after July 1, 2003, a
11 business agent" -- "a business entity agent or high
12 managerial agent shall be subject to the payment of a
13 fine."

14 That's my kind of overall question, is why
15 those types of conforming amendments are not in place or
16 unnecessary for the remainder of the measure.

17 MR. GRUESKIN: Well, let me address them one
18 by one. The original language used a definition that the
19 legislative staff found duplicative of the existing
20 definition of agent, so that language was used
21 throughout.

22 The particular conduct in (1)(a) and (1)(b),
23 those provisions were not changed, because the purpose of
24 the measure is to address accountability for the business
25 entities' acts. Obviously individuals have liability

1 under the existing statutes for their own acts, separate
2 from this statute. This is about, as the title suggests,
3 criminal liability of business entities. And therefore,
4 the question was how far beyond that entity could the law
5 go. As to -- so I don't believe that the changes to
6 (1)(a) and (1)(b) were necessary.

7 As to the conforming amendment to (3),
8 excuse me -- 18-1-606(3), it seems to me that that either
9 would have been repetitive, because the question would be
10 whether or not legislature can amend the statute further
11 to provide that clarity, or whether or not there are
12 separate offenses that might be implicated.

13 I think that, you know, probably optimally
14 the language relative to offenses committed after July 1,
15 2003 could have been amended as well, but it seems to me
16 that ultimately that's going to be an issue for the
17 legislature if it feels that there's -- clarity is
18 required since it's in the statute.

19 MR. CARTIN: The offense that's referenced
20 there in 18-1-606(3), in the sentence that begins, "For
21 an offense committed on or after July 1, 2003," the
22 offense is the offense described in Subsection (1) of
23 18-1-606?

24 MR. GRUESKIN: Well, I'll be honest with
25 you, I'm not actually sure that (3) is as related to (1)

1 as your question presumes.

2 MR. CARTIN: Okay.

3 MR. GRUESKIN: And the reason is, is that
4 (3) uses the reference to a corporation. (2)(b) defines
5 a business entity, and (1)(a) addresses business entity.
6 Therefore, it seems to me that (3), we would have had to
7 have changed (3) entirely to expand it to business
8 entities as well as corporations.

9 And so that's probably -- I mean, that's
10 probably a more limited provision than the extent of (1)
11 and (2). And standing on their own, (1) and (2) --
12 because, as the staff pointed out, these are not
13 separate offenses. These are simply circumstances
14 surrounding which there's liability for an offense.

15 So (1)(a) and -- excuse me. (1) and (2)
16 stand on their own separate from (3); and therefore --
17 again, I would reiterate that the legislature can, if it
18 chooses, make (3) consistent with (1) and (2). But
19 currently, (3) isn't consistent with (1) or (2) anyhow.

20 MR. CARTIN: Thank you.

21 MR. HOBBS: Any other questions for the
22 proponents?

23 MR. DOMENICO: Yeah. Actually, I have a
24 question about how you see the civil damages aspect of
25 this working. What would the citizen or individual

1 residing in Colorado who brought one of these actions --
2 how would they show civil damages? I mean, what do you
3 expect -- what would they have to show? Say -- I don't
4 know -- give me an example, I guess.

5 MR. GRUESKIN: If there are damages flowing
6 from the nonperformance of the duty required by law.
7 What comes to mind is an entity is required to cease
8 polluting. It refuses or fails to do so, even though
9 it's under an order from the Department of Public Health
10 and Environment. And there are damages to the downstream
11 users or other -- you know, other aspect of the
12 environment or other citizens. It seems to me that's
13 the --

14 MR. DOMENICO: So this would be kind of a
15 qui tam-type thing? They wouldn't have to show damages
16 to themselves necessarily, but to the state?

17 MR. GRUESKIN: That's correct. They're
18 acting as private attorneys general. And for that
19 reason, there is no personal participation in the damage
20 award.

21 MR. DOMENICO: Okay.

22 MR. HOBBS: If there are no other questions,
23 let's move on, then, to the question of whether the
24 measure complies with the single-subject requirement. Is
25 there anybody who wishes to testify on that question?

1 Doug Friednash signed up, and I don't know whether you
2 want to testify on this or not.

3 Welcome, Representative Friednash.

4 MR. FRIEDNASH: Thank you. It's been a few
5 years since those days, but I appreciate it. Nice to see
6 you. I'm here on behalf of the Denver Metro Chamber of
7 Commerce, and I would like to actually touch on some of
8 the things you just brought up in terms of questions, but
9 I think I'll wait until the next aspect of this hearing
10 to do so, because I think it's probably more guided
11 toward those things.

12 The concerns that I have without obviously
13 going into the merits of this are, we believe that this
14 does violate the single-subject rule, and in the
15 following ways: First, what we're dealing with here is
16 an existing criminal statute, and we are seeking to amend
17 something that's found in the criminal code that is the
18 title of that. And obviously, I don't think the language
19 of it fits within the title, but the tilts deals with
20 criminal liability for business entities.

21 Now, the first thing this does is it expands
22 the liability for business entities to, basically, any
23 employee or agent of the company, as I read the
24 definition of agent. High managerial is basically the
25 same as -- it would be encompassed by the agent anyway.

1 And then the second thing it does is it
2 creates a civil -- a separate civil private right of
3 action, which is not like the qui tam situation, because
4 the person who brings the qui tam case gets those damages
5 or is entitled to bring damages. The state can be the
6 party bringing the qui tam action.

7 So it's a little different, but basically it
8 creates the private right of action. And that private
9 right of action is separate and distinct from the
10 criminal liability portion of this.

11 And again, it doesn't fit under the bill
12 title, in my view. But even assuming it did, it's
13 completely separate and distinct. It creates a new,
14 separate private right of action where any Colorado
15 resident at all can bring a case, and the state gets the
16 award if there is an award. And if the party is
17 successful, they will be awarded attorneys fees and costs
18 under this section, which is a new remedy to this case.
19 It also creates an affirmative defense, which applies
20 apparently to businesses -- applies only to the agents
21 and not the business entity itself.

22 The final thing it does is something that
23 was asked but, which is this revenue source, which is
24 apparently going to be exempted from the TABOR -- or from
25 the Bird-Arveschoug Amendment, as I read it, and I think

1 that's a separate distinct issue.

2 So as I view this, there are at least three
3 separate and distinct issues: criminal liability, which
4 is the existing bill title this references; the civil
5 liability portion and creating civil liability for
6 individuals, agents, and business entities; and finally,
7 the third piece, which is this new revenue source, that
8 moneys are paid under the Colorado general fund, but the
9 title doesn't describe that that's even exempted under
10 Bird-Arveschoug.

11 So that's our brief reading of how this is
12 filing as a single subject. At that point, I'm happy to
13 take questions or otherwise pass.

14 MR. HOBBS: Thank you. Let me ask a
15 question or maybe suggest a different point of view and
16 have you respond to it. Maybe going to your last point,
17 I am kind of curious if you know whether or not damages
18 are already exempt under the Bird-Arveschoug Amendment.

19 MR. FRIEDNASH: I brought a copy of that
20 here, and I looked at it, and my understanding is it is
21 not, but I'm not positive. But I think they're not
22 currently exempted.

23 MR. HOBBS: Okay.

24 MR. FRIEDNASH: I think the first two
25 sections of 24-75-201.1 talk about the specific ways in

1 which the exemptions apply, and I think there's only
2 three or four of them. That's my recollection of looking
3 at the statute.

4 MR. HOBBS: Well, let me just ask you, then,
5 just going back to kind of the general argument that
6 we're starting with a statute right now that deals with
7 criminal liability and kind of expanding it, the
8 proposal, I think, is to expand it beyond that, but the
9 caption to the to the statute -- to 18-1-606, Criminal
10 Liability of Business Entities, you know, my recollection
11 is that's an editorial thing that can be changed as the
12 statute is changed.

13 And I guess I would suggest maybe for the
14 sake of discussion that the subject is something like
15 liability of business entities or, you know, liability
16 for wrongful conduct of business entities or something
17 like that.

18 And there may be a criminal aspect of that
19 liability and a civil damages aspect of that liability.
20 But the fact that there's different aspects of it
21 wouldn't violate the single-subject requirement.

22 MR. FRIEDNASH: Yeah, I think it's a title
23 problem. I agree with you. I think the fact that it's
24 creating a private civil right of action as well is what
25 makes it a separate and distinct issue, that it really is

1 going beyond that.

2 MR. HOBBS: Okay. But still the subject
3 would be liability for wrongful conduct of business
4 entities, wouldn't it? Wouldn't that be a fair
5 description of the single subject of this proposal?

6 MR. FRIEDNASH: I think that's one way to
7 look at it. But again, what is kind of disjointed in
8 this is the disconnect between Section (1) and (3), as we
9 pointed out, and even in (1)(a) and (1)(b). I'm not sure
10 how that -- I don't necessarily buy the argument that
11 this is going to tie in -- that it incorporates employees
12 or agents and high managerial employees the same way that
13 they've articulated.

14 And I think there is a disconnect with
15 respect to the issues insofar that (3) really deals with
16 criminal penalties. This one doesn't create criminal
17 penalties in that context for the employee or agent or
18 high managerial agent. So I think there are a little
19 different.

20 MR. HOBBS: Okay. Well, and maybe one other
21 thing that I wanted to ask about: For the sake of
22 argument, I guess, I could see that the civil damages,
23 you know, simply from the proponent's point of view, may
24 be simply part of the liability they wish to impose on
25 people that are, you know, responsible for the wrongful

1 conduct of the business entity.

2 And once the measure imposes civil damages,
3 the money has to go somewhere. So putting it into the
4 general fund and saying whether or not it's subject to
5 the 6 percent general fund appropriation limit arguably,
6 then, would simply be administrative details, that you
7 have to deal with what happens to the money and,
8 therefore, wouldn't be a separate subject.

9 MR. FRIEDNASH: I understand your position
10 or your articulation of that issue. You know, having
11 served, I think the public is really weary of things that
12 disconnect from TABOR and Bird-Arveschoug Amendment. It
13 is called Bird-Arveschoug. People know what it means. I
14 mean, it's got this general vernacular to it, as well as
15 TABOR.

16 I think they really -- when you say you're
17 going to exempt out something from the general fund or
18 spending limits, I think that truly is a separate issue
19 that calls for a discrete standard or discrete subject,
20 and I think therein lies the problem.

21 MR. HOBBS: Other questions from the board
22 for Mr. Friednash? Thank you very much.

23 MR. FRIEDNASH: Thank you.

24 MR. HOBBS: I don't have anyone else signed
25 up to testify. Is there anyone else who wants to testify

1 on the subject of single-subject compliance?

2 Seeing no one else, Mr. Grueskin, would you
3 like to respond?

4 MR. GRUESKIN: Thank you, Mr. Chairman. As
5 I understand it, the argument is that there are three
6 subjects: criminal liability, civil liability, and how
7 the revenue gets addressed. I will tell you, Mr.
8 Chairman, I have recrafted the bill title, should we get
9 there, and my single-subject description is virtually
10 parallel to yours. So I think we're looking at it in the
11 same way.

12 I would also note for the board that the
13 supreme court has really addressed this issue in the case
14 of Initiative Number 1999-2000 Number 200(A). This was
15 dealing with provisions around the consent for a
16 physician to perform an abortion, and that initiative had
17 substantive provisions, had reporting provisions, had
18 civil penalties and criminal penalties and were found to
19 be a single subject.

20 Likewise, in this last cycle, there was an
21 Initiative Number 73 that went up to the supreme court in
22 and around a pay-to-play measure. The question was
23 whether or not the remedy was separate from the
24 provision, because it required certain -- it was a
25 multifaceted remedy, including the invalidation of the

1 election. The court found that to be a single subject.

2 What we're talking about here are various
3 ways to ensure compliance with the requirements of law,
4 and the civil remedy is specifically crafted to be
5 triggered if the criteria in Section (1) are violated.
6 So I think that they are necessarily related to the
7 ability or the subject of the liability for criminal
8 conduct in businesses.

9 As to the Bird-Arveschoug issue, the court
10 over and over has said implementation details are not
11 separate subjects. You could not do this initiative
12 without -- you couldn't do a Bird-Arveschoug exception
13 unless this were part of the law. And there's no reason
14 to think that voters are somehow going to have some
15 mental disconnect over creating the remedy and how the
16 resulting revenue is treated.

17 So I'd ask you to look at that argument as a
18 reflection of the implementation measure and find this to
19 be a single subject.

20 MR. HOBBS: Questions for Mr. Grueskin?

21 MR. DOMENICO: Well, actually, I mean, I
22 would just -- I'm not persuaded by the argument that the
23 Bird-Arveschoug part is a separate subject. But I have
24 real problems with the idea that you could take a statute
25 as it exists, applies -- creates criminal liability for

1 business entities and both alter it to impose that
2 liability on individual employees and managers and then,
3 also, change the current remedy from imposing criminal
4 liability on business entities to imposing criminal and
5 civil damages on individuals and on the business entity.

6 One or the other would seem to be a single
7 subject to me. And I haven't looked at the two cases you
8 cited, but neither one of them sounded exactly on point
9 to me. I mean, obviously if you're creating a new crime,
10 you're going to have all sorts of penalties for it. But
11 extending an existing form of liability to a new class of
12 people seems like one subject to me, and then imposing on
13 everybody a new form of liability seems really like
14 another subject.

15 I mean, what's the necessary relationship
16 between the two other than trying to, you know -- as you
17 say, I guess they're both trying to discharge criminal
18 liability. But I mean, that can't be -- that can't be --
19 that's way too broad, isn't it?

20 MR. GRUESKIN: Well, I don't think it's too
21 broad. I think the entire idea here is that there is
22 already a statutory mechanism for assessing criminal
23 liability against employees and agents of a company for
24 their affirmative acts.

25 But what this statute deals with is either

1 the passive act of knowing but not doing anything about
2 it or, in the alternative, not performing the duties
3 required by law.

4 So this simply takes kind of the existing
5 construct of being able to go against the business entity
6 and its agents for their affirmative acts that violate
7 the criminal laws and extending it where it only now
8 applies to the business entity for the knowledge without
9 somehow -- without intervening to take an action as to
10 the criminal act or, alternatively, knowing about the
11 failure to perform a duty imposed by law.

12 MR. DOMENICO: Right. So now an employee, a
13 low-level -- under this measure, a low-level employee
14 under existing law before this measure who knows that his
15 company may be dumping pollution somewhere but it's not
16 really his responsibility but he's learned about it and
17 he doesn't do anything about it, under current law, he
18 probably has no potential liability.

19 But under this provision, he's on the hook
20 for criminal liability and civil liability. In addition,
21 the organization previously, the entity, would have been
22 subject to criminal liability, but now they're also
23 subject to this private right of action.

24 I mean, those seem like two sort of
25 things you -- they're related, obviously, but they're not

1 necessarily related. It seems to me you would be pretty
2 surprised if voting on one to necessarily include the
3 other.

4 It's very different, it seems to me, than
5 the Bird-Arveschoug part, where if you just came in here
6 and said, you know, we need to create this private right
7 of action against business entities, and it was just --
8 not the change in Section (1), but just the later change
9 creating the civil damages and the private right of
10 action for them, you know, it wouldn't -- that really
11 would seem to me to be just kind of a detail. You've
12 created this new revenue source and you've got to figure
13 out what to do with it.

14 But how that necessarily relates in a not
15 sort of surprising way to extending business entity
16 liability to individual employees, I'm not -- I'm
17 struggling with.

18 MR. GRUESKIN: Okay. Well, let me first
19 address one of the issues that was raised in the
20 arguments that this was not a single subject and that
21 you've repeated now, which is that virtually every
22 employee is going to have to face this liability.

23 Definition of agent is actually very, very,
24 very narrow. As already adopted by the legislature, an
25 agent is a director or officer or employee or other

1 person who's authorized to bind the entity. And high
2 managerial agent is somebody who's in a policy-making or
3 supervisory role.

4 It seems to me that in terms of actual
5 knowledge, that -- whether that knowledge is as far-flung
6 and widespread in a corporate entity or business entity
7 is an open question. Those usually aren't secrets that
8 are openly shared among the entire workforce.

9 But in any event, it seems to me that where
10 the court has already addressed measures, it has civil
11 and criminal liability and found no single-subject
12 problem over a new substantive limitation, with new
13 reporting requirements, that simply extending an existing
14 statute and the goal of that existing statute isn't any
15 more problematic than what the courts already addressed.

16 And we may just have to agree to disagree,
17 but it seems to me that if it the court can less a
18 provision that never existed, a requirement that never
19 existed and civil and criminal penalties that never
20 existed and say that they're all reasonably related, this
21 measure meets that test.

22 MR. DOMENICO: I appreciate that.

23 MR. HOBBS: Any other questions? If not,
24 then let's turn the board discussion on the question of
25 whether the measure complies with the single subject

1 requirement. Any discussion by the board?

2 MR. DOMENICO: Well, as you can tell, I have
3 real trouble with it. I do think a lot of people would
4 be surprised, even though -- and I appreciate what Mr.
5 Grueskin said, that if this were sort of all new,
6 creating new liability for everybody, that that might be
7 a single subject.

8 But where you're -- I mean, it seems to me
9 this really is doing two things that would surprise a lot
10 of people: It's extending criminal liability that
11 currently exists to -- from just applying to business
12 entities, to applying to some class of employees.
13 Whether it's as broad as it sort of seems to say, anybody
14 authorized to act on behalf of the corporation or the
15 entity, or whether it's narrower than that, in any case,
16 it's extended criminal liability to individuals, which
17 seems like one subject.

18 And then creating an entire new right for
19 civil damages brought by any resident creating a private
20 right of action seems, to me, to be a surprising
21 extension of the statute. That really is a different
22 subject.

23 And I'm going to -- if there's a rehearing
24 on this, which I'm guessing there would be, I'm going to
25 reserve the right to change my mind. But at the moment,

1 I see those as two subjects.

2 MR. HOBBS: Okay. I guess I'm probably
3 looking at things as fitting within a single subject. I
4 respect the point of view, and I understand Mr.
5 Domenico's points, I think. I am sort of looking at this
6 as falling under the general subject that maybe something
7 like, you know, liability for wrongful acts of business
8 entities. And I think Mr. Gueskin expressed -- he
9 didn't label it as a purpose, but I think he expressed
10 that the purpose of the measure was to ensure compliance
11 with the law by business entities.

12 And there's several ways that the measure
13 approaches that, and they all, to me, seem to be related
14 to what I think is the major purpose. And like I say, I
15 think they fall under that general subject of business
16 liability. So I think it's probably a single subject, in
17 my view. Mr. Cartin.

18 MR. CARTIN: Thank you, Mr. Chairman. And I
19 agree with you, Mr. Hobbs. I also -- I think Mr.
20 Domenico's raised some good points here. But I don't see
21 under the relevant precedent the surprise that I think
22 Mr. Domenico sees in the measures of a criminal and civil
23 liability connection.

24 I do thing think, as Mr. Gueskin has
25 articulated, that these provisions are reasonably

1 related. And I think, as he said, that the provisions of
2 Subsection (4) and (5) of the measure dealing with an
3 affirmative defense and then the civil damages are all
4 tied into Subsection (1) of the measure and are triggered
5 by an offense under Subsection (1) of the measure.

6 So I see the connectivity, and I agree with
7 Mr. Hobbs that it does seem to be the single -- that this
8 does fit under a broader subject or purpose of wrongful
9 conduct of business entities.

10 And I also wanted to just note for the
11 record that there were some changes made from the version
12 that was submitted to staff, and specifically the version
13 of the measure that was reviewed by staff spoke to an
14 associated person as well as the business entity being
15 guilty of offense and continued definition of associated
16 person. And that was subsequently changed for submittal
17 to the title board to "agent" or "high managerial agent."

18 And I also would note that in the original
19 draft, Subsection (5)(d) provided that the moneys -- the
20 civil damages shall be exempt from the revenue-spending
21 provisions of Section 20 of Article X of the Colorado
22 Constitution. And now in the measure submitted to the
23 board it provides such moneys when appropriated shall be
24 exempt from the provision of Section 24-75-201.1,
25 Arveschoug Bird [sic].

1 And there were a number of other technical
2 kind of changes that were made in response. In my mind,
3 per 140-105 Subsection (2), these changes from the draft
4 that was submitted to legislative staff are in response
5 to some or all of the comments of legislative counsel and
6 Legislative Legal Services and do not amount to a
7 substantial amendment that would otherwise have been --
8 would require to be resubmitted. So I just wanted . . .
9 Thank you.

10 MR. HOBBS: Thank you. Any further
11 discussion? If not, is there a motion on the question of
12 single-subject compliance? I guess I'll go ahead and
13 move that the board finds that the measure complies with
14 the single-subject requirement and proceed to set titles.

15 MR. CARTIN: Second.

16 MR. HOBBS: Any further discussion? If not,
17 all those in fair say "aye."

18 MR. CARTIN: Aye.

19 MR. HOBBS: All those opposed, "no."

20 MR. DOMENICO: No.

21 MR. HOBBS: That motion carries two to one.
22 Then let's go to the titles. We do have staff-prepared
23 drafts.

24 Mr. Grueskin, have you looked at the staff
25 drafts? Do you have any comments?

1 MR. GRUESKIN: I do.

2 MR. HOBBS: Ms. Gomez will put the staff
3 draft on the screen. I think Mr. Grueskin may have an
4 alternative draft?

5 MR. GRUESKIN: I have taken the liberty, Mr.
6 Chairman, of trying to recraft this, because I think that
7 as originally stated, the single-subject description
8 wasn't accurate. And, frankly, it seemed to me that the
9 title wasn't all that descriptive. And what I've done is
10 I've got black-lined version and then a clean version at
11 the bottom. There would be hopefully no changes between
12 them.

13 Let me describe generally what I've done.
14 I've stated the single subject, much as you did, Mr.
15 Chairman. And then I've changed the initial reference to
16 extending criminal laws -- because it's about liability,
17 and the statute is so titled -- to making it clear, to
18 the extent I could, in a brief form what this change was,
19 in terms of extending it to a business entity's agent --
20 agents and defining them in the parenthetical -- begins
21 "including directors, officers," et cetera -- and then
22 sets forth the two conditions in (1)(a) and (1)(b), the
23 nonperformance of duties required by law and the essence
24 of approval by persons authorized to either be directors
25 or manage the entity.

1 I have taken out the affirmative defense
2 language in the middle because it applies to both
3 criminal and civil, and that wasn't clear. And it seemed
4 to me that introducing that before you introduce the
5 civil action might be confusing to voters. I've put that
6 at the end.

7 I've tried to shorten, in certain instances,
8 the language. I don't use "business entity" in every
9 instance. I don't use "high managerial agent" in every
10 instance, as you'll see. I've combined the civil
11 action -- excuse me. I've tried to simplify the
12 description of civil actions and the attorney fee and
13 costs remedies and then described the affirmative defense
14 at the end to make it clear what is affirmative defense
15 and that it applies to both civil and criminal
16 proceedings.

17 I've tried to keep it brief, and I think
18 mine runs maybe three or four lines long. I'm certainly
19 open to any thoughts or improvements the board might
20 have.

21 MR. HOBBS: Let's just take a minute or two
22 and take a look at that.

23 Hopefully everybody's had a chance to look
24 through this. Personally I think I like this approach
25 better but, you know, I think we're sort of at a fork in

1 the road, you know, just to decide whether the board
2 wants to work off of the staff draft or work off of Mr.
3 Grueskin's, you know, marked-up changes to the staff
4 draft.

5 So personally, you know, I like -- in
6 general, I like the changes that Mr. Grueskin has
7 suggested and would prefer to work off of that. But I'm
8 curious how the other board members feel.

9 MR. CARTIN: I would agree with that, Mr.
10 Chairman.

11 MR. HOBBS: Is that all right with you, Mr.
12 Domenico?

13 MR. DOMENICO: Yeah. That's fine.

14 MR. HOBBS: Let's work from there then, and
15 I think Mr. Grueskin did pass out some copies. Hopefully
16 people that need a copy -- anybody else need a copy? Do
17 you have enough for everybody?

18 MR. GRUESKIN: I've only got one for myself.

19 MR. HOBBS: If there's others -- others that
20 want copies? Yes. Let's just take a minute and we'll
21 run some other copies off.

22 Mr. Friednash, maybe when you're ready,
23 we'll give you a chance to respond it this, but I want to
24 give you a chance to look through this.

25 MR. FRIEDNASH: Sure. Thank you.

1 MR. HOBBS: Ms. Gomez has some additional
2 copies for anybody that wishes for another copy. Again,
3 I still only have Mr. Friednash signed up to testify. Is
4 there anybody else who wishes to sign up to testify on
5 the titles for Number 57?

6 Mr. Friednash, are you pretty close?

7 MR. FRIEDNASH: Yeah.

8 MR. HOBBS: If you would like to give us
9 your comments on Mr. Grueskin's draft.

10 MR. FRIEDNASH: Thank you. I make the
11 following points, I guess, just reading through this: I
12 think it should indicate -- when I look at the fourth
13 line down, it says, "directors, officers, certain
14 employees." I think it's "all employees" or just
15 "employees." I think "certain employees" is misleading.

16 As I read again the definition of agent,
17 under the existing law, it says, "any director, officer,
18 or employee of the business entity." It's not certain
19 employees. It's any employee.

20 And so that's the first thing. So I think
21 that should be stricken in order to make it not
22 misleading. And then it says, "and agents." I think it
23 should be "high managerial agents," to be consistent
24 with, you know, the statute. Again it's -- and for other
25 reasons, as you will see in a second. Because the high

1 managerial agents are the ones who formulate business
2 policies or supervise employees, so that's what that's
3 intended to mean.

4 And I don't think we should create this
5 inference that it just -- the problem is, it creates an
6 inference that it only applies to these certain employees
7 or high managerial employees, when, in fact, it's any
8 employee at all under a business. And I think that needs
9 to be clarified.

10 Farther down where it says, "creating a
11 civil action against a business, its agent . . ." I
12 think it needs to say -- again, that it should say it's a
13 private right of action by any Colorado resident.

14 Again, voters need to know that this applies
15 to every single Colorado resident; otherwise, it's not
16 clear who the civil action applies to.

17 And then it strikes against a business -- if
18 I'm going too fast or I'm losing anyone, let me know. I
19 apologize -- against a business or its agent. Again,
20 this is confusing, in that we have used a different
21 description here than what exists above for the criminal
22 liability.

23 Again, it creates an inference that the
24 criminal and civil piece is different when they're the
25 same. It applies not just to agents. Again, it's all

1 employees. It should indicate it's liability to -- civil
2 liability applies to a business entity's agents,
3 including directors, officers, employees, and high
4 managerial agents. So I think that should be clarified
5 in this area, too, for the civil piece of this.

6 The description discussion about the general
7 fund in the state of Colorado, I understand your uniform
8 position about that, but I think we need to indicate that
9 it is exempt from the state's spending limits. And I
10 think that should be clarified so the voters -- that's
11 not hidden from the voters. I think that's something the
12 voters will want to know and should be advised about the
13 very specific nature of this funding mechanism.

14 The last piece -- well, two other real quick
15 points: It says, "and allowing persons who disclose to
16 the attorney general all facts known to them." I think
17 it really should say "require it." It's not just
18 allowing. You have a duty. If you want to utilize
19 affirmative defense, you've got to report this to the
20 attorney general. We probably need to say the Colorado
21 attorney general, just for clarity.

22 And then I think you need to indicate in
23 here the variant that disclosure must occur prior to
24 being charged with an offense.

25 Now, I understand these need to be brief. I

1 understand, but I think it's really important not to
2 create inference that you can advise somebody at any time
3 but yet the disclosure has to occur beforehand.

4 I think in order for this ballot to be fair
5 and clear -- the title to be fair and clear, unambiguous
6 and not mislead the voters, those changes need to occur
7 to this title.

8 MR. HOBBS: Thank you. Any questions for
9 Mr. Friednash? Thank you.

10 MR. FRIEDNASH: Thanks.

11 MR. HOBBS: Mr. Grueskin, would you like to
12 respond?

13 MR. GRUESKIN: I'll take good suggestions,
14 no matter their source. I really don't have any problems
15 with virtually any of these suggestions. I think my
16 one -- I mean, let me say at the outset, I think that the
17 clarification to "a business entity's agents and
18 employees" is fine. I don't know that the title has to
19 be exactly reflective of that, particularly because it's
20 an existing law. I think you have a little more
21 flexibility.

22 I'm totally fine with where Mr. Friednash
23 goes on that introductory clause that it's underlined,
24 taking out the word "employees" and substituting "high
25 managerial agents."

1 I have no problem with his language about
2 creating a private right of action by any Colorado
3 resident. I don't think that the -- the whole point of a
4 private right of action is that it's going to be brought
5 by individuals. So I don't think you need that "by any
6 Colorado resident" language, but if Mr. Friednash feels
7 that that's important language, it doesn't bother me.

8 Likewise, I don't have any problem with his
9 inclusion of a more expansive description of agent in
10 that same reference to civil actions. It seems to me
11 that's fine.

12 He raised the issue of the revenue
13 exemption. That to me seems like -- I mean, I'm not
14 really sure that you could find one in a hundred people
15 who knew what the Bird-Arveschoug meant, as long as you
16 left the state capitol out of your survey area.

17 And more to the point, I'm not really sure
18 that that's a central element to the measure, which is
19 this board's test. If you want to put it in, I mean,
20 that's not a battle as far as I'm concerned. But I think
21 you have plenty of room not to put it in.

22 Now, I wasn't exactly sure -- that brings
23 us, then, just to the language about the affirmative
24 defense. I don't think you need insert "Colorado" as a
25 modifier to attorney general. Again, if you want to do

1 it, go for it. But I think that that's the assumption,
2 since there's no way that the Colorado statutes could be
3 amended to require the U.S. attorney general or any other
4 state attorney general to have any sort of role here.

5 Requiring persons -- Mr. Friednash wanted to
6 use the word "requiring," and I guess you would have to
7 change it so that it would be "requiring that persons
8 disclose to the Colorado attorney general all facts known
9 to them in order to qualify for an affirmative defense."
10 Doesn't really affect me one way or the other. I'm okay
11 with that.

12 And I think that the aspect of including the
13 language "prior to any charges" is fine; but again, I
14 don't think it's an essential detail. If you want to put
15 it in, the proponents have no objection whatsoever.

16 MR. HOBBS: If you wouldn't mind going back
17 to the first one, because I probably got confused. In
18 line 3, the reference to "certain employees," was it
19 there that you were saying instead of saying "certain
20 employees," we can simply change it to "high managerial
21 agent"?

22 MR. GRUESKIN: No. I think Mr. Friednash
23 wants to take out the word "certain."

24 MR. HOBBS: Okay.

25 MR. GRUESKIN: And then the comment after

1 employees it says "and," and I think he wants to insert
2 the words "high managerial" as a modifier to "agents." I
3 didn't think that was all that descriptive, but if the
4 term of art is seen as somehow more communicative to
5 voters than the definition itself or the summary of
6 definition, I'm totally okay with it.

7 MR. DOMENICO: I'll tell you what I would
8 suggest to deal with that is, after "business entities"
9 on line 3, get rid of "agents" and "including," and then
10 get rid of "certain." And then I would leave out "high
11 managerial," because I'm not it -- I think I agree with
12 Mr. Grueskin. I don't know that it adds much.

13 The description that comes after "agents"
14 defines high managerial agent, right? They're the ones
15 who formulate a business's policies or supervise
16 employees, and so it's kind of redundant.

17 But I do think you could get rid of a
18 little -- I'm not sure that the "agents including" part
19 is necessary. And then you avoid using "agent" over and
20 over again, which I think could be a little confusing.
21 So that's what I would suggest.

22 MR. HOBBS: What was again, Mr. Domenico?

23 MR. DOMENICO: Working off of Mr. Grueskin's
24 draft, on the third line, it says, Liability to a
25 business entity's agents, comma, including. And I would

1 get rid of agents, comma, including and just go straight
2 to "liability to a business entity's directors,
3 officers" -- and I would get rid of "certain," as Mr.
4 Friednash suggested -- "employees." And then I would
5 leave the rest, what Mr. Grueskin suggested.

6 MR. HOBBS: You're okay with that, Mr.
7 Grueskin?

8 MR. GRUESKIN: Um-hum.

9 MR. HOBBS: And I thought the word "certain"
10 was there because it's just those employees who are
11 authorized to act on behalf of the business entity.

12 MR. DOMENICO: But every employee is
13 authorized to act on behalf. I mean, that's what being
14 an employee is, right? I'm confused, really, how this is
15 going to work out. That's part of the problem,
16 obviously. But I mean, that's what -- everyone's
17 authorized to do something.

18 MR. HOBBS: Well, I was looking at it more
19 narrowly instead of it being -- an agent being any
20 employee of the business entity, being at least somebody
21 who could act on behalf in the sense of speaking for or
22 binding the entity or something.

23 Granted, in the sense, everybody does act on
24 behalf, and literally I think you're right, Mr. Domenico.
25 I just wasn't -- I'm assuming that the -- that an agent

1 was somebody who actually has some powers on behalf of
2 the business entity. Perhaps I'm wrong.

3 MR. GRUESKIN: I think that is a very good
4 point. That's why we used the word "certain" originally,
5 because I think the case law is fairly clear that not
6 every employee is authorized to act on behalf of a
7 business entity. I mean, if you are a member of the
8 maintenance staff and you go in and you sign checks,
9 those probably aren't binding checks of the entity.

10 MR. DOMENICO: Well, that's not what the
11 measure says or what the statute -- I mean, this is not
12 your fault. You're not changing this part. But what the
13 statute says is, agent means any director, officer, or
14 employee of a business entity, or any other person who is
15 authorized to act on it.

16 The way I read that is, "agent" includes all
17 employees and other people who may not be employees but
18 who are authorized to act on behalf of the business
19 entity. So now, how that would apply to who you would
20 hold criminally liable I'm not -- and civilly, I'm not
21 clear how this would work out. But that's what the
22 definition of agent says to me in the current statute,
23 which isn't being changed.

24 MR. HOBBS: I think that's a good point. I
25 was overlooking the fact that it does say, Director,

1 officer, or employee, without limitation.

2 MR. GRUESKIN: I think for purposes of
3 setting the title, you know, this is a matter that the
4 courts are ultimately going to establish, but for
5 purposes of setting the title, I accept Mr. Friednash's
6 change. There can't be an argument that somehow the
7 reference to "employees" is going to be misleading,
8 so . . .

9 MR. HOBBS: Okay. Well, shall we go ahead
10 and propose a change here and maybe kind of take these
11 one by one, unless there's more questions or, Mr.
12 Grueskin, you have other things to say about --

13 MR. GRUESKIN: No.

14 MR. HOBBS: I think you've covered Mr.
15 Friednash's points. I guess I would first like to
16 discuss Mr. Domenico's suggestion with respect to line 3,
17 which I think is to strike the word -- at the beginning,
18 strike agents, comma, including. And then strike the
19 word "certain," I believe. And is that it?

20 MR. DOMENICO: That was my suggestion, yeah.

21 MR. HOBBS: So it would read, "extending
22 criminal liability to a business entity's directors,
23 officers, employees, and agents, who formulate . . ." et
24 cetera. I think I'm fine with that, and I think Mr.
25 Friednash is fine with that. He's nodding yes. Mr.

1 Cartin.

2 MR. CARTIN: Do you need an "and" between
3 "officers" and "employees" there? The way that it reads
4 right now, can it be construed to mean all directors,
5 officers, employees, and agents who formulate business
6 policies or supervise employees? The only agents who
7 formulate a business policy or supervise employees are
8 the high managerial agents.

9 And I guess to say to state it differently,
10 the way you just read it, it sounds as though it only
11 extends liability to directors, officers -- not only. It
12 extends liability to directors, officers, employees, and
13 agents who formulate a business's policies who supervise
14 employees. And, in fact, it's broader than that, right?

15 MR. HOBBS: I think you're right. I think
16 that would be a good clarification to the language.
17 You're saying this phrase "who formulate a business's
18 policies," et cetera, only modifies "agents"?

19 MR. CARTIN: Um-hum.

20 MR. HOBBS: As opposed to modifying
21 everything that precedes it. So I think we
22 could insert -- it would make sense to me to insert the
23 word "and" after "officers" and strike the comma after
24 "employees" so that it reads -- I guess I'll just make
25 this motion for discussion purposes, that the first part

1 of that clause would read, Extending criminal liability
2 to a business entity's directors, comma, officers, comma,
3 and employees, and agents who formulate a business's
4 policies, et cetera. Do I have that correct? Is there a
5 second?

6 MR. CARTIN: Second.

7 MR. HOBBS: Any further discussion?

8 MR. DOMENICO: I think that's an
9 improvement.

10 MR. HOBBS: Okay. All those in favor say
11 "aye."

12 MR. CARTIN: Aye.

13 MR. DOMENICO: Aye.

14 MR. HOBBS: All those opposed, "no." That
15 motion carries three to zero. Other changes to Mr.
16 Grueskin's draft?

17 I would like to support Mr. Friednash's
18 suggestion about private right of action. This is in
19 one, two, three, four, five -- line six, I think. And I
20 think for discussion purposes -- I'm not sure what I'm
21 about to say is sufficiently economical, but I guess I
22 would suggest striking the phrase "creating a civil
23 action" and substituting the phrase "allowing any
24 Colorado resident to bring an action for civil damages"
25 and then pick up again with what's already there,

1 "against a business entity or its agent."

2 So that clause would read, "allowing any
3 Colorado resident to bring an action for civil damages
4 against a business or its agent for such criminal
5 conduct." Is there any support for that? I guess I'll
6 make that a motion for the sake of discussion. If
7 there's not a second --

8 MR. DOMENICO: I'll second it. I think
9 that's an improvement.

10 MR. HOBBS: Okay. Discussion? All those in
11 favor say "aye."

12 MR. CARTIN: Aye.

13 MR. DOMENICO: Aye.

14 MR. HOBBS: All those opposed, "no." That
15 motion carries three to zero. Mr. Cartin.

16 MR. CARTIN: As a matter of process, are we
17 going to put all these up once

18 MR. HOBBS: I'll read them into the record,
19 since we don't --

20 MR. CARTIN: We're working off Mr.
21 Grueskin's draft.

22 MR. HOBBS: Yes, if that's okay. And then
23 this is kind of the old-fashioned way, but we'll just
24 have to do it that way. And I'll read it into the record
25 once we're done.

1 MR. DOMENICO: No multimedia assistance?

2 How can we survive?

3 MR. HOBBS: It'll be version two dot zero.
4 We'll work on that one next time. Knowing that when Mr.
5 Grueskin comes, he sometimes brings his own draft. Any
6 other suggested changes to Mr. Grueskin's draft?

7 MR. DOMENICO: You know, I sort of leave it
8 up to you guys, but I actually thought that a statement
9 about exempting the award in the civil action from
10 revenue limits might add something to some people. I
11 guess I sort of agree with Mr. Grueskin; it's probably
12 not central, but it is something that is part of it.
13 It's not insignificant, I don't think. So I think that
14 might be a valuable addition.

15 MR. HOBBS: It first struck me that way, but
16 I guess the more I thought about it and based on Mr.
17 Grueskin's comments, it does strike me that outside the
18 capital and the capital complex, I'm not sure that would
19 mean much to those people.

20 MR. DOMENICO: Well, I mean, I would agree
21 that Bird-Arveschoug doesn't mean anything to most
22 people, but I think most people do understand that there
23 are revenue limits on the state. And I would bet more
24 people understand that concept than know what the general
25 fund is versus some other fund, and we've got the general

1 fund in there.

2 So I mean, I can go either way on that. I
3 mean, I also suppose people will understand this is
4 unlikely to be huge amounts of money. Who knows. But
5 this may not be a big concern. It doesn't look like --
6 it's not really a revenue measure. So I just thought I
7 would throw that one out there.

8 MR. CARTIN: I guess I'm not really
9 compelled to add it.

10 MR. DOMENICO: All right. I won't make a
11 motion, then.

12 MR. CARTIN: Okay.

13 MR. HOBBS: Okay. Any other changes to Mr.
14 Grueskin's draft? If not, is there a motion to adopt Mr.
15 Grueskin's draft as amended? Mr. Cartin, so moves. I'll
16 second that. And so before we vote, let me read, then,
17 what the title would be into the record.

18 The title would be an amendment to the
19 Colorado Revised Statutes concerning liability for
20 criminal conduct of businesses, comma -- oh, I would like
21 to make one other suggested change, and that is after the
22 word "and" but before "in connection therewith," insert a
23 comma. I think we normally put one there. So it would
24 be businesses, comma, and, comma, in connection
25 therewith, comma. Is there any objection to that change?

1 And I will start my reading over again with that comment.

2 So Mr. Cartin's motion, I think is -- is a
3 that a friendly motion to your motion?

4 MR. CARTIN: I deem that a friendly
5 amendment.

6 MR. HOBBS: Thank you. The title would read
7 as follows: An amendment to the Colorado Revised
8 Statutes concerning liability for criminal conduct of
9 business, comma, and, comma, in connection therewith,
10 comma, extending criminal liability to a business
11 entity's directors, comma, officers, comma, and employees
12 and agents who formulate a business's policies or
13 supervise employees, comma, if the business fails to
14 perform duties that are required by law or if management
15 engages in, comma, authorizes, comma, solicits, comma,
16 requests, comma, commands, comma, or knowingly tolerates.
17 the business's conduct, semicolon, allowing any Colorado
18 resident to bring an action for civil damages against a
19 business or its agent for such criminal conduct,
20 semicolon, requiring that awards in civil actions be paid
21 to the general fund of the state of Colorado; semicolon,
22 permitting an award of attorney fees and costs to a
23 citizen who brings a successful civil action, semicolon,
24 and allowing persons who disclose to the attorney general
25 all facts known to them concerning a business's criminal

1 conduct to use that disclosures as an affirmative defense
2 to criminal or civil charges, period.

3 And then the ballot title and submission
4 clause would be the same but in the form of a question,
5 so that it would begin, "Shall there be an amendment,"
6 et cetera, and ending with a question mark. I think
7 that's the motion. Any further discussion?

8 MR. DOMENICO: I'll just explain why -- I
9 mean, since I think it contains two subjects, why I'm
10 going to have to vote against it, even though it does a
11 good job of laying out what's in there.

12 I mean, just the single subject stated as
13 liability for criminal conduct of businesses could
14 contain all sorts of things in addition to these. You
15 could be creating dozens of new substantive crimes, could
16 be doing all sorts of things.

17 The way it's written now makes pretty clear
18 that -- to me that within that rubric of liability for
19 criminal conduct of businesses, you're doing two really
20 different things. The first part, extending liability to
21 all these individuals and then creating this civil
22 action.

23 And so while I think the title reflects the
24 measure fairly well, I think it highlights for me why
25 I've got this difficulty with the single subject. So

1 that's why I'll vote no.

2 MR. HOBBS: Okay. Thank you. If there's no
3 further discussion, all those in favor say "aye."

4 MR. CARTIN: Aye.

5 MR. HOBBS: All those opposed, "no."

6 MR. DOMENICO: No.

7 MR. HOBBS: That motion carries two to one.

8 That completes action on Number 57. And the time is
9 10:19 a.m. Let's take a five-minute break, and then
10 we'll proceed with the other agenda item.

11 (Break from 10:19 a.m. to 10:28 a.m.)

12 MR. HOBBS: Let's resume, if everybody's
13 ready. We'll go to the next agenda item, 2007-2008
14 Number 62, Cause for Employee Suspension and Discharge.

15 For the record, the time is 10:29 a.m.

16 And, Mr. Grueskin, I think you represent
17 proponents on this one, I believe. If you would like to
18 come forward, identify yourself for the record. We'll
19 see if there's any questions or if you have any general
20 comments.

21 MR. GRUESKIN: My name is Mark Grueskin, and
22 our firm is counsel for the proponents. I don't have any
23 general comments. I'm just going to jump into it if the
24 board wants me to.

25 MR. HOBBS: Are there any questions from the

1 board for the proponents?

2 MR. DOMENICO: I guess I just have one
3 question about how this works. I mean, my reading of
4 it -- I guess it's (2)(I) is the only exception for a
5 kind of business slow-down-type releases. So a company
6 can't lay off 5 percent or 8 percent. It's got to layoff
7 at least 10 percent or its liable under this section. Is
8 that . . .

9 MR. GRUESKIN: That's what the wording
10 reflects.

11 MR. DOMENICO: Okay.

12 MR. HOBBS: Mr. Cartin.

13 MR. CARTIN: Mr. Grueskin, does this apply
14 to all employers, including government?

15 MR. GRUESKIN: I'm sorry?

16 MR. CARTIN: Does this apply to employees of
17 all employers, including governmental employers, like the
18 State or local government, in addition to a
19 private-sector employer?

20 MR. GRUESKIN: The proponents didn't include
21 a specific governmental exception.

22 MR. CARTIN: Is it fair to say that this
23 provision impacts, if not overrides, the
24 employment-at-will doctrine in Colorado?

25 MR. GRUESKIN: I think that was the intent

1 of the proponents, yes.

2 MR. CARTIN: Thank you.

3 MR. HOBBS: Mr. Domenico.

4 MR. DOMENICO: Is crime involving moral
5 turpitude as, you know, defined anywhere in statute, or
6 is that kind of just worked out?

7 MR. GRUESKIN: I actually haven't researched
8 that, but I think that to the extent that any of these
9 provisions are either unclear or are -- require some sort
10 of collaboration, the proponents included Subsection (5),
11 allowing the general assembly to pass appropriate
12 legislation. So I assume that if that reference isn't
13 clear, the legislature would make it clear.

14 MR. DOMENICO: All right.

15 MR. HOBBS: Any further questions for
16 proponents? If not, then let's move on to discussion of
17 whether the measure complies with the single-subject
18 requirement. I think I have one person signed up to
19 testify.

20 Mr. Friednash, do you have comments on a
21 single-subject issue?

22 MR. FRIEDNASH: Yes.

23 MR. HOBBS: If you'll identify yourself for
24 the record, please, and who you represent.

25 MR. FRIEDNASH: Good morning, again. Doug

1 Friednash appearing on behalf of the Denver Metro Chamber
2 of Commerce. Let me just start with a few basic points
3 and then kind of go into specific issues that we would
4 like to raise this morning.

5 Obviously the governing principles you're
6 all very familiar with. I think there's a few that are
7 really particularly apt here, though: The concept that
8 an initiative can't hide purposes unrelated to its
9 central purpose is one of them.

10 Properly applied, the single-subject
11 requirement helps to ensure that voters are not surprised
12 after an election to find an initiative included a
13 surreptitious but significant provision that was
14 confiscated by other elements of the proposal. And I'm
15 going to get to these points in a minute here.

16 And the title board may evaluate the
17 substance of an initiative to determine whether it
18 complies with the single-subject requirement. And the
19 impact of the proposed initiative or constitutional
20 amendment on existing constitutional provisions have to
21 also be administered in your single-subject analysis.

22 I raise this point because this particular
23 proposal has massive implications for the way this state
24 does business. They are complex, and they are way too
25 broad to unite these multiple subjects. And they're

1 procedural and they're substantive and they're
2 administrative and they impact virtually all facets of
3 employment, every single facet of employment in this
4 state.

5 The true purpose obviously beyond this is to
6 eliminate the at-will employment relationship in
7 Colorado, which has existed for many, many years. The
8 relationship basically allows -- basically, in a
9 nutshell, it provides that employees or employers can
10 terminate employment with or without a cause, with or
11 without reason, except for illegal reasons, at any time.
12 And this completely modifies that. It's not discussed in
13 the initiative. The true purpose of this is hidden here,
14 and it replaces it with this just-cause provision.

15 Now, just cause, I would point out, is --
16 there already is a definition of just cause in the
17 Colorado Constitution, and it's referenced in Article
18 XII, Section 13, Sections 1 and 8. It replaces it with a
19 different definition.

20 Putting aside for a second that this also
21 conflicts with 8 -- and again, I'm not trying to get into
22 the merits, but I think in the context, these are the
23 things that are at issue here. It conflicts with 8-73 --
24 I think it's 108 -- that deals with traditional
25 unemployment awards for partial benefits or full awards

1 for compensation as well.

2 It creates this new inconsistent definition.
3 Again, this is a different definition of just cause. It
4 eliminates employers' right to contract. And again, this
5 is not discussed here. It's in the initiative, but the
6 fact that the fundamental right to contract is recognized
7 by Article I, Section 10 of the United States
8 Constitution.

9 Again, that isn't discussed anywhere. But
10 by creating this just cause, companies that have internal
11 policies, by way of example only, this replaces it.
12 You've got this internal mechanism to handle employment
13 disputes for suspension, by way of example only. Or you
14 have at-will employment contracts that are -- you know,
15 many, many businesses do specifically provide for that by
16 way of contract. This completely eliminates it. It
17 eradicates your right to contract.

18 It cuts off one's unfettered access to the
19 court system. Again, this is really hidden in the
20 initiative. But let me talk just real quickly. If this
21 applies, which it does, to state employees, you've just
22 eliminated -- this has to be a separate subject -- the
23 entire civil service system of Colorado.

24 And that civil service system -- and it
25 never mentions it, but that civil service system provides

1 certified state employers two basic precepts: one is,
2 you have a certified state employee, which, as I
3 understand it, is an employee who's been with the state
4 for a year or more. They have certain rights. And those
5 rights are recognized by the Colorado Constitution.

6 And those rights -- again, it's not in here
7 anywhere, but those rights include the right to a
8 hearing, the right to have an agency determination by an
9 administrative law judge, the right to appeal that to
10 state appeal board, and the right to appeal that to the
11 Colorado Court of Appeals. It's gone.

12 For everyone else, there's this, quote,
13 mediation process -- which I'll talk about in a second --
14 which, as anyone knows, it's a complete misnomer.

15 Mediation is issued to describe nonbinding
16 dispute resolution. As it's used here, it's used,
17 really, essentially as arbitration. I think that's a
18 catch phrase or a slogan that will mislead voters. They
19 won't understand it. But it is described, really, in the
20 context of mediation, which is really arbitration.

21 But what it does is, there's a mediator
22 who's appointed -- and I don't know what the process is.
23 I don't know what the burdens of proof are. But the
24 mediator decides this, and there's no appellate provision
25 whatsoever.

1 And I think by doing this they create two
2 problems: It conflicts with Article XII, Section 13 of
3 the Colorado Constitution and Colorado Revised Statute
4 24-50-125, Subparagraph (3). And that provides that the
5 courts of justice shall be open to every person and a
6 speedy remedy afforded for every injury to person,
7 property, or character and the rights and justice should
8 be administered without denial or delay.

9 Ironically enough, the argument that that's
10 a separate kind of issue was made by Mr. Grueskin in the
11 case of -- the matter concerning Ballot Initiative 55,
12 the single-subject issue that dealt with nonemergency
13 services and talking about how nonemergency service
14 really encompasses all these other rights; and
15 therefore -- and the court agreed -- these things are
16 not -- they basically violate single-subject
17 requirements.

18 So to eliminate that, that creates a problem
19 with our constitutional right to access to the court. As
20 well as your constitutional right to due process that's
21 recognized both in the federal and state constitution.
22 The state constitution reference is Article XII --
23 Article II -- I apologize -- Section 25.

24 The essence of that process provides you are
25 entitled to a fair hearing. In case law -- and I'm happy

1 to give you cites -- it's clearly articulated that that
2 also means appellate rights. So you've completely
3 eliminated that, and you have effectively eliminated the
4 state civil service system and employees' rights to
5 appeal and handle that. Again, these things are not
6 described anywhere in this proposal.

7 The text of this also creates some problems.
8 I can go into that when we get to that point. But the
9 overall problem with this is -- you know, there's -- the
10 number of cases that are somewhat analogous when we look
11 at an initiative that has procedural and substantive
12 changes that are hidden when they're complex and they're
13 way too broad to be unified under a single-subject
14 analysis, that's what's presented here. And in a
15 nutshell, I think those are the kind of overall general
16 problems with this proposal.

17 MR. HOBBS: Questions for Mr. Friednash?

18 MR. DOMENICO: I think I just have one.
19 It's true, isn't it, that a number of other states have
20 something similar to this? A number of states have an
21 abrogated at-will employment, have they not? I mean, not
22 necessarily through this sort of an amendment to the
23 constitution.

24 MR. FRIEDNASH: My understanding is that --
25 again, I have not researched this point specifically.

1 But my understanding is the only state that has a just
2 cause -- and I may be wrong -- but is Montana. The
3 just-cause provision.

4 MR. DOMENICO: Okay.

5 MR. HOBBS: Mr. Cartin.

6 MR. CARTIN: Mr. Friednash, just to be clear
7 in your argument about the state civil service, the
8 constitution provides for the state civil service and the
9 personnel system for -- and out of that, we've got
10 extensive rules and regulations for due process and
11 disciplinary action and suspension and termination.

12 It's your position that this will eliminate
13 that or at least supersede it in addition to its impact
14 on employment at will in the private sector and would
15 also necessarily -- if there are local governments that
16 have personnel boards set up for the purpose of hearing
17 complaints, it would override those as well and just
18 provide -- and have a uniform just-cause standard, and
19 this mediation -- the just-cause standard, the mediation
20 would replace all of those procedures and substantive
21 rights that are in place right now? Is that your
22 argument?

23 MR. FRIEDNASH: Yes. And another piece, I
24 mean, there's new remedies that aren't provided now, and
25 that's another aspect of this. You've got the ability to

1 seek very specific damages, such as reinstatement, back
2 pay as well, that are not currently provided for.

3 But I mean, it conflicts with those things
4 or supersedes them. Let's assume, for argumentative
5 sake, that proponents argue, Well, this is just one
6 option you have; you can apply it, but you can still
7 pursue those. It's unclear from this if that's true or
8 not.

9 But I would argue that you're going to have
10 all kinds of issue preclusion and claim preclusion
11 arguments that are going to prohibit you from pursuing
12 those.

13 So effectively, once an employee requests
14 mediation, they're entitled to mediations; and mediation
15 take place within 120 days, as I read this text. So I
16 think ultimately there's just a plethora of substantive
17 and administrative -- substantive procedural and
18 administrative changes that's follow from this.

19 And it's analogous to when you talk about
20 certain provisions being too broad to be unified. I
21 think that's what you have here. There's a lot of
22 separate subjects, in my view, but there's also a lot of
23 separate components that fall within this. This is going
24 to impact all kinds of statutes and constitutional
25 amendments that exist that the voters won't even come

1 close to understanding, because they're hidden in this.

2 MR. CARTIN: Just taking one provision, is
3 it your progression that this measure conflicts with
4 Article XII, Section 13 of the constitution?

5 MR. FRIEDNASH: Article XII, Section 13
6 being?

7 MR. CARTIN: The personnel system.

8 MR. FRIEDNASH: Yes.

9 MR. CARTIN: You think it's in conflict with
10 that?

11 MR. FRIEDNASH: Absolutely.

12 MR. HOBBS: Okay. Thank you.

13 MR. FRIEDNASH: Thanks.

14 MR. HOBBS: Mr. Grueskin, would you like to
15 respond?

16 MR. GRUESKIN: I don't really think that
17 there is a great deal to respond to, frankly. When I was
18 asked whether or not there was an exception to government
19 employees, I think my statement was, is that there is no
20 exception written in.

21 However, as the board knows, courts will
22 construe provisions of the constitution to operate
23 together. And if they -- only if they find an absolute
24 conflict will they find that one has to implicitly appeal
25 the other.

1 Number 55 -- I know you're very familiar with that
2 decision, and just a couple of pieces from that
3 particular case. The court said, "Thus, we must examine
4 sufficiently an initiative's central theme, as expressed,
5 to determine whether it contains incongruous or hidden
6 purposes or bundles incongruous measures under a broad
7 theme."

8 And then the court went on to conclude that,
9 "We conclude these two purposes terminating services
10 benefiting the welfare of individuals not lawfully
11 present in Colorado and denying access to unrelated
12 administrative services that facilitate organization and
13 regulation are incongruous. The prohibition against
14 multiple subjects serves to defeat voter surprise by
15 prohibiting proponents from hiding effects in the body of
16 an initiative."

17 Could you -- and the court said, "First,
18 this initiative's complexity and omnibus proportions are
19 hidden from the voter." If you would be so kind to just
20 explain for me how Number 62 comports with the standards
21 set forth by the court in 55.

22 MR. GRUESKIN: I know that the title board
23 struggles with Number 55 on a routine basis and I think
24 that its application, in a variety of different contexts,
25 has been questioned. And when I view Number 55 as the

1 basis for a single subject, the board doesn't necessarily
2 agree with me.

3 It seems to me what 55 was all about was a
4 set of proponents that were saying, literally saying, as
5 the court acknowledged in its decision, this applies to
6 absolutely everything under the sun the government does.
7 And it talked about the fact that what was being
8 curtailed wasn't the purpose necessarily, that -- excuse
9 me. That the provision of government services wasn't the
10 purpose, that it was this across-the-board addressing of
11 where government services would be denied.

12 And the court's particular concern, as I
13 recall it, was that proponents could legitimately hold
14 out and voters could legitimately lead if there were
15 certain, quote, nonemergency services, if those would be
16 understood. And those, you know, related to welfare-type
17 services the health-type services that wouldn't be
18 affected -- excuse me. The health services wouldn't be
19 affected, but welfare and other types of government
20 assistance services would be affected.

21 But then the court pointed to the Web site
22 of the proponents who said, We really intend this to
23 apply to every single type of service, administrative
24 services, land title recording, and the like. And court
25 said, You can't hold out one objective and secretly or in

1 their instance, not so secretly, hold out a second
2 objective when people aren't going to naturally link
3 them.

4 I don't see where there's any disconnect
5 from what this measure does. As proponents have drafted
6 it, it sets up a different standard for when certain
7 sorts of employment actions can occur. I guess I'm not
8 sure where there's some sort of hidden impact because of
9 the change in that standard.

10 MR. CARTIN: Thank you.

11 MR. DOMENICO: I guess the only question I
12 have along those lines is, if -- the language that the
13 decision of the mediator shall be final or (E) really is
14 meant -- is that really intended, as far as you
15 understand it, in fact, to mean that there is no appeal,
16 no ability to take this mediator's decision into court
17 anywhere?

18 Or is it just meant to sort of -- because I
19 mean, I guess I do see -- and maybe it's really more of a
20 merits problem, that if that was the intent, you may
21 actually have the problem with due processes. People
22 don't have the right to -- either side doesn't have the
23 right to take this into court. Or is that meant -- I
24 mean, there are lots of decisions of people -- final
25 decisions that you still can appeal from, right? I mean,

1 that was the way I was originally interpreting that, that
2 then you could go -- there would be some kind of appeal
3 right probably from there.

4 MR. GRUESKIN: That's correct.

5 MR. DOMENICO: Okay. I guess my only other
6 question in this is more just an option question too is,
7 is the intent with this mediation, is that the -- could
8 an employee pursue another remedy? I mean, could -- it
9 says an employee may apply for mediation, but could the
10 employee say, I don't want to deal with the mediator; I
11 just want to go straight into court for a violation of
12 the other parts? It doesn't seem to prohibit that. I
13 guess that's something that could be spelled out by the
14 general assembly, maybe.

15 MR. GRUESKIN: That's correct.

16 MR. DOMENICO: Okay.

17 MR. GRUESKIN: That's correct. The idea, as
18 I understand it, of the proponents was to set up an
19 expedited process whereby these matters could be
20 resolved, resolved quickly. If they weren't resolved,
21 then obviously there are other remedies. And as you
22 point out, there's nothing in here that says that
23 traditional remedies are beyond the reach of the affected
24 parties.

25 MR. HOBBS: Mr. Grueskin, would it be close

1 if I characterized the single subject as what's expressed
2 in the caption of the single subject being just cause for
3 employee discharge or suspension, and the purpose of the
4 measure to abolish the at-will employment doctrine?

5 MR. GRUESKIN: Well, in terms of the
6 single-subject statement that's in the staff draft, I
7 didn't change that. So I thought that that was an
8 accurate reflection. And, you know, except as otherwise
9 provided as indicated already, there are other provisions
10 of the constitution. I think this has the effect that
11 you've outlined.

12 MR. HOBBS: I'll just go ahead and sort of
13 express where I am on the question. I mean, I think that
14 is, in my mind, a fair statement of the single subject.
15 Although there are others, perhaps. But the fact that
16 the enactment of this would override a lot of things, you
17 know, some provisions in the constitution that deal with
18 the state personnel system or statutory provisions that
19 deal with unemployment compensation, things like that.
20 The fact that it overrides a lot doesn't seem to me that
21 it has more than one subject.

22 It requires just cause for termination or
23 suspension, I think, for all employers in Colorado,
24 public or private, I think. I mean, that's the way I'm
25 reading it. That has a lot of effects, I think, as Mr.

1 Friednash points out, but I don't view those effects as
2 being separate subjects. You know, so that's kind of why
3 I'm asking it. And that it's all related; everything in
4 the measure is related to -- connected to a purpose of
5 the proponents to eliminate the at-will employment
6 doctrine.

7 If I'm way off from that, I want to know,
8 but that's the way I'm looking at it.

9 Is there anybody else who wishes to testify
10 on the single-subject question?

11 Mr. Friednash, did you have anything else
12 you wanted to say?

13 MR. FRIEDNASH: Briefly. I think you are
14 entitled and do need to look at this in terms of its
15 implications, because I don't think you can just look at
16 it in that vacuum.

17 And the 55 case clearly articulates, as do a
18 few others, the Waters case -- they talk about how some
19 things can be so broad that you have to look at their
20 implications of the other things in terms of the
21 single-subject analysis.

22 And he just indicated that the mediation
23 issues are found. This is going into the Colorado
24 Constitution. This is not a statute. This is going into
25 the Colorado Constitution. Once again, we're amending

1 the Colorado Constitution in a very substantial way.

2 And obviously I'll get to should this
3 proceed to the title. I don't know how you fix the
4 title. It is going to be confusing. It is going to be
5 misleading to voters. And that's what's happening. And
6 because this touches so many issues and it has such a
7 broad theme, I think it does create these single subjects
8 within it.

9 And the fact that we are basically doing
10 away with the state personnel system is a separate and
11 distinct issue. The fact that we are doing away with
12 people's other constitutional rights are separate issues.
13 They may be cloaked in this issue, but this will be a
14 very controversial initiative.

15 And I'm talking about the initiative. It's
16 going to be controversial in a sense because it does go
17 to all these other separate and distinct constitutional
18 amendments. And to throw our hands up and say, Well, the
19 court can sort this out later, I don't think the court in
20 55 was saying we're going to wait until later. I think
21 they want it sorted out now rather than later. Thank
22 you.

23 MR. HOBBS: Can I ask, Mr. Friednash, would
24 it be fair to say, though, that -- you know, we accept
25 your argument that essentially an initiative proponent

1 cannot, by way of initiative, eliminate the at-will
2 employment doctrine. Or to state it another way, an
3 initiative cannot require all employers in Colorado to
4 have just cause to terminate or suspend an employee. I
5 mean, you're basically saying the initiative just can't
6 do that.

7 MR. FRIEDNASH: No. I think the initiative
8 can do that. What I'm saying is, this does a lot of
9 other things that are unrelated to that. I guess that's
10 the point. It's not just doing away with the traditional
11 at-will employment. It's doing a lot more than that.

12 It's changing the mechanism which all
13 employment matters are dealt with through the system. It
14 is changing the state personnel system. It is modifying
15 recovery for these kind of claims and remedies for these
16 claims. It's modifying people's right to due process,
17 people's right of access to court. That's the problem.

18 It's not just changing the standard.
19 They're not just saying from now on, here's the new
20 standard. They're saying we're going to do it in a way
21 that conflicts with a lot of other issues that I think
22 should be spelled out, because they are fundamental and
23 profound issues.

24 MR. HOBBS: If the proponents so eliminated
25 Subsection (4), the remedy provisions, would that solve

1 the problems that you're raising? You're saying the
2 remedy -- that the measure goes on doesn't simply require
3 just cause, but it goes on and provides a mechanism
4 that's in conflict with the state personnel system, for
5 example.

6 MR. FRIEDNASH: That's part of it, yes. I
7 mean, I think that's part of the problem. It's part
8 Section (4), and you still -- assuming Section (4) was
9 gone, which is separate, you still have the issue with,
10 you know, to extend -- I guess this turns more on the
11 issue of whether it's misleading or confusing.

12 Again, there is a definition that is
13 provided for under another constitutional amendment for
14 what is just cause, and this conflicts with that. In
15 terms of your question, yeah, that's, I think, the bulk
16 of the problems.

17 MR. DOMENICO: Could the state -- could
18 someone propose an initiative that said, We hereby
19 abolish due process in Colorado? I mean, in the sense of
20 would we have the authority to, under your understanding,
21 say, You can't pass an initiative that amends that, just
22 because it's got so many effects throughout everything?

23 Do you think that's within our authority, or
24 vice versa, to say either we abolish due process or we
25 adopt; we say you have to have due process in this state?

1 MR. FRIEDNASH: Well, obviously anybody can
2 propose anything in this state and do it. But on a
3 serious level, it's a great question, because you have
4 other pieces to that. But at least that would be
5 addressing a very specific single issue.

6 And the problem here is that this touches on
7 so many different aspects. It doesn't just deal with
8 just cause, and it's not just the enforcement. There's
9 remedy provisions. There are constitutional rights that
10 are in play here that really are separate and distinct.

11 The issue again about civil service, I think
12 that is the clear effect, and it should say that in here.
13 We are abolishing or eliminating the civil service
14 system, because this is what it does. And again, it is a
15 constitutional amendment. It is not an initiative.

16 MR. HOBBS: Thank you.

17 MR. FRIEDNASH: Thank you. I appreciate
18 your time.

19 MR. HOBBS: And I don't have anybody else
20 signed up to testify. So I'll turn to board discussion
21 on the single-subject question. Mr. Cartin.

22 MR. CARTIN: Well, I think this one is a
23 close call. And I understand the chairman's line of
24 questioning about measures that override a number of
25 provisions or they impact a number of existing

1 constitutional and statutory provisions, that that, in
2 and of itself, does not render a measure violative of the
3 single subject.

4 This one -- when you consider some of the
5 impacts of the measure that Mr. Gueskin has admitted to
6 and that Mr. Friednash has raised here, it does -- you
7 know, under the language in 55, when I look at the
8 court -- when it said, "First, this initiative's
9 complexity and omnibus proportions are hidden from the
10 voter" -- and again, I think that may be a subjective
11 determination on a case-by-case basis, but I think there
12 could be some question under 55 on the single subject and
13 whether or not 62 meets the single-subject grounds.

14 I am going to give the measure and the
15 proponents the benefit of the doubt under the line of
16 cases that provide what the title board should move
17 forward and effectuate a single subject where one can be
18 ascertained.

19 I think the statement in the staff draft of
20 the single subject concerning just cause for action
21 against an employee by an employer, maybe we can talk
22 about that as well, if we get to that point.

23 But at this point in time, I would support
24 moving forward with -- while being respectful and
25 recognizing the issues that Mr. Friednash has raised and

1 I myself having some heartburn over the fact that this
2 measure, despite Mr. Grueskin's assurances that the
3 courts will move to harmonize conflicting provisions, it
4 does seem to have a direct impact on not only the
5 constitutional provision governing the civil service
6 system but employment at law and a number of other due
7 process and existing rights under employment law in
8 Colorado.

9 MR. HOBBS: Okay. Thank you.

10 MR. DOMENICO: I actually -- I don't think I
11 have too much trouble with this one. I mean, I think I
12 agree, first of all, with Mr. Grueskin, that it's
13 unlikely this would be interpreted to conflict with the
14 civil service amendments. Courts do go out of their way
15 to avoid bringing conflicts if they don't have to. Even
16 if it did, I'm not sure that creates a single subject.

17 I mean, you can do broad things through the
18 initiative process that impact all sorts of stuff. You
19 can do it through any kind of a constitutional amendment.
20 I mean, as I tried to bring up in my example, if the
21 state had no due process constitutional requirement and
22 someone came in and proposed one, I think that's pretty
23 clearly a single subject, even though due process
24 probably has an effect on essentially every area of
25 people's legal relationships, at least.

1 And so if you're going to do something
2 broad, that doesn't make it two subjects. I mean, where
3 I had a difficulty with the last one was, you had to rely
4 on a very broad subject to do very specific things, and
5 that's the difficulty I had with that one. This one just
6 does something very broad, and it has a lot of impacts,
7 but it's a single subject.

8 I mean, there's a little question, I guess,
9 about the mediation aspect of it. But that to me -- the
10 procedural aspect of how you carry out this new regime
11 seems to be part of the type of thing that's usually
12 allowed to go forward. I mean, whether that's the best
13 system or not or whether you would have to include
14 something or let it be worked out, probably not. But
15 that's up to the proponents.

16 And not getting into the wisdom of the
17 measure itself, it seems like a single subject that is
18 intended to have a very broad effect and do a lot of
19 things, as Mr. Friednash pointed out, but I don't think
20 that gives us -- we have the authority, even under 55, to
21 reject it because of that.

22 MR. HOBBS: Mr. Cartin.

23 MR. CARTIN: Just briefly. And again, I
24 want to be clear that my argument is it's very broad, and
25 so it may have single-subject problems. My argument is

1 that under 55, you can have a broad title, and that isn't
2 necessarily violative of single-subject grounds. But
3 when you have this -- "The prohibition against multiple
4 subjects serves to defeat voter surprise by prohibiting
5 proponents from hiding effects in the body of an
6 initiative." Again, "This initiative's complexity and
7 omnibus proportions are hidden from the voter."

8 When a measure is so broad that you have
9 that type of, you know, danger, that kind of implication,
10 that kind of result, under 55 you have a problem. I'm
11 not saying this one does. I'm saying it walks right up
12 to that.

13 MR. DOMENICO: This is a little similar to
14 the discussion we had a couple weeks ago where Mr.
15 Grueskin was on the other side. That just because -- it
16 seems to me, clearly, if they had just come in and
17 proposed Subsection (1) of this without any of the
18 details that we would have no argument that it's a single
19 subject, even though it would potentially impact the
20 civil service section, which I do think if it clearly --
21 if the effect was definitely to have that, that might be
22 the kind of thing that people would be surprised and
23 misled about.

24 But since I don't think it does that, the
25 fact that they have gone on to spell out some of the

1 details, I think they're entitled to do that rather than
2 having to leave it up to courts or the legislature to
3 spell certain things out. That Subsection (1), to me, is
4 clearly a single subject, even though it would have very
5 broad effects.

6 And then the rest of it, they're entitled to
7 define the terms, just as I think I felt the proponents a
8 couple weeks ago were entitled to define certain terms,
9 rather than leaving it up to others.

10 But I think I understand where you're going,
11 that some of these impacts may be hidden is the real
12 problem, not so much that it will have a lot of impact,
13 but that you would be surprised to learn of them. And I
14 don't quite see it.

15 MR. HOBBS: And I actually think I agree
16 with Mr. Cartin and Mr. Domenico. You know, I think it's
17 good to bring up Number 55. I think it is a troubling
18 case and you could -- you know, but I think in this case,
19 I think both Mr. Cartin and Mr. Grueskin explain to my
20 satisfaction how it's a little different.

21 And I think it has to do with the fact that
22 the complexity in Number 55 led to hidden effects that I
23 think are really not pressing here. I mean, I'm looking
24 at this as more of a relatively simple measure, in a way.
25 I mean, it has a lot of effects and a lot of major

1 effects. But I don't see it as a complex measure in the
2 same way that I view -- that the court, I think, viewed
3 the measure in Number 55.

4 I think it is a single subject, you know,
5 and there's other court cases that I think supported the
6 idea that this is a single subject. I mean, one of the
7 court cases is 1999-2000 Number 256, which dealt with
8 citizen management of growth, 12 P.3d 246.

9 And one of the things that the court said in
10 that case is that -- and I think this is a quote, "So
11 long as the proposal encompasses a single subject, even
12 if the subject is general, it does not violate the
13 constitution."

14 And the court also said in that case, "We
15 have never held that just because a proposal may have
16 effects or that it makes policy choices that are
17 inevitably interconnected, that it necessarily violates
18 the single-subject requirement."

19 And the latter part that quote, I take to
20 heart with respect to the mediation provision of the
21 proposal. I don't know that that's inevitably connected,
22 but as Mr. Domenico said, I think it's a choice that the
23 proponents can make as far as how they want the main
24 feature to be carried out. And that seems, in my mind,
25 not to violate the single-subject requirement.

1 So I think it sounds like we pretty much
2 agree that this may constitute a single subject. So I'll
3 accept a motion, if there is one.

4 MR. DOMENICO: I move that we find that it's
5 a single subject.

6 MR. HOBBS: I'll second that. Any further
7 discussion? If not, all those in favor say "aye."

8 MR. DOMENICO: Aye.

9 MR. CARTIN: Aye.

10 MR. HOBBS: All those opposed, "no." That
11 motion carries three to zero. Then let's proceed to
12 consider the drafts. Ms. Gomez will project on the
13 screen in the room the staff draft.

14 Mr. Grueskin, have you had a chance to look
15 at the staff draft, and do you have any comments?

16 MR. GRUESKIN: I have, Mr. Chairman. I
17 would like to give you a marked-up version. This one, I
18 actually haven't, as you will see, done all that much
19 violence to this staff draft.

20 I'll tell you, I made just, I think, three
21 or four changes. One, I took the defining just cause and
22 put it behind the primary provision, which has been
23 referred to as Subsection (1).

24 I, in the next clause, tried to make -- I
25 didn't substantively change it, but I tried to make it a

1 little bit more clear in terms of the written
2 documentation requirement.

3 Then I tried to combine the next two
4 phrases, because it seems to me there was an awful lot of
5 repetition, if you will. I also made it clear that the
6 mediator can assess costs as well as award attorneys
7 fees. But other than that, I think the staff did its
8 job, and we will ask that the board accept the title that
9 I've indicated or help Mr. Friednash . . .

10 MR. HOBBS: Okay. Any questions for Mr.
11 Grueskin?

12 Mr. Friednash, do you have any comments
13 either on the staff draft or Mr. Grueskin's proposed
14 changes?

15 MR. FRIEDNASH: Thank you, again. We have
16 some concerns again and don't believe that this is a
17 fair, clear, and accurate title. And not just to be
18 redundant, but let me kind of point out some of those
19 things.

20 Ultimately, the overriding problem is,
21 again, that we believe voters are going to be enticed to
22 vote for a measure not realizing how its enactment is
23 going to deprive them of other things or how it impacts
24 their lives.

25 And this board is not -- and obviously you

1 should be considering the public confusion that's going
2 to be created by this title or a misleading title.
3 You're not precluded from adopting language that explains
4 to the voters and the signers of the petition how the
5 initiative fits in the concept of existing law, even
6 though that specific language is not found in the text of
7 the proposed initiative.

8 This does not clearly reflect the true
9 intent and meaning of this proposal, which is to
10 eliminate at-will employment. It doesn't fully express
11 how that is then replaced with this new legal standard
12 for terminating and suspending employees.

13 It doesn't express the fact that it has
14 redefined the definition of just cause, nor does it
15 provide a definition of just cause, which I think is
16 important when voters look at this. I realize it needs
17 to be brief, but I think the definition should be in
18 there. There's a lot of -- I can think of a plethora of
19 situations where this would affect voters in a way that
20 they would be confused by.

21 It doesn't, we don't think, provide any
22 discussion of how this applies to state workers as well.
23 Obviously that's a direct import. This applies to all
24 employees. And that was a question that this board had
25 with respect to initial discussion of the initiative

1 itself and the fact that it does, in fact, apply.

2 The question is who does it apply to. It
3 does not indicate it applies to all employees. It
4 doesn't indicate its intent to eliminate access to the
5 court and due process rights and the shift of elimination
6 of the state personnel system.

7 The proposal uses mediation, which we think
8 that's a clear misnomer. And along those lines, why it's
9 a misnomer should be identified here too, which is, the
10 mediator's decision is final. That is not a mediation.
11 That's arbitration. It's more of a catchy phrase in
12 concept than arbitration.

13 And for those reasons, I think this board
14 should examine to what degree the use of mediation in
15 this title and even the term "just cause" without a
16 definition can be used as kind of a catch phrase.

17 It doesn't discuss elimination of
18 employees -- or employer's right to contract with
19 employees, because it is replacing that traditional
20 system.

21 Those are just generally the reasons why we
22 don't think it's fair, clear, accurate and will mislead
23 voters. I am very, very concerned about the public
24 confusion that will be created by this title. And
25 without a pretty substantial overhaul, this doesn't get

1 us there, in our view. Happy to answer any questions if
2 you have any.

3 MR. HOBBS: Questions for Mr. Friednash?

4 MR. DOMENICO: No. But he raised a couple
5 of points I would like to ask Mr. Grueskin about, I
6 think.

7 MR. HOBBS: Thank you. Mr. Grueskin.

8 MR. DOMENICO: One is just, isn't Mr.
9 Friednash right, that this really isn't mediation; it's
10 arbitration?

11 MR. GRUESKIN: I think that the conversation
12 that I had with -- I think it was Mr. Hobbs that the
13 point of this mediation was that it promotes a process.
14 It has time lines. It has finality. And then that
15 mediator's decision is final, but we haven't precluded
16 any other remedies provided. I think you pointed that
17 out to me, Mr. Domenico:

18 MR. DOMENICO: Yeah. That sounds to me
19 like -- I mean, anytime -- mediators, as I understand it,
20 generally try to get the parties to come to an agreement;
21 and if they don't, then they go fight it out somewhere
22 else. Whereas arbitrators do what is being done here,
23 which is the two parties come in and present their
24 evidence, and then the arbitrator makes a decision. I'm
25 not sure it makes too big of a difference. I'm just

1 trying to make sure.

2 MR. GRUESKIN: But as was pointed out,
3 typically arbitration is -- you know, curtails other
4 remedies.

5 MR. DOMENICO: Right.

6 MR. GRUESKIN: There's no curtailment here.
7 So if we used arbitration, arguably the signal we would
8 send would be exactly the wrong one.

9 MR. DOMENICO: Okay. I don't think
10 that's -- whichever word is used, I think it's -- I'm not
11 sure it's misleading. I'm not sure the people outside
12 the legal profession and people who pay attention to
13 baseball off-season would know much about an arbitration.
14 It doesn't cause a problem. I'm just kind of making sure
15 I understand that.

16 Then the other only -- the one good point I
17 thought worth discussing, at least, that Mr. Friednash
18 brought up -- given that we've already sort of decided
19 that had all these effects, to the extent they're
20 subsumed within there, are not really our problem to deal
21 with -- I do wonder whether it would be a good idea to
22 provide some of the definition of just cause.

23 And I'm not sure if it is or is not, but do
24 you think there's any danger from your point of view if
25 we don't that this will be found to be sort of an

1 incomplete title?

2 MR. GRUESKIN: I listened to arguments from
3 Mr. Friednash, and I thought about this issue. I think
4 it's important to note first that Subsection (2) says,
5 "For purposes of this section." So it's not like you're
6 amending -- in the abortion case, they amended the
7 definition, and it had systemwide effects. That's not
8 what's going on here.

9 That having been said, I don't have a
10 problem with just cause being reflected in the title in
11 terms of definition. I think that's -- I don't think
12 it's pivotal any more than it would be required to
13 delineate the effects of the measure, which the court
14 said you don't have to do. But I sure wouldn't object to
15 that.

16 MR. HOBBS: Let me raise an angle with that
17 question. I guess initially I was thinking we didn't
18 need to define just cause. We didn't even need to say
19 that the measure defines just cause. I mean, just cause
20 is a pretty simple concept, and it has to do with
21 employee misconduct or poor performance or something.

22 And the more I think about it, I guess
23 I'm -- I mean, it does look like most of the elements of
24 the definition of just cause are along those lines, you
25 know, poor employee performance or conduct. And, in

1 fact, I think maybe all of them arguably, until you get
2 to the last two, one of them is -- has nothing -- well,
3 the last two have really nothing to do with the employee.
4 There's filing of bankruptcy by employer or, I think,
5 laying off a percentage of the workforce.

6 And it makes some sense to deal with those
7 as potentially just cause, but they're not -- I mean,
8 first of all, I'm not sure that the reader would think of
9 those things. But in particular, the result that I think
10 might be surprising that an employer could not lay off
11 less than 10 percent of their workforce is pretty
12 significant.

13 And I'm wondering or feeling maybe the need
14 to somehow address that, and I don't know whether it's
15 sort of like explain what the definition of just cause is
16 and work it into that or whether to accept that most of
17 the definition of just cause is unsurprising.

18 But just include a clause that says that
19 simultaneous discharge of less than 10 percent of a
20 workforce is not just cause, and just go straight to the
21 heart of the matter. But like I say, one way or the
22 other, I'm inclined to think that we need to say
23 something about the fact that an employer cannot lay off
24 less than 10 percent. Do you have any further thoughts
25 about that?

1 MR. GRUESKIN: Well, I originally didn't
2 believe that the reference to defining just cause was
3 necessary. But in light of the nature of this measure, I
4 thought it was appropriate. And I think it's a signal to
5 voters that this is something to attend to, that you're
6 going to want to know what just cause is.

7 And I suppose you could find a way of
8 summarizing (A) through (F) in terms of employee
9 misconduct or something of that nature. But (G) isn't
10 necessarily an employment-related infraction; and
11 therefore, it seems to me it kind of falls in the
12 category of the bankruptcy issue or the 10 percent
13 discharge or suspension. So, you know, if you wanted to
14 kind of group those four issues together, I suppose that
15 would kind of cover the waterfront for you.

16 MR. HOBBS: Well, we could maybe say,
17 "Defines just cause to include" -- and again, I don't
18 have the right language, but -- various forms of employee
19 poor performance or misconduct, comma, and two or three
20 others.

21 MR. GRUESKIN: Or you could kind of use that
22 summary and, you know, include -- as you pointed out, (H)
23 and (I) is kind of economic circumstances affecting the
24 employer; so that you can be somewhat brief, but it also
25 sends a signal to voters that there is -- there are going

1 to be just cause elements that are employee-driven, and
2 there are going to be some that are employer-driven.

3 MR. HOBBS: Okay. Discussion by the board?
4 Mr. Cartin.

5 MR. CARTIN: Mr. Chairman, to play out your
6 suggestion along with Mr. Grueskin's comments, would one
7 approach be -- on Mr. Grueskin's draft -- to add on to
8 the new underlined language defining just cause, is that
9 where you would suggest adding clarifying or additional
10 language to the effect that defining just cause as . . .
11 I'm focusing on Mr. Grueskin's kind of three categories:
12 performance -- including performance, and (G) is criminal
13 conduct, and then (H) and (I) can probably be grouped
14 under economic circumstances or business -- well, it
15 wouldn't be business. Economic . . . Finding just
16 cause . . .

17 MR. DOMENICO: Just from my perspective, if
18 you're going to do this, I think that Mr. Hobbs is right.
19 That it probably should specifically include something
20 about the 10 percent, because I think if it just said
21 something about economic difficulties of the employer or
22 something along those lines, that would be probably, I
23 think, misleading.

24 In the sense that it would give people the
25 idea that basically an employer could lay someone off

1 anytime they had an economic justification for it.
2 Whereas that 10 percent limit is specifically designed,
3 it seems to me, to eliminate that defense and -- unless
4 you lay off 10 percent.

5 MR. CARTIN: Fair to say there are three
6 options, then: To go ahead and leave it as defining just
7 cause and the voter is put on notice that just cause is
8 defined somewhere and they need to go and look; to go
9 ahead and list -- defining just cause and list (A)
10 through (I), including the text of (I) on the 10 percent;
11 or the third option is to somehow lump them into three or
12 four categories and try to come up with some general
13 terminology.

14 And what I'm hearing from you, Mr. Domenico,
15 is that option three has the danger of potentially
16 misleading the reader.

17 MR. DOMENICO: Yeah. Unless you say
18 something pretty specific about that 10 percent, I think
19 it does.

20 MR. CARTIN: Well, I guess just because of
21 the impact -- this may not be the best grounds to resist
22 the particular change, and I'm open to being persuaded
23 otherwise.

24 Just the impact on the length of the trailer
25 to include items (A) through (I) specifically and spell

1 out what just cause is, rather than -- instead of saying
2 defining just cause, I guess I would lean -- and I
3 understand the discussion here and the argument.

4 I guess right now I would lean to keeping
5 defining just cause and not highlighting one or more of
6 the various circumstances that constitute just cause to
7 the exclusion of others.

8 MR. DOMENICO: I think either it should be
9 left, or I do think we could craft something that lumps
10 basically (A) through (G) together as poor performance or
11 misconduct by the employee; and then, comma, filing of
12 bankruptcy by the employer, comma, simultaneous discharge
13 or suspension of 10 percent or more of the employers
14 workforce in Colorado.

15 Something along those lines that basically
16 makes three groups but specifically refers to the -- lays
17 out the two economic ones. I guess it's really two
18 groups, but both of the economic ones are kind of spelled
19 out separately.

20 That's the only other option I see to either
21 spelling them all out, which I don't think is necessary;
22 and I agree that it would sort of muck things up.
23 Leaving it, I suppose that, you know, you could make the
24 argument that that puts you on notice that if you care
25 what -- how just cause is defined, you should look at it.

1 But, you know, Mr. Hobbs said when he first
2 saw that he thought just cause had kind of a fairly
3 readily acceptable definition, but that this actual
4 definition doesn't quite meet with what sort of was in
5 his head. I mean, it's got some specifics that aren't
6 really what you necessarily would think is part of just
7 cause.

8 So my recommendation probably would be to
9 include sort of the misconduct idea, misconduct or poor
10 performance, bankruptcy or 10 percent layoffs would
11 probably be the direction I would go. I could be talked
12 into just leaving it. Although I think that's a risk
13 that it would be misleading or incomplete.

14 MR. HOBBS: Let me attempt to put some
15 language out there, and then we can decide. I think I
16 would like to work off the screen, and then we can take
17 Mr. Grueskin's suggestions and work them into what we
18 have on the screen so that everybody can see the proposed
19 changes.

20 I guess I would propose in the second line
21 moving -- as Mr. Grueskin suggests, moving that phrase
22 "defining just cause." First, let's just move it. You
23 know, cut it and paste it so that it comes off the next
24 clause, which I think is after the semicolon in line 4.
25 And then -- so it just says defining just cause.

1 So I'll just take a run at this. Defining
2 just cause to mean specified types of employee misconduct
3 and substandard job performance, comma, the filing of
4 bankruptcy by the employer, comma.

5 And I'm just going to quote from the
6 measure, I think. "Thus, the simultaneous discharge or
7 suspension of 10 percent or more" -- add "the." I'm
8 sorry. The simultaneous discharge or suspension of 10
9 percent or more of the employer's workforce in Colorado,
10 semicolon.

11 There's some things I don't particularly
12 like, but I think that follows kind of the concept that
13 we talked about that Mr. Domenico referred to. There's
14 the employee problems that one might expect, I think. I
15 just don't remember seeing surprises there, and then
16 there's the two economic conditions that would allow
17 suspension or discharge.

18 MR. DOMENICO: I think that accurately and
19 thoroughly reflects what the measure does. It's not
20 poetry, but these aren't usually.

21 MR. HOBBS: Mr. Grueskin or Mr. Friednash,
22 if you have any comments, you're welcome to make them.

23 MR. FRIEDNASH: My only comment is --

24 MR. HOBBS: If you are, you need to come to
25 the microphone, though. Thank you.

1 MR. FRIEDNASH: Mr. Friednash, the only
2 comment I make is, you may want an "or" instead of "and."
3 Where it says, "and the simultaneous discharge," you may
4 want to say "and/or" or "or". That's my only comment.

5 MR. HOBBS: Which one? I was struggling
6 with the conjunction myself. Which one?

7 MR. FRIEDNASH: Where it says, "The filing
8 of bankruptcy by the employer and the simultaneous
9 discharge or suspension," you may want to put "or" there
10 or "and/or."

11 MR. HOBBS: Okay. I'm okay with that. I
12 think the measure says "or." Is that okay?

13 MR. DOMENICO: (Nodded head.)

14 MS. GOMEZ: So just change it to "or"?

15 MR. HOBBS: Yes. I guess I'll go ahead and
16 move that change.

17 MR. DOMENICO: I'll second it.

18 MR. HOBBS: Any further discussion? If not,
19 all those in favor, say "aye."

20 MR. CARTIN: Aye.

21 MR. DOMENICO: Aye.

22 MR. HOBBS: All those opposed, "no." That
23 motion carries three to zero. Are there other suggested
24 changes to the staff draft? I think Mr. Grueskin had
25 some. Maybe work through them if anybody wants to offer

1 those.

2 MR. DOMENICO: I think those are all,
3 actually, pretty good. I don't know if you want me to
4 work through on what's now line 7. After "requiring an
5 employer to provide," insert "to an employee." And then
6 after "written documentation," add "of the basis for his
7 discharge or suspension." And then basically delete the
8 rest of that clause through "suspended."

9 And then in line 10 after "mediation," add
10 "to seek an," and then delete -- including the semicolon
11 this time.. Delete all the way through "just cause to."

12 And then after "award," insert "of."
13 Actually, yes, right there on 11. And then after "back
14 wages," delete "or"; insert "and." And then delete "to
15 the employee" at the end of that line. Leave the
16 semicolon in.

17 And then on line 12, after "allowing the
18 mediator to," insert "assess costs for his services to
19 the losing party and." I'll move those changes.

20 MR. CARTIN: Second.

21 MR. HOBBS: Discussion? If not, all those
22 in favor say "aye."

23 MR. CARTIN: Aye.

24 MR. DOMENICO: Aye.

25 MR. HOBBS: All those opposed, "no." That

1 motion carries three to zero. Further changes to the
2 staff draft?

3 MR. CARTIN: Just from the drafting
4 standpoint, I guess I just note that the measure isn't
5 gender neutral, and the title reflects that.

6 MR. HOBBS: Actually, I noticed it in the
7 measure but where is it in this titles?

8 MR. DOMENICO: "Basis for his discharge."

9 MR. CARTIN: On line 9, "who believes he was
10 discharged." And line 12, "assess costs for his
11 services."

12 MR. HOBBS: The measure has that, so . . .

13 MR. CARTIN: Actually, the measure says the
14 mediator shall -- I don't want to belabor this. But just
15 for the record, "The mediator shall assess costs for his
16 or her services to the losing party."

17 MR. HOBBS: Is there a motion to adopt the
18 staff draft as amended?

19 MR. DOMENICO: I make that motion.

20 MR. HOBBS: I'll second that. There's been
21 enough changes I'm going to read it into the record
22 before we vote.

23 So the title would read: An amendment to
24 the Colorado Constitution concerning just cause for
25 action against an employee by an employer, comma, and,

1 comma, in connection therewith, comma, prohibiting the
2 discharge or suspension of an employee by an employer
3 unless the employer has first established just cause,
4 semicolon, defining, quote, just cause, end quote, to
5 mean specified types of employee misconduct and
6 substandard job performance, comma, the filing of
7 bankruptcy by the employer, comma, or the simultaneous
8 discharge or suspension of 10 percent or more of the
9 employer's workforce in Colorado, semicolon, requiring an
10 employer to provide to an employee written documentation
11 of the basis for his discharge or suspension, semicolon,
12 allowing an employee who believes he was discharged or
13 suspended without just cause to apply for mediation to
14 seek an award of back wages and reinstatement, semicolon,
15 allowing the mediator to assess costs for his services to
16 the losing party and award attorneys fees to the
17 prevailing party, semicolon, and authorizing the general
18 assembly to enact legislation to facilitate the purposes
19 of this amendment, period.

20 And the ballot title and submission clause
21 would read the same except in the form of a question.
22 Any further discussion? So the motion is to adopt those
23 titles. All those in favor say "aye."

24 MR. CARTIN: Aye.

25 MR. DOMENICO: Aye.

1 MR. HOBBS: All those opposed, "no." That
2 motion carries three to zero, and the time is 11:44.
3 We're adjourned -- we're in recess until -- 1:30? 1:30
4 this afternoon.

5 WHEREUPON, the within proceedings were
6 concluded at the approximate hour of 11:44 a.m. this 20th
7 day of February, 2008.

8 * * *

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CERTIFICATION

I, KIRSTEN M. THORNGATE, Registered Professional Reporter, do hereby certify that the above proceedings were reported by me at the time and place hereinabove stated, and that the above is a true and accurate transcript of the proceedings, prepared by means of computer-aided transcription.

I further certify that I am not related to any party herein or their counsel, and that I have no interest in the result of this hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of February, 2008.

KIRSTEN M. THORNGATE
Registered Professional Reporter

Re: Title board hearing; 2007-2008 #57 and 2007-2008 #62
Date of Proceedings: February 20, 2008
Reporter: KT
Proofer: SK

COFFMAN REPORTING & LITIGATION SUPPORT, INC.
1440 Blake Street, Suite 320
Denver, Colorado 80202
303.893.0202

February 25, 2008

DOUGLAS J. FRIEDNASH, ESQ.
Fairfield and Woods, P.C.
1700 Lincoln Street
Suite 2400
Denver, Colorado 80203

Re: Title board hearing; 2007-2008 #57 and 2007-2008 #62
Date of Proceedings: February 20, 2008

Dear Mr. Friednash:

Enclosed is the above original transcript. Signature is either not applicable or not required under these circumstances.

Please do not hesitate to call if you have any questions about this matter.

COFFMAN REPORTING

cc: Attending counsel

ORIGINAL FILED ON: _____

1 INITIATIVE TITLE SETTING REVIEW BOARD
2 STATE OF COLORADO, DEPARTMENT OF STATE

3
4 REPORTER'S TRANSCRIPT OF TITLE BOARD HEARING
5 March 5, 2008

6 IN RE:

7 INITIATIVE 57 - CRIMINAL AND CIVIL LIABILITY OF
8 BUSINESSES AND INDIVIDUALS FOR BUSINESS ACTIVITIES

9 AND

10 INITIATIVE 62 - CAUSE FOR EMPLOYEE SUSPENSION AND
11 DISCHARGE

12 PURSUANT TO NOTICE to all parties in
13 interest, the above-entitled matter came on for
14 public hearing before the Colorado Secretary of
15 State's Initiative Title Setting Review Board on
16 Wednesday, March 5, 2008, commencing at 11:00
17 a.m., in the Blue Spruce Conference Room, 1700
18 Broadway, Denver, Colorado, before Jennifer
19 Windham, Certified Shorthand Reporter and Notary
20 Public within and for the State of Colorado.
21
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ORIGINAL

Attachment

2

Page 2

1 PROCEEDINGS
2 MR. HOBBS: Let's go on to the next
3 agenda item. This is 2007-2008, Number 57,
4 criminal and civil liability of businesses and
5 individuals for business activities. The time is
6 11:00 a.m. And now sitting as the designee of the
7 Director of the Office of Legislative Legal
8 Services is Dan Cartin. We have a motion for
9 rehearing that -- a written motion for rehearing
10 submitted by Mr. Friednash. So I'd like to hear
11 from him first.
12 Mr. Friednash, if you'd like to
13 identify yourself for the record. We've read your
14 brief, but whatever highlights you'd like to
15 stress, we'd appreciate that.
16 MR. FRIEDNASH: Thank you. Good morning.
17 Doug Friednash appearing on behalf of Joe Blake. We
18 filed the motion for rehearing. I'm not going to
19 regurgitate my motion for rehearing, you'll be happy
20 to hear. I will try to make my comments as brief as
21 possible. And I want to focus on a few things.
22 First, just to recap what the measure does: It -- it
23 does -- and I know we've talked before.
24 I'm not going to focus on the third
25 component of this, which is what I felt was the third

Page 3

1 subject, that being this expenditure issue, but I am
2 going to focus on the first two, which are it takes
3 an existing criminal statute and it imposes criminal
4 liability to businesses -- that's the current law --
5 that have either a passive act of knowing and not
6 doing anything or don't specifically perform an act
7 required by law.
8 And it extends that to all employees of a
9 company, low-level employees, HR, I think agents,
10 which would probably include independent contractors,
11 officers and directors. And as you know, a criminal
12 statute has a different standard, which is beyond a
13 reasonable doubt. And the -- the statute itself has
14 a subsection dealing with fines that only seem to
15 apply to businesses, not the rest of these -- this
16 universe of people, the employees, et cetera, high
17 managerial agents and so forth. And we believe
18 that's one very specific and distinct subject.
19 The second one is it allows any Colorado
20 resident to file a civil lawsuit based on a passive
21 act of knowing and not doing anything or not
22 performing an act required by law. And, again, this
23 is an expansion now. This civil private right of
24 action creates liability to business, that's new,
25 obviously, the employees of that business, officers

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1 and directors, again, high managerial agents or
2 employees alike.
3 It basically creates a private right of
4 action in each Colorado resident. So we have three
5 million private attorney generals in the state. They
6 don't need to be injured. As long as they have a
7 \$156 filing fee, they can file a civil complaint in
8 the state, and may be filing separate and distinct.
9 There may be a lot of complaints being filed over the
10 same issues, that somebody just reads something in a
11 newspaper over.
12 And the standard, unlike the criminal
13 standard, beyond a reasonable doubt, the civil
14 standard is a preponderance of the evidence. The
15 central theme of this topic is simply, you know,
16 business liability, and it falls kind of -- and I
17 think that's what we discussed last week. And I
18 think simply characterizing the topic as business
19 liability is too broad and general of a concept to
20 satisfy the single-subject requirement.
21 And I want to kind of go through some
22 examples, I think, that are kind of indicative
23 of -- of why I think the public is going to be
24 surprised by this, why they're going to be confused
25 about this, and why it's misleading. A low-level

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1 employee who is cognizant that the company he works
2 for may be polluting or is polluting somewhere, but
3 it's not that person's responsibilities to do
4 anything under current law.
5 Current law doesn't provide a basis of
6 liability. This law does. And it imposes upon every
7 person that's aware of something like this to file a
8 notice with the Attorney General's office. I'm not
9 sure how that's going to proceed. But they have to
10 notify the Attorney General in order to protect
11 themselves against being charged civilly or
12 criminally.
13 Illegal immigration is another good
14 example. You could believe -- you could have
15 knowledge that the company you work for may be hiring
16 illegal immigrants, you could be an HR director, you
17 may receive some false information from an employer
18 that you may not know is false, or maybe you work for
19 the HR person, or you're just aware of somebody
20 coming in your office that you think is an illegal
21 immigrant. That's another classic example of where a
22 litigation can come. And it's not just civil
23 litigation; it's civil litigation.
24 I think the issue is -- is disconcerting
25 for a variety of reasons. And obviously if you look

2 (Pages 2 to 5)

Page 6	Page 8
<p>1 at 55 -- I know that this panel just discussed that, 2 the board just discussed that in relationship to the 3 last issue. You had the concept of nonemergency 4 services and this category concept of nonemergency 5 services, and the court found there were two 6 unrelated purposes that were grouped under the broad 7 theme of restricting nonemergency services, 8 decreasing taxpayer expenditures that benefit 9 welfare, the members of a targeted group, and denying 10 access to other administrative services. 11 In re: Public Waters -- In re: Public 12 Rights and Waters to -- these are just a couple of 13 cases I've highlighted in the motion -- the court 14 found that grouping distinct purposes water 15 conservation district elections and the public trust 16 doctrine under the theme of water didn't satisfy the 17 single subject because the connection was too broad 18 and general. And there are other examples. 19 This measure, you know, does those two 20 separate, distinct things. I mean, they impose 21 criminal liability on one hand and extend that for a 22 variety of -- of things, and new substantive crimes 23 that I think the public is not going to understand or 24 be aware of. They're going to be hidden from them. 25 Criminal liability can be based on -- the</p>	<p>1 understand the difference between agents and the very 2 specific set of people that it applies to in the 3 criminal context. 4 Secondly, it refers to in the civil 5 conduct, civil context, that you can be charged based 6 on criminal conduct. I think criminal conduct is a 7 catch phrase, a slogan, and I also think it, again, 8 doesn't capture all of the civil aspects of this 9 statute, and the different ways you can be sued, not 10 just for, you know, garden variety criminal conduct, 11 but for violating civil wrongs, tortious conduct, you 12 know, failure to warn, being aware that there's some 13 violation in a company and not reporting it. These 14 are new civil things; they're not necessarily 15 criminal. 16 But I think the title is misleading 17 insofar that the voters are going to be surprised 18 that it encompasses these things. And, ultimately, 19 it -- it fails to express the true meaning and intent 20 of the proposed initiative, because it doesn't 21 adequately apprise the voters of the extent and 22 effect of these initiatives reached. And it really 23 is sweeping reform here that we're talking about, and 24 very separate and distinct reform in both the 25 criminal context and a civil context.</p>
Page 7	Page 9
<p>1 criminal component can be satisfied by a civil wrong. 2 In other words, I think that a -- an employee of a 3 company who breaches a fiduciary duty, an employee of 4 a company who has a duty of fidelity or duty to warn 5 or duty to act in good faith, these basic duties can 6 be prosecuted in a criminal manner. So it expands 7 and, I think, creates potentially dozens of new 8 crimes. 9 The civil component is -- creates, again, 10 a number of new civil wrongs that can be created and 11 prosecuted basically by any resident of the state in 12 the court system, with the damages from that going to 13 the general fund, which are then exempted from state 14 spending limits. 15 The concern I have with respect -- and I'm 16 going to, in the interest of time, address 17 everything, I think, at once. I think that will help 18 things go a little smoother. But one of the concerns 19 I had is in setting the title, you know, we -- this 20 board definitively talked about how the criminal 21 conduct applies to -- very specifically the group of 22 people that it applies to, all employees. But with 23 reference to the civil conduct, we just stated that 24 it applies to agents. I think people will be 25 confused about that, first of all. That they won't</p>	<p>1 The -- we believe that another issue is 2 that the proponents amended both the title, and more 3 importantly the text, I think, without having this 4 reviewed by legislative legal services and 5 legislative counsel. That there was substantive 6 titles, substantive changes to the definition of who 7 this applied to. It was associated persons, which 8 was a much narrower group of individuals, and then 9 this got expanded to include, basically, all 10 employees of the company. 11 The purpose is to allow legislative 12 counsel to kind of analyze the legal services, 13 analyze these measures, look at them, comment on 14 them, and also to allow the public to understand 15 these at an early stage, and that didn't happen. And 16 I think for those reasons, it needs to be sent back 17 as well. So I will limit my comments. I think we've 18 pretty thoroughly discussed our position with respect 19 to this issue in the motion, and I'm more than happy 20 to answer any questions you may have at this time. 21 MR. HOBBS: Are there any questions for 22 Mr. Friednash? Mr. Domenico. 23 MR. DOMENICO: Could you just clarify what 24 you meant by the -- this brings in a bunch of civil 25 conduct that's civil and not just criminal conduct.</p>

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1 I mean, I . . .
2 MR. FRIEDNASH: Sure.
3 MR. DOMENICO: Go ahead.
4 MR. FRIEDNASH: When we were here last
5 week, counsel for the proponents pointed out this
6 applies -- this -- this is intended to apply to the
7 passive act of knowing and not doing anything or
8 extending or not performing an act required by law.
9 As I read the definitions under the
10 current definition of criminal liability of business
11 entities, I believe it includes any type of duty that
12 is owed. I think it includes -- and I think he's
13 articulated it as such anyway, but not performing
14 acts required by law. I mean, you have required by
15 law in the employment context by way of example,
16 duties of good faith and fair dealing, duty of
17 loyalty, duty of fidelity to your company. Those are
18 all civil issues that are required by law. There's
19 also fraud issues as well that can be created in kind
20 of a civil context. I think that's the extent of
21 this. It applies in a civil context because in here
22 it discusses how the civil component is based on that
23 same type of conduct. That's illuminated in 1A
24 and -- and 1B.
25 MR. DOMENICO: Even -- I agree with you

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1 that that 1A is kind of confusing about exactly what
2 it includes. But that's already part of the statute,
3 right? The measure isn't changing that. So to the
4 extent certain conduct that you or I might not
5 consider criminal is made criminal, that's in --
6 that's done by the current statute.
7 What's changed -- the -- what they're
8 changing here is who can be held liable for that,
9 right, and then what the penalties are by extending
10 civil penalties, right? I mean, they're not changing
11 the type of conduct that is brought within it or are
12 they? I mean, maybe I should ask Mr. Grueskin this,
13 but would the extension of this to individuals change
14 the range of conduct, I guess, is kind of what I'm --
15 MR. FRIEDNASH: It's a great question.
16 MR. DOMENICO: -- what I'm asking.
17 MR. FRIEDNASH: And I think the answer is
18 -- is yes. It effectively changes things. Because
19 corporations, businesses may owe different duties and
20 obligations under law than officers and directors to
21 their shareholders, to board members, to their
22 employees, or employees may hold with respect to each
23 other and obligations they have to the company.
24 So I think it does open Pandora's box in
25 that context. And that's one of the problems with

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1 it. And if I'm wrong, then this is just confusing.
2 Because to me the plain language of this, which is
3 confusing, you're right, it is in the law, but when
4 you start applying it to new, separate and distinct
5 situations and people, you're opening up new areas
6 and new substantive issues and new substantive crimes
7 and new civil claims for relief.
8 MR. DOMENICO: It does say in 1A that the
9 duty that we're talking about is one imposed on the
10 business entity. And so I guess I would read that as
11 not extending to kind of the separate duties that
12 officers have such as an individual fiduciary duty.
13 But am I -- do you disagree with that?
14 MR. FRIEDNASH: I do only in the sense
15 that in litigating these kinds of cases from a civil
16 prospective, duties employ -- that apply to
17 businesses also apply to their employees, so it does
18 create separate and distinct issues that fall within
19 the purview of duties owed to business entities and
20 of themselves. The business owes a particular duty
21 to warn, to acknowledge pollution, for example, or to
22 deal with pollution and not pollute. And that
23 extends to all of the employees.
24 And maybe within that construct, the
25 employees have separate and distinct obligations with

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1 respect to that particular duty. Somebody opens the
2 newspaper and they believe that
3 there's -- they read about X corporation dumped
4 pollution in a stream, and they live near that
5 stream, or maybe they don't; they just want to file
6 an action. And they file a lawsuit, and they can
7 name every employec of that company, and -- and this
8 will be sorted out later.
9 MR. DOMENICO: That's all I have.
10 MR. HOBBS: Mr. Cartin.
11 MR. CARTIN: Mr. Friednash, I just wanted
12 to follow up on a couple of your arguments. And the
13 first one -- or, well, one of them is -- goes to the
14 language, the amendment to 18-1-606, Subsection 1,
15 which says, "As amended by the measure of business
16 entity, agent, or managerial agent are guilty of an
17 offense if." And as I understand your argument, it's
18 part -- it's part of the -- part of your brief --
19 your motion going to resubmittal. It was a change
20 made post a reviewing comment.
21 As I understand your argument,
22 you're -- you're arguing that that ought to read
23 either a business entity, agent or high managerial
24 agent -- agent "is" rather than "are" guilty of an
25 offense if -- or a business entity agent and high

Page 14	Page 16
<p>1 managerial agent is guilty of an offense if. And I 2 didn't pick this up the first time the measure was 3 through, but the word is, is in that introductory 4 paragraph and does not appear stricken. And I've got 5 to confess that as it's written, I'm -- I'm a little 6 confused as to what it means as well, but could you 7 maybe just touch on that. 8 MR. FRIEDNASH: Yeah. I'm not sure I can 9 do a better job than what you just did. I mean, 10 that's the problem I have isolated. And it's -- 11 again, I don't think I can be more articulate than 12 that -- that explanation, as -- as you set it up. 13 MR. CARTIN: And then the second question 14 I have just to follow up on -- I think your argument 15 in paragraph -- it's Section 2 -- in Section 3, 16 Paragraph A where you mention this that the variance 17 implies more of a civil component -- this goes to the 18 actual title of the measure where the title currently 19 says, in the trailer specifically, "Following in 20 connection therewith, extending criminal liability to 21 business entities, directors, officers and employees 22 and agents who formulated business's policies or 23 supervise employees." And then going down to 24 "Allowing any Colorado resident to bring an action 25 for civil damages against a business or its agent for</p>	<p>1 directors, officers and employees and agents who 2 formulated a business policy -- policies or supervise 3 employees. That seems to suggest that this 4 initiative only applies to those employees who 5 formulate policies or supervise employees, and that's 6 not what it does, and that's another problem. As you 7 read that, just -- as it's drafted today, it does not 8 clearly delineate that you don't have to just 9 supervise employees or -- or -- or formulate business 10 policies to have this supplied to you. So I think 11 that's a second problem within it. 12 MR. CARTIN: I guess I'd just say I 13 disagree with that, and I think that we specifically 14 addressed that issue at the last meeting. And 15 that's -- that's why it's crafted that way. 16 MR. FRIEDNASH: I understand. 17 MR. CARTIN: So that the formulating 18 business policy applies just to the agent. 19 MR. FRIEDNASH: But my concern is voter 20 confusion. Somebody reading this could easily jump 21 and believe that that only applies to those people 22 that fall within that class of categories, and I 23 think it goes beyond that. 24 MR. CARTIN: Thank you. 25 MR. HOBBS: Any other questions? Hearing</p>
Page 15	Page 17
<p>1 such criminal conduct." 2 Is your argument basically that in that 3 second clause, the one that begins "Allowing any 4 Colorado resident," that instead of just having 5 against a business or its agent that that language 6 ought to conform to the language in the first clause 7 following the "in connection therewith"? In other 8 words, is it your argument that it ought to read 9 "consistent with the -- with the measure allowing any 10 Colorado resident to bring an action for civil 11 damages against a business entities, directors, 12 officers and employees and agency who formulated 13 business's policies or supervise employees?" 14 MR. FRIEDNASH: Yeah, that's part of it. 15 And the reason being, I think the inconsistency may 16 confuse voters or mislead them to think that it 17 applies to a class of people that they may not 18 understand. I don't know. I don't think voters 19 understand what the term agent means. And I think 20 that's why you have a definition in the statute that 21 explains who the agents are. 22 And let me point out one other thing. As 23 you just read that -- you know, as a voter is going 24 to read this, they're going to read this to read that 25 it extends criminal liability to a business entities,</p>	<p>1 none then. Thank you. 2 MR. FRIEDNASH: Can I make just one other 3 point in passing? 4 MR. HOBBS: Yes, sir. 5 MR. FRIEDNASH: You asked as to A and 6 whether that just applies to businesses. I think the 7 way B is written it also raises all of these 8 different issues of those different duties applying. 9 So they talk about acting within the scope of their 10 employment, and I think that kind of raises it in 11 that phrase as well. That's all I have. 12 MR. HOBBS: Okay. Thank you. 13 MR. FRIEDNASH: Thanks. 14 MR. HOBBS: I'd like to hear next from 15 Mark Grueskin on behalf of the proponents. 16 MR. GRUESKIN: Thank you, Mr. Chairman and 17 Members. Mr. Friednash and I formally agreed out in 18 the hall that we would try not to make this a 19 marathon session, so I'll try to keep my comments 20 brief. The single-subject argument is basically that 21 there is an expanded criminal liability and there are 22 private rights of action resulting in potential civil 23 actions. 24 I would suggest that if the criminal/civil 25 dichotomy becomes the basis for a decision about</p>

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1 single-subject, that there are a number of statutes
2 that are of suspect. And I haven't done an -- an
3 exhaustive review, but I will tell you that, for
4 instance, the anti-trust statutes authorize the
5 Attorney General to institute criminal proceedings.
6 This was passed in 1992 as part of the same law.
7 There was -- and that authority exists at
8 6-4-117CRS. And the same law at the same time,
9 passed by the same general assembly in the same act,
10 the general assembly provided for civil -- civil
11 damages in 6-4-114CRS. Now, is a violation of single
12 subject providing civil and criminal penalties in the
13 same act? Well, if so, then in 2003 when the general
14 assembly passed a statute requiring prompt payment of
15 wages to employers, it established at 8-4-114 certain
16 criminal penalties. And, likewise, at 8-4-119,
17 provided for certain civil penalties, all in the same
18 act, all in 2003.
19 Additionally, in 1990, the general
20 assembly passed a securities rewrite that provided
21 for both criminal and civil penalties in 11-51-603
22 and 604. I could go on and on, but you get the
23 flavor of where I'm going. I think that the Supreme
24 Court has consistently said that enforcement is a
25 subtopic of the more general subject and does not in

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1 itself reflect a second subject.
2 So if you've got two means of enforcement,
3 civil and criminal, do you have a multiple subject?
4 I would suggest to you that the Supreme Court has
5 never looked at it that way. It's looked at
6 initiatives that have civil and criminal remedies and
7 found that they reflect single subjects.
8 The suggestion is that this is a sweeping
9 change. And, in fact, what this is, is it's an
10 extremely narrow change, as the legislative counsel
11 and Office of Legislative Legal Services pointed out
12 at our proponents' review and comments hearing. And
13 what I'd like to do, Mr. Chairman, if I may, is
14 provide you with a copy of that.
15 MR. HOBBS: Thank you.
16 MR. GRUESKIN: Now, I need to find my copy
17 of that memo. On Page 3, Question 3 -- 4A, they
18 wanted to know why in the original draft there was a
19 definition of an associated person and asked how that
20 compared with 18-1-607 that describes criminal
21 liability of an individual for corporate conduct.
22 There is already an affirmative legislative act that
23 imposes individual liability for criminal acts of a
24 corporation.
25 All this statute does is say where the

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1 corporation or the entity knows of affirmative
2 obligations under law and does nothing. In other
3 words, an omission rather than a commission. There
4 is also liability. This is a gap filler. And so the
5 sweeping liability that is suggested, in fact,
6 already potentially exists. And, therefore, the
7 unknown potential I think is -- is not entirely
8 accurate.
9 The suggestion is that the statement of
10 the single subject is inaccurate, the liability for
11 criminal conduct of businesses. And ultimately we
12 get back to the issue that this really is about the
13 business entities' conduct and what a specific
14 individual associated with that entity does or
15 doesn't do. And so it ultimately is, in fact, all
16 rooted back to the -- the business entity.
17 Now, we could tweak that, and I frankly
18 wouldn't have any problem with doing so, but I think
19 ultimately you could leave it the same because this
20 is not an issue that is somehow spun off to people
21 who are unassociated with a business. It is the
22 business entities' criminal conduct.
23 The suggestion is made that criminal
24 conduct is a catch phrase. You've got to have some
25 evidence, the Supreme Court has said, that it is a

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1 catch phrase. And obviously the word -- I don't
2 think the word conduct is problematic. So the
3 question would be whether criminal is problematic.
4 And if it is, I would have no problem virtually
5 mimicking the statute which speaks -- the existing
6 statute -- which speaks of conduct -- 1A talks about
7 conduct constituting the offense as does 1B. So if
8 you want to talk about conduct constituting a
9 criminal offense, you can certainly do that.
10 As long as I'm looking at the statute, and
11 we seem to kind of be dealing with some accuracy
12 issues and some single-subject issues. Rather than
13 leave anything unaddressed, I thought we'd just kind
14 of make it global here.
15 I think it's important to note that the
16 allegation that there are all sorts of internal,
17 corporate standards of conduct that are implicated,
18 it's pretty much belied by the first sentence in --
19 in one that talks about an entity or agent is guilty
20 of an offense if. You can't be guilty of anything
21 other than a crime, at least to the best of my
22 knowledge. This is being done under the criminal
23 statutes. Therefore, I don't think there's any real
24 problem with the expansion to some fiduciary
25 responsibility or other civil issue, unless you can

Page 22	Page 24
<p>1 be guilty of a civil offense, which is not how that 2 word is typically used, nor is it how its typically 3 understood, nor is it how it's specifically used here 4 in this statute. 5 Likewise, the offense language is 6 replicated, not only in the first line, but in 7 Subparagraph A and Subparagraph B. So it has to be 8 an offense under the criminal code. And so I think 9 that the expense is not nearly as broad 10 as -- as would be suggested. 11 The other jurisdictional issue that is 12 raised is if the proponents made a sub -- substantive 13 change without giving the legislative counsel an 14 opportunity to consider it, that being the expansion 15 of the language to -- let's see -- the expansion of 16 the language to agent. But I would point out for you 17 at the top of Page 4 on the review and conduct memo 18 that I've handed out, that the specific question that 19 was raised by staff was quote, "What is the 20 difference between the definition of associate -- 21 associated person and agent in Section 18-1-606 22 Colorado Revised Statute?" 23 So the parallel or lack of parallel or the 24 overlap or the inconsistency between the definition 25 that was proposed and the existing statutory</p>	<p>1 directly from the review and comment process. I -- 2 without getting into specific possible language 3 changes, I think that covers the jurisdictional 4 arguments. If I've missed something, I'm happy to 5 respond to your questions and thoughts. 6 MR. HOBBS: Questions for Mr. Grueskin? 7 Mr. Domenico. 8 MR. DOMENICO: I just have a couple of 9 quick -- quick ones. First, what -- what does -- 10 work does high managerial agent do in this? I mean, 11 doesn't everything that applies to -- I mean, as you 12 said, high managerial agent to me is a subset of 13 agent or employee, or it's a subset of something else 14 that's defined in there. And all of the penalties 15 and all of the provisions apply equally to everyone. 16 Is there something I'm missing that there's a reason 17 there's a high managerial agent is in there at all? 18 MR. GRUESKIN: Are you asking about in the 19 original statute or -- 20 MR. DOMENICO: Well, yeah, or either. I 21 mean, does -- are there cross -- cross references to 22 that elsewhere in the statutes that -- that -- 23 MR. GRUESKIN: To be honest with you, 24 Mr. Domenico, I haven't gone back and listened to the 25 legislative tapes. My guess is that that was some</p>
Page 23	Page 25
<p>1 definition was raised by staff in the review and 2 comment hearing. That they didn't suggest specific 3 language doesn't mean that they didn't bring up the 4 definition of agent, of which high managerial agent 5 is part. 6 I would note for you that Paragraph 2A in 7 the existing statute is a combined definition, and 8 therefore the fact that the proponents decided not to 9 create their own definition in this measure, but to 10 use the definition that is already provided by 11 statute, was at the direct suggestion of the staff. 12 This last issue about how the language was 13 chosen in terms of, "A business entity, agent or high 14 managerial agent are guilty of an offense if" also 15 stems from the staff's specific suggestion. On 16 Page 2 at the bottom, Question Number 5, the original 17 language was that a business entity and associated 18 person is guilty, and the proponent's grammar was 19 called into question and the suggestion was made that 20 are should be used instead of is. 21 Now, perhaps that was a mistake on the 22 part of the proponents based upon the suggestion of 23 staff, but it was based upon the suggestion of staff. 24 And therefore, it didn't spring from the brow of Zeus 25 or even from the brow of the proponents; it came</p>	<p>1 really good idea that sprang out of a legislative 2 committee hearing or perhaps a debate. But I've 3 looked at the statute to see if there's different 4 treatment of an agent -- 5 MR. DOMENICO: Right. 6 MR. GRUESKIN: -- as opposed to a high 7 managerial agent -- 8 MR. DOMENICO: And there's not. 9 MR. GRUESKIN: -- and I haven't seen that. 10 The proponents included both terms just to make it 11 clear that it -- there wasn't a conflict, that there 12 wasn't some sort of carve out. Whether that was 13 warranted, or whether they could have just used 14 agent -- 15 MR. DOMENICO: Right. 16 MR. GRUESKIN: -- I don't -- I don't know. 17 MR. DOMENICO: Yeah. I just find that 18 confusing because when you read that you think, oh, 19 well, there's going to be some reason to treat a high 20 managerial agent differently than a regular employee, 21 and I don't see it anywhere. 22 MR. GRUESKIN: I suppose -- I mean 23 obviously there is overlap because officers are both 24 agents and high managerial agents. What is not 25 overlapped is any other agent in a position of</p>

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1 comparable authority with respect to the formulation
2 of business policies. So I don't know -- I suppose
3 then because it uses the word agent, it must be
4 limited to directors and employees, as well as
5 officers, that have that kind of role rather than as
6 suggested independent contractors or consultants,
7 or -- I assume that the legislature meant to use the
8 word that it did in referring back. So it --
9 MR. DOMENICO: Yeah. I just wonder if
10 there was that one time a differential treatment of
11 the two, because there's not.
12 MR. GRUESKIN: I'm afraid I really
13 don't --
14 MR. DOMENICO: All right.
15 MR. GRUESKIN: -- have a good answer for
16 you.
17 MR. DOMENICO: Okay. My -- my other
18 question was: When you were talking about what an
19 offense is, you suggested that it's only an offense
20 if it's -- and maybe I'm misreading you -- it's only
21 an offense if it's somehow otherwise an offense in
22 the criminal code. But the way I read it is this
23 makes an offense subject to the criminal penalties,
24 and now under your proposal, civil penalties, makes a
25 criminal offense anything that is an omission to

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1 discharge a specific duty of affirmative performance
2 imposed on the business entity by law, which -- which
3 seems to me not to require some other criminal
4 prohibition, just a specific duty imposed on the
5 entity by law becomes, by nature of the current --
6 the current statute, a criminal offense, right?
7 And then the two things that I see this
8 measure as doing is making individuals responsible
9 for that and then also including this civil aspect.
10 But I don't see that it -- that the current statute
11 requires that it somewhere else be defined as a
12 crime. Am I wrong about that?
13 MR. GRUESKIN: Could you rephrase that
14 last question.
15 MR. DOMENICO: And you suggested, and
16 maybe I just misheard, that the only things that
17 amount to offenses under current law, and we'll
18 also -- which this doesn't change according to, as I
19 think you're saying -- under current law, I thought
20 you suggested that there had to be some -- it's only
21 an offense under this statute if it's an offense
22 under some other criminal prohibition.
23 And my reading of it is this creates the
24 criminal prohibition even if the other duty that's
25 imposed is not necessarily couched as criminal. I

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1 mean, I think there are -- the example we used last
2 time was requirements -- disposal requirements for
3 pollution, which themselves don't impose criminal --
4 aren't -- those statutes don't necessarily say it's a
5 crime if you don't dispose of it. They just say you
6 shall dispose of your -- your hazardous waste in a
7 certain way.
8 And my reading of this is, of the current
9 statute is: If you fail to do that, the entity is
10 then guilty of a crime as it's laid out in this
11 section. Am I -- is your understanding different
12 that it has to be a crime separately from this
13 section? That the disposal statute would have to say
14 it's a criminal offense not to do this?
15 MR. GRUESKIN: I think there are two
16 answers to your question. The -- the broad one that
17 certainly was the basis for my statement is reflected
18 by what legislative staff told the proponents. On
19 Page 3, Question Number 4, the staff stated, quote,
20 "Section 18-1-606, Colorado Revised Statutes,
21 describes the circumstance under which a business may
22 be guilty of an offense; it is not an offense
23 itself."
24 Now, presuming staff to be, you know,
25 accurate and credible, I -- I take that at its face

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1 value, and therefore would suggest to you that when
2 the proponents expanded the applicability of that
3 precept, that it describes the circumstance under
4 which guilt can be found, rather than a specific
5 offense that they were accurate.
6 I would also suggest to you that Paragraph
7 3 talks about where businesses commit offenses, which
8 if committed by an individual would result in the
9 following punishment. So I think what Sub 3 does is
10 to take -- to meet your -- your issue it -- it --
11 current law already applies statutes to corporations,
12 even if the corporations are not specifically
13 referred to. And this measure doesn't change that at
14 all. I don't know if that was helpful to you. But
15 I -- I think that -- I mean, as a general matter, I
16 think that the staff's suggestion is correct, that
17 this doesn't create specific offenses, it creates
18 circumstances under which an offense may be deemed
19 to -- to occur.
20 MR. DOMENICO: Okay.
21 MR. HOBBS: I'm not sure that it matters
22 to me, but I -- but I'm also not sure that I agreed
23 with the -- the legislative staff's interpretation,
24 so -- so maybe I at least ought to pause here and --
25 and try to figure out if -- if it's relevant to this

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1 discussion. I mean, it looks to me like 606 does
2 define an offense and imposed penalties, I mean the
3 existing law.
4 I -- I didn't bring 607 with me, but I
5 interpreted 607 to mean that -- that when an
6 individual does something wrong, they can't say, as
7 long as it was in their official capacity for the
8 corporation or the business, that they're -- that
9 they're protected from prosecution.
10 In other words, if -- if they did commit a
11 crime, that they can be individually prosecuted
12 against the individual. Then the fact that they did
13 it in their official capacity, so to speak, was
14 basically no defense. So I -- I just -- which seems
15 to be a little different than the legislative
16 interpretation, because it does look to me like 606
17 does define a crime and impose a penalty for -- on a
18 business -- for business misconduct. And then the
19 measure extends that crime to individuals, agents and
20 high managerial agents under some circumstances.
21 So I don't know if -- I'm not sure that
22 this goes anywhere, but I just wanted to point out
23 that I wasn't quite sure that I saw the legislative
24 staff interpretation quite the same way. Now,
25 they -- they know better than me, but I just didn't

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1 see it the same way.
2 MR. GRUESKIN: I'd like to defer to them
3 too. I -- I think that, you know, the title of
4 Section 606 is criminal liability of businesses.
5 It's not about establishing new crimes. And I think
6 certainly in the Tabor context, the Supreme Court has
7 looked to the title as indicative of the -- of
8 constraints to be implied upon a proposal that's
9 presented to the voters. And I think that, you know,
10 in the same context, this measure would be implied.
11 But I -- I agree with you in -- in --
12 it's -- it may be a distinction without a different
13 here in terms of describing liability that is
14 attributable to individuals under specific
15 circumstances.
16 MR. HOBBS: Mr. Cartin.
17 MR. CARTIN: Thank you, Mr. Chair, and
18 I'd -- just to follow up on that. I -- I tend to
19 agree with -- with Mr. Hobbs about -- with regard to
20 the fact that this appears to be a statute that sets
21 forth an offense and a penalty. But I just -- I just
22 want to make sure that I understand. And I would
23 say -- this is probably an editorial comment -- as
24 the statute is currently written probably isn't as
25 artful as it could be.

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1 But the way that I read it -- and I know
2 that time is of the essence here. But under
3 currently law, under 18-1-606, under Subsection 1, a
4 business entity is guilty of an offense if either of
5 the conditions in 1A or 1B are met. And when you go
6 down to Subsection 3, there's some language that
7 talks about corporations.
8 MR. GRUESKIN: Right.
9 MR. CARTIN: And then you get to the
10 language that says for an offense committed on or
11 after July 1, 2003, a business entity shall be
12 subject -- shall be subject to the payment of a fine
13 and then an offense committed by a business entity
14 would be a misdemeanor, et cetera.
15 So to me you have the offense -- you have
16 the offenses set forth in 1A and 1B and you have the
17 penalties set forth in Subsection 3. I went back and
18 looked and this statute was amended in 2003. And
19 basically what they did was everywhere where it said
20 corporation, they inserted business entity and then
21 created a definition of business entity. And the
22 language for -- in Subsection 3 for an offense
23 committed on or after July 1, 2003 was added in 2003.
24 And if you -- I'm sure you know all of
25 that, Mr. Grueskin, but I just wanted to get that as

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1 part of this discussion. So that's how I interpret
2 the statute now. With the amendment, the difficulty
3 that I'm having, and I -- and I recognize what this
4 staff memo says in Question Number 5 there on Page 2.
5 And when the -- when the measure was
6 submitted, the language said "business entity and
7 associated person is guilty." And the question
8 was -- and the -- the comment was -- if the
9 proponents intended to use the "and," then the "is"
10 should change to "are." Or if the proponents intend
11 to use "is," then it should be business entity or
12 associated person. And what happened, I think, was
13 that they went ahead and did the "or" but did the
14 "are" too, and didn't leave the "is" in. That sounds
15 a little bit like Dr. Suess, but I think that's --
16 that's the issue here.
17 Is that the way I read it now is a
18 business entity, agent or high managerial agent are
19 guilty of an offense if -- and -- and assuming for
20 the sake of discussion that the "are" should be an
21 "is." When you get to A, the conduct constituting
22 the offense consists of an omission to discharge a
23 specific duty of affirmative performance imposed on
24 the business entity by law.
25 If its entity, agent or high manager -- or

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<p>1 high managerial agent -- does this impose 2 liability -- and this may get to Mr. Domenico -- come 3 back to Mr. Domenico's line of questioning, I'm 4 not -- and if it does I apologize -- but -- but 5 assuming its entity, agent or high managerial agent 6 is, if the conduct constituting the offense consists 7 of an admission to discharge a specific duty of 8 affirmative performance imposing (inaudible) by the 9 law. 10 Is the business entity the agent and the 11 high managerial agent all guilty of the offense? 12 Because there's no conforming language to 1A or 1B, 13 for example, and I think we went over this last time, 14 to say in 1A, for example, imposed on the business 15 entity, agent or high managerial agent. And so my 16 question is: If there's a violation of 1A, who is 17 guilty? 18 MR. GRUESKIN: The way the measure reads, 19 the individuals who are covered under the statute and 20 the business entity are potentially guilty. 21 Obviously, I can't tell you based upon the facts that 22 are unknown to me whether or not all would be guilty. 23 It might be one; it might be two; it might be three. 24 It depends upon -- 25 MR. DOMENICO: But what would limit that?</p>	<p>1 don't know, maybe you're right, that that's not 2 really our problem, but. . . 3 MR. GRUESKIN: Well, and -- and the 4 question seems to me is whether or not your current 5 language in describing that is accurate. 6 MR. DOMENICO: Right. 7 MR. GRUESKIN: And right now your current 8 language says extending criminal liability to a 9 business entity's, directors, officers and employees, 10 and then this clause about agents. If the business 11 fails to perform duties that are required by law or 12 if management engages in blah, blah, blah. Your 13 title reflects your reading of the measure. 14 MR. DOMENICO: Yeah. I mean, I think I 15 agree with that. I think I agree that that's not 16 really our problem. I'm not sure I agree that the 17 title is as clear as it could be. But I just wanted 18 to make sure. Because I was struggling with trying 19 to figure out who's guilty. And it seems to me that 20 under the statute itself, it's everybody. And now 21 maybe it would be interpreted in a way to alleviate 22 the sort of absurd situation where you'd have every 23 employee guilty of a crime. I mean, I would hope so, 24 but. . . 25 MR. GRUESKIN: And there's nothing in</p>
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<p>1 I mean, the only defense I see -- I mean, the way 2 it's written is that they're all guilty if the 3 business -- I mean, and that means every employee. 4 And there's no limit on them knowing any of this. 5 They're all guilty if the entity engaged in this -- 6 and their only affirmative defense as it's written is 7 that they reported it to the Attorney General. 8 I mean, are you relying on some kind of 9 due process exception that would -- that would be 10 read into this that would limit it to actual 11 individuals who had some responsibility for it, 12 because there's not in the plain language of it. 13 MR. GRUESKIN: Well, the plain language is 14 what the plain language is. I mean, frankly, you 15 know, I mean I don't know that this goes to single 16 subject as much as it goes to kind of the merits of 17 the measure -- 18 MR. DOMENICO: Right. Yeah. And I -- I 19 appreciate that, and I just want to make sure we 20 understand what's going on. But that is -- that is 21 the way I read it that -- that the statute itself 22 wouldn't contain any kind of a knowledge requirement 23 or a responsibility requirement on the part of an 24 agent, so the plain language would include every 25 employee is guilty of a crime under this. And, I</p>	<p>1 here, as you point out, that reads out due process 2 from the Colorado Constitution. 3 MR. DOMENICO: Sure. 4 MR. GRUESKIN: So, I mean, the -- the -- 5 would a -- would a campaign be run that suggests 6 certain things? Sure. Is this the only draft of the 7 measure that you're going to see this cycle? I don't 8 know. But my guess is that for purposes of today, 9 the issue is whether or not if -- if whether this is 10 a proposal you can -- you can subsequently get your 11 arms around in terms of embracing, whether or not the 12 title is accurate. And then the proponents are going 13 to figure out which measure of theirs to circulate. 14 And frankly, they -- let me -- let me take 15 one step forward. One of the real criticisms in the 16 initiative process is that there's no give and take 17 and therefore things get floated to voters that are 18 truly problematic. 19 My view is that, notwithstanding maybe the 20 legislative staff didn't quite get it right in terms 21 of their comments, that's one opportunity for that 22 review. The first hearing before this board is a 23 second opportunity for that review. Thoughtful 24 comments made by knowledgeable counsel are another 25 opportunity for that review, a rehearing is a fourth</p>

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1 opportunity. This is productive exercise. And so,
2 you know, I -- I just want you to know that I
3 appreciate the -- the give and take. And, you know,
4 I'm serious when I tell you, this may not be the only
5 version of this measure that you'll see.
6 MR. DOMENICO: All right. Can I just ask:
7 Could you just explain a little bit more how you see
8 this as interacting with 18-1-607.
9 MR. GRUESKIN: Sure. 18-1-607 provides
10 that the affirmative criminal acts of a corporation
11 are attributable to certain of its key actors. What
12 it does not say is that the failure to act is
13 attributable to certain of its key actors. This
14 measure is intended to fill in that gap so that there
15 is liability for commission and omission on the part
16 of both the entity and its key actors.
17 MR. HOBBS: Any other questions for
18 Mr. Grueskin? Thank you. Mr. Friednash, any final
19 comments?
20 MR. FRIEDNASH: Just real brief --
21 MR. HOBBS: Okay.
22 MR. FRIEDNASH: -- I promise. I would
23 tell you that whether the general assembly passes
24 something or not, and whether that constitutes single
25 subject is no real standard for a title board dealing

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1 with initiative process, I can think of many things
2 that have passed while serving the legislature that
3 probably didn't fall within the scope of the single
4 subject.
5 Having said that, enforcement is not just
6 what this is about. This is about it creates new
7 substantive crimes. And clearly this is an offense
8 and a penalty. The word offense starts in Subsection
9 1. They're guilty of an offense if it then defines
10 the type of offenses they are dealing with here. And
11 it is something that whether DAs or the Attorney
12 General's office prosecutes cases, persons will be
13 filing cases based on this. People will read this
14 and believe they have a private right of action based
15 on this type of conduct. And I think that is
16 something that we will see.
17 And I think it is confusing, and
18 ultimately, you know, there are hidden purposes here,
19 and, you know, it is -- there are a lot of provisions
20 here that are coiled up in the folds of a complex
21 initiative. It's easy to say that this is just a
22 business liability, but it's confusing, it's
23 misleading, and it hard to read.
24 And the voters are going to be surprised
25 by the manner in which it is ultimately interpreted.

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1 You know, when we were here previously, Mr. Grueskin
2 explained this as what this statute deals with is
3 either the passive act of knowing but not doing
4 anything about it, or in the alternative, not
5 performing the duties required by law. This is an
6 expansion hearing, it's not just about enforcement of
7 other criminal acts. Thank you.
8 MR. DOMENICO: I have one more question
9 that I think maybe is more for Mr. Grueskin, but you
10 might be able to answer it while you're up there.
11 And that is: Is there any similar civil right of
12 action under 607 or the -- the affirmative, the --
13 the imposition of this affirmative crime for
14 affirmative acts? Is there a similar civil liability
15 section in that, or is that unique to this new
16 measure? Like in 607, do you know?
17 MR. FRIEDNASH: Not that I'm aware of.
18 I'll defer to Mark, but not that I'm aware of.
19 MR. GRUESKIN: No. There -- I mean, to
20 the best of my recollection, Section 607 is, I think,
21 one or two lines --
22 MR. DOMENICO: Straight criminal.
23 MR. GRUESKIN: -- based on --
24 MR. DOMENICO: Yeah, that's my
25 recollection too. Okay.

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1 MR. HOBBS: I don't have anyone else
2 coming up to testify, so I will turn to board
3 discussion. Any discussions by the board?
4 MR. DOMENICO: I guess I'll start.
5 I -- this is a, I think a closer case than the last
6 one, but I'm still where I was previously in thinking
7 that this is two subjects. I think the cases that I
8 looked at that sort of were relevant are the waters
9 cases, the Number 17 from last -- last year about the
10 environmental conservation as well as the public
11 trust doctrine and the Number 55.
12 All of those it's quite clear to me could
13 be grouped under something you would call a single
14 subject. But yet, the court held all of them to
15 violate the single-subject requirement and -- and the
16 way I -- the only way I can try to make sense of
17 these, and I'm not sure I've ever succeeded is, that
18 if you have to raise the level of generality of what
19 you call the subject so high that it's pretty far
20 removed from the actual action that's going on in the
21 measure in order to bring everything under it, which
22 is to say I picture kind of a pyramid and the subject
23 is way up high and the -- the two things -- they're
24 really here two things that trouble me. And they
25 seem, while they're related to the same single

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1 subject, they're sort of surprising and I think not
2 really connected to each other in any sort of
3 necessary way, and that is the -- the extension as
4 Mr. Grueskin said the basic point here is extending
5 liability to individuals for omissions of their
6 corporation. That seems to me to be one subject.
7 And then the -- the imposition, though, of
8 these new civil penalties, both on the business and
9 on the individuals, is, I think, sort of confusing.
10 The fact that there's a separate statute that already
11 imposes some criminal liability on individuals adds
12 to what I think is kind of confusion here that --
13 that I would think that the clearer way to do -- I
14 mean, the way that would be less surprising, less of
15 a risk of kind of log rolling, of hiding this
16 expansion of civil liability behind the sort of --
17 the basic -- what I see as the basic purpose, which
18 is to extend liability for omissions to individuals,
19 corporate or business entity omissions to individuals
20 would be to either do it -- do the extension of
21 liability for individuals in 807, which already deals
22 with that subject -- and then separately in -- in --
23 or I'm sorry, I keep saying 807 -- 607, and this is
24 606. And then if you want to expand the types of
25 remedies that are available or the types of

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1 enforcement to include civil penalties, you could do
2 that in -- here in 606.
3 The trying to do the two of them together
4 as opposed to some of the legislation that
5 Mr. Grueskin referenced where you create a new crime
6 and you say, well, the way we're going to enforce
7 this is, you know, going to include both civil and
8 criminal penalties. I think there's something very
9 different about this where basically you're saying,
10 well, we've already got these crimes and we're
11 extending liability for them to individuals, and
12 we're also creating a new -- a new form of
13 enforcement.
14 For some reason to me, I find that much
15 more of a surprise and unrelated to the basic point
16 of who should be liable of how they should be liable.
17 And maybe I'm wrong about that. I -- I would also
18 point out -- we're probably not supposed to say it
19 out loud -- but I think it's pretty clear that the
20 single-subject requirement is applied more
21 stringently to initiatives than it is to everyday
22 legislation, whether that's wise or not.
23 I think my reading of this, especially the
24 water cases, 17 and 55, suggests that while these are
25 related to a single subject, the -- what they do

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1 under that single subject is so unrelated to each
2 other that I don't think we've -- we can really
3 accurately capture it in the title, which suggests to
4 me that it's not a single subject.
5 MR. HOBBS: Mr. Cartin. Okay. Well, I'll
6 go ahead and start. I guess I do see it a little
7 differently than Mr. Domenico, I think. I mean, I'm
8 sort of wondering if Mr. Cartin is going to say
9 something that turns me around. But basically I
10 think I don't -- I don't see this as a single-subject
11 violation. And -- and I agree that it's -- that it's
12 sometimes hard to, when we look at cases like public
13 rights and water, I know it's sometimes hard to --
14 like Number 55 -- I know it's sometimes hard to
15 figure out what the rules of the game are.
16 But I -- I think this is a fairly narrow
17 subject, and not an -- not an excessively broad
18 subject. I think it does have to do with -- with
19 liability from business misconduct, which I think
20 is -- is a fairly well-confined subject. There's
21 more than one thing going on in the measure to
22 advance the purposes of the measure, I think, and as
23 Mr. Domenico -- and Mr. Domenico notes what they are.
24 But it seems to me that they are all
25 related to business liability for misconduct and --

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1 and extending liability to individuals seems to
2 promote that purpose that the proponents have as --
3 as well as providing a -- award -- award of civil
4 penalties as well. So I see them as pretty tightly
5 connected to the purpose and -- and within a fairly
6 narrow subject, I think. So I just -- I just see it
7 a little differently, I think.
8 MR. HOBBS: Any comments, Mr. Cartin?
9 MR. CARTIN: I -- I don't have much to add
10 to your comments, Mr. Chairman. I -- I, too, based
11 on the text in the measure, if there are -- if there
12 are two purposes here, if there is more than one
13 purpose, they're certainly related in my mind. And
14 the fact that you have an extension of criminal
15 liability to a business's agents coupled with a civil
16 right of action against the entity or its agents
17 arising out of that criminal activity, to me that
18 just isn't -- to me those are interrelated purposes.
19 That doesn't rise to the level of, as the court has
20 said, grouping distinct purposes where the connection
21 is too broad and too general to make them part of the
22 same subject.
23 On in 55 where the court said the
24 complexity and ominous provisions are hidden from the
25 voter. To me you don't have that here. There's --

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1 there's no surprise in my mind, and I'm reluctant to
2 even go to the -- the surprise analysis. But I --
3 again, I would just say that to me it seems as though
4 it's a fairly narrow title and -- or subject, and
5 that there is a single subject.
6 And I think that when you do have
7 decisions like -- I think Mr. Domenico's point is
8 well taken. But when you -- when you have
9 articulations of the single-subject requirement
10 and -- and looking in where the court says in one
11 paragraph that they're not going to look at the --
12 the effect or the intent of the measure or construe
13 the legal effects, and then -- then go straight to we
14 must examine sufficiently an initiative's central
15 theme as to express or determine whether it contains
16 incongruous for hidden purpose or bundles,
17 incongruous measures under a broad theme. That makes
18 it tough on the title board.
19 And so what I -- what I come back to, I
20 guess, is 14106.5, and -- and to -- to Mr. Domenico's
21 comment about being more of a stringent view of the
22 single subject on initiatives than is before the
23 general assembly on bills. I'm -- that may be --
24 that may be one take on it. But I'm -- I'm reluctant
25 to go there, and I just kind come back to kind of

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1 keep my eye on the ball under 14106.5, Subsection 3,
2 where it says, "It is for the intent of the general
3 assembly that is setting titles pursuant to Section
4 1515 of Article 5." The initiative title setting
5 review board creating Section 14106 should apply
6 judicial decisions constrained (inaudible) of the
7 constitution single-subject requirement for bills and
8 should follow the same rules employed by the general
9 assembly in considering titles for bills.
10 And I think that Mr. Grueskin's pointing
11 out a couple of statutes that have done where you've
12 had a civil and criminal component in both provide a
13 strong basis for the -- for a conclusion that this
14 has a single subject. And I'm -- I'm still kind of
15 following that as part of my rule, sir. I -- to me
16 in my mind, there's a single subject here if there's
17 a bill, and so I'm going to go ahead and extend that
18 to an initiative.
19 MR. DOMENICO: Just to respond real
20 quickly on that last point. I mean, my -- my point
21 about the case as cited by Mr. Grueskin
22 is -- the more important point to me is not having
23 really looked at all of them, the way they were
24 characterized and my understanding of them is that I
25 wouldn't necessarily disagree that -- with those. I

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1 don't think, though, that they're analogous in saying
2 X is now a crime and we're going to enforce this
3 crime through both civil and criminal penalties is
4 different to me than saying this thing that's a
5 crime, we're now holding responsible for it a whole
6 new class of people, and in addition both for those
7 new people and for the entity that previously was
8 responsible for it we're creating a new type of
9 liability, to me is very different than saying we're
10 creating a new type of wrongful conduct and here's
11 how we're going to enforce it.
12 And it's -- I agree that these are -- can
13 be related to a single subject. I find, frankly,
14 liability for criminal conduct of businesses, though,
15 is very broad, contrary to Mr. Hobbs' statement.
16 This doesn't define any of that conduct; you have to
17 look elsewhere for it. And so, I mean, the
18 combination of adding a new type of liability to an
19 existing crime as well as adding a new class of
20 people who are subject to prosecution and to the new
21 type of liability is where I have the trouble and
22 where I see a distinction that's very different from
23 the cases we were talking about, whether or not
24 they're initiatives or legislation.
25 MR. HOBBS: Thank you. I guess I'll go

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1 ahead and move that -- that the board deny the motion
2 for rehearing.
3 MR. CARTIN: Second.
4 MR. HOBBS: Any further discussion? If
5 not, all that's in favor say aye.
6 MR. CARTIN: Aye.
7 MR. HOBBS: Aye. All those opposed say
8 no.
9 MR. DOMENICO: No.
10 MR. HOBBS: That motion carries two to
11 one. And that completes action on Number 57. The
12 time is 12:07 p.m. Let's go on to the next agenda
13 item, 2007-2008, Number 62, cause for employee --
14 MR. GRUESKIN: Mr. Chairman, could I
15 just -- before you ahead here --
16 MR. HOBBS: Mr. Grueskin, yes, sir.
17 MR. GRUESKIN: Did your ruling -- just so
18 I understand, did your ruling cover the various
19 points, the allegations made about the inherent lack
20 of clarity? Did -- did you interpret those to be --
21 and I'm not sure, because I wasn't -- wasn't sure,
22 about whether those were challenges to the
23 jurisdiction of the board or whether those were
24 challenges to the title you set, as was the case for
25 the specific allegation on, you know, who is an agent

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1 and whether or not the single-subject reference is
2 correct. So I just want to make sure that the ruling
3 is clear on the record.

4 MR. HOBBS: Thank you. And I -- although
5 I didn't speak to that, it was -- it was my intention
6 to also support what the board had gone before with
7 respect to the titles and so forth, including the
8 questions about whether the changes were in response
9 to comments from legislative staff and so forth. Is
10 that -- I don't know whether the other board members
11 want to weigh in on that.

12 MR. DOMENICO: I mean, I'll just say I
13 think the title is -- is confusing and misleading in
14 some ways mostly, but it's related to the fact that I
15 think the measure itself contains more than one
16 subject, so . . .

17 MR. HOBBS: Thank you. So, again,
18 let's -- we'll close discussion then on Number 57 and
19 go on to Number 62. And in the interest of time,
20 we're actually going to have to move a little faster
21 on this one. So I think we have to be -- by about
22 12:45, I'd like to be finished.

23 Again, we have a motion for rehearing with
24 a fine brief from -- Mr. Friednash, would you like to
25 highlight some of your points?

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1 MR. FRIEDNASH: Sure. Let me make this
2 quick as well. I appreciate your time constraints.
3 This is a complex initiative with a very broad theme
4 that contains a lot of hidden purposes and bundles
5 incongruent measures under that very broad theme.
6 The -- let me just kind of highlight what is missing
7 and what this does.

8 The intent and purposes of this is to
9 eliminate at-will employment doctrine in Colorado.
10 That is nowhere contained in the measure itself or
11 the text. It eliminates the parties' right to enter
12 into employment contracts and collective bargaining
13 agreements. It's a hidden purpose. That is one of
14 the things this does. It's not addressed in the text
15 or the title.

16 It replaces that traditional employment
17 relationship with a new just-cause standard that
18 governs all employment relationships in Colorado,
19 public and private. I believe the voters are going
20 to surprised to understand that, again, this
21 eliminates at-will employment. That, two, it creates
22 a just-cause standard to the extent where there is
23 one.

24 And that the just-cause standard
25 includes -- and I will concede that this is included

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1 in the title itself, but there are nonbusiness or
2 nonperformance reasons that constitute the
3 termination of just cause. They can be a reduction
4 in force by a business, if less than 10 percent would
5 not constitute just cause. So it goes beyond the
6 traditional concept of just cause. But I think in
7 doing so, that will be confusing for voters to
8 understand.

9 The -- it creates a -- and -- and here's
10 where I think it really goes beyond into another
11 subject, and really an incongruous subject in that.
12 This isn't just about creating a new standard for the
13 termination of employees or suspension of employees,
14 which is largely hidden, but we are actually
15 replacing the current one. But it also creates this
16 new remedy. And the new remedy is for a sole remedy
17 for dispute resolution, which is called mediation,
18 but it's a final, binding decision. It's not a
19 nonbinding mediation that we're all familiar with,
20 which would be arbitration.

21 And, again, this is placed in the
22 constitution. It's not something the legislature is
23 going to be able to tinker, except to the level
24 which they can facilitate the implementation. But
25 this is going to be placed in the constitution, and

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1 the sole remedy is for someone to file a complaint
2 within 30 days and to have a hearing in 120 days.
3 That's not in the bill of title, those two pieces.
4 This is complaint procedure.

5 That it's a final decision is not clear.
6 Nor is it clear, a hidden purpose, that this now goes
7 along and eliminates one's right to the court system.
8 And they agree to disagree on it, but that's my
9 interpretation of this. And if I'm wrong, then it's
10 just confusing and misleading to voters, but I think
11 voters will be surprised that this is the effect of
12 this proceeding.

13 There is no -- unlike the arbitration act,
14 which lays out in a number of different statutes the
15 method of which you can appeal to district court, and
16 the basis in which you can appeal, there's no such
17 reference here whatsoever, instead it just says that
18 this is a final decision. It eliminates access to
19 court, due process, and personal system rights that
20 are available to state employees.

21 Again, voters are going to be surprised to
22 learn that if you're a state employee, that there's
23 this new mechanism that has been created here. It is
24 a separate and distinct purpose in subpart and in
25 subject matter, not even a subpart, but impact that

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1 this initiative creates.
2 It creates new remedies that aren't
3 provided by law. One is the attorneys' fees
4 provision. There is an attorneys' fees provision
5 under a wage claim act by way of example only, but
6 not with respect to traditional employment,
7 relationships or contract relationships, unless it is
8 a part of the contract itself. But this allows a new
9 remedy, which is attorneys' fees, and another new
10 remedy, which is reinstatement. There's no remedy
11 right now in Colorado law that provides for
12 reinstatement, except in Title 7 context.
13 So ultimately what this does is it joins
14 multiple subjects and it poses a danger of unfair
15 surprise and fraud occasioned by the inadvertent
16 passage of a surreptitious provision coiled up in the
17 fields of a complex initiative. This is from the
18 decision last year in Initiative 17.
19 And as Mr. Cartin recently pointed out,
20 what's difficult is there's clear language that says
21 in that decision you have examine sufficiently in the
22 initiative of central theme to determine whether it
23 contains hidden purposes under a broad theme. This
24 clearly contains hidden purposes under a very broad
25 theme of just cause for termination and suspension of

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1 employees.
2 I think it is similar to in re: proposed
3 initiative 1997 through 1998, Number 63, where the
4 court held that the title board failed by fixing the
5 title in summary of initiative until judicial
6 qualifications because it contained provisions
7 proposing to change the manner, the selection, powers
8 and procedures of an independent constitutional body
9 which were unrelated to judicial qualifications. The
10 theme was the judicial branch, but could not be
11 considered to be a single subject.
12 It's easy to say we have this single
13 subject and everything fits within the scope of it.
14 But the problem here is that, one, it doesn't, and,
15 two, voters are going to really be surprised of all
16 of the direct implications of what this initiative
17 does. It conflicts with the constitution. Granted,
18 yeah, you don't have to go to the merits right now.
19 But as we've learned from Amendment 41,
20 you know, it takes years, potentially, to unravel
21 some of the mysteries of initiatives, especially when
22 they get placed in the Colorado Constitution. It may
23 take years to unravel this.
24 And how a court interprets conflicting
25 constitutional amendments or provisions in the manner

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1 in which they do it, is going to be at issue. And it
2 is, at minimum, confusing and misleading. But in my
3 view it goes a step further, because that's actually
4 what this does. The use of the phrase "mediation,"
5 and finality are really misleading terms in this
6 document and things that I think are going to be very
7 confusing to the voter.
8 And then, finally, let me just touch on,
9 again, a similar problem that occurs here that
10 occurred in the last measure, which is the amended
11 title and text wasn't exactly -- well, first of all,
12 the amended title was submitted here. The text
13 itself added two new definitions to just cause,
14 which, again, it's my understanding that those two
15 issues, which were the filing of bankruptcy by a
16 business and the simultaneous discharge of 10 percent
17 or more employer -- employer's workforce in Colorado
18 were provisions that weren't contemplated by
19 legislative counsel and legal services. So, as
20 promised, I made by remarks brief and will take any
21 questions.
22 MR. HOBBS: Thank you. Any questions?
23 MR. CARTIN: No.
24 MR. HOBBS: Thank you very much.
25 MR. FRIEDNASH: Thank you.

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1 MR. HOBBS: Mr. Greuskin.
2 MR. GREUSKIN: Let's see who can be
3 briefer. Most of the concerns raised are about what
4 voters might or might not understand as to the
5 potential effects. First of all, all of that is
6 conjecture. Secondly, the court has never said that
7 the effects of the measure have to be stated in the
8 title. And, thirdly, that's the purpose of a
9 campaign. I mean, that's why campaign professionals
10 use the maxim for voters, "if you don't know, vote
11 no." And I'm sure that there will be an active
12 campaign on this. But the question is whether or not
13 this is a single subject.
14 I think that our position was stated at
15 initial hearing. I'm not going to go through it
16 again. Bottom line, you've got concerns about
17 potential effects rather than actual, distinct
18 purposes that have no reasonable connection with one
19 another. And that alone is not a basis for this
20 board not to set a title.
21 In addition, as to the civil service
22 system and the like, the court traditionally reads
23 these provisions consisting with existing law, and I
24 think they do that here. The question was also
25 raised as to -- in terms of jurisdictional concerns,

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1 whether or not the additional conditions of just
2 cause were ever considered by the legislative counsel
3 and legal services.
4 With your permission, Mr. Chairman, I'd
5 like to give you the review and comment memo.
6 MR. HOBBS: Thank you.
7 MR. GRUESKIN: I'd ask you to take a look
8 at Page 5, Question Number 5, that which points the
9 staff specifically raised whether or not the
10 proponents were intending to require that just cause
11 be applied even when there was, quote, a lack of work
12 or even bankruptcy of the employer. Is this the
13 proponent's intent?
14 The proponents took heed of that question
15 and added those two conditions. Obviously, they
16 added some specificity so that it wasn't simply that
17 vague language, and therefore we think the issue was
18 adequately addressed below. I think all of the other
19 issues were addressed two weeks ago, and so I'm not
20 going to repeat our responses unless you just want me
21 to.
22 MR. HOBBS: One -- one question is: Would
23 it be a fair statement that the purpose of the
24 initiative is to eliminate the at-will employment
25 doctrine in Colorado?

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1 MR. GRUESKIN: Well, I think that you've
2 got it more accurately done in terms of your
3 single-subject statement, which talks about and
4 doesn't say establish, but it's an establishment of a
5 just-cause standard for actions. Obviously, that
6 stands in -- in distinction to the at-will status or
7 standard that is currently used.
8 MR. HOBBS: Okay.
9 MR. GRUESKIN: But it isn't simply
10 eliminating at-will, because that would leave a void.
11 MR. HOBBS: Okay. Thank you.
12 MR. DOMENICO: I've got one quick thing.
13 The one thing that concerns me is this, is the
14 mediation. And I think we talked about last time I
15 think you sort of reassured me that just because it's
16 a final, doesn't mean there's no recourse to the
17 courts after that. And if that's true, I think
18 I'd -- I'd -- I'm willing to go along.
19 I think I may -- it -- it would trouble me
20 if -- especially since I think Mr. Friednash is
21 right, that this is really arbitration that's called
22 mediation. That by itself is probably not enough for
23 me to find the measure misleading, but if it were
24 combined with the idea that in addition to
25 establishing a just-cause regime, you're also talking

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1 all disputes about employment essentially out of the
2 court system, would seem to me to be a pretty big
3 change that was kind of hidden.
4 And so as long as I'm assured that that's
5 not the intent and -- and you won't be coming into
6 the Supreme Court urging them to say that nobody can
7 challenge the decision of one of these mediators,
8 then I think I'm okay.
9 MR. GRUESKIN: Mr. Domenico, as I -- as I
10 stated two weeks ago, this doesn't create an
11 exception to the right of judicial review. All this
12 does is set an expedited time frame for an initial
13 informal process between an employer and employee.
14 And, frankly, as a finality, it is clear that it is
15 a -- a final decision as to the process under this
16 subsection.
17 MR. DOMENICO: Okay. That's what I had
18 hoped you'd say.
19 MR. HOBBS: Mr. Cartin.
20 MR. CARTIN: Mr. Grueskin, assuming --
21 assuming for the -- the sake of this question that
22 I'm about to ask you and for discussion that
23 Mr. Friednash's allegations -- that the true purpose
24 is -- well, assuming for the sake of the discussion
25 that the effect of the measure is to create a

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1 just-cause standard for employee discharge or
2 suspension and to supersede or repeal at-will
3 employment in Colorado and that -- and the effect is
4 that it supersedes an (inaudible) of appeals in the
5 state's civil service system as well as impacting any
6 local governmental civil service system that may be
7 in place.
8 Assuming that that's the effect -- for the
9 sake of discussion, that those are the effects of the
10 measure, and you don't have to agree or disagree that
11 those are -- like you say, they may be conjecture,
12 but for the sake of discussion, let's say that is the
13 effect. Why shouldn't -- why under the -- the
14 relevant cases shouldn't separate measures be
15 presented to the voters for each of those three for
16 just cause, for the impact on the civil service state
17 and local and for --
18 MR. GRUESKIN: The at-will?
19 MR. CARTIN: -- the at-will?
20 MR. GRUESKIN: All right. I'll --
21 MR. CARTIN: Why shouldn't those be
22 treated as separate subjects?
23 MR. GRUESKIN: First of all, you know,
24 the -- the underlying basis of my answer is that I
25 don't concede --

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1 MR. CARTIN: All right.
2 MR. GRUESKIN: -- okay?
3 MR. CARTIN: Okay.
4 MR. GRUESKIN: The -- the purported
5 effects. It seems to me that the at-will and
6 just-cause effects, if you will, or provisions go
7 hand in hand. I mean, you couldn't have at-will and
8 just cause. I think that that's clear. If you -- if
9 you were making a blanket rule, you couldn't have
10 both of those. So necessarily one is part of the
11 other subject. I don't -- I just have a very, very
12 difficult time thinking that the proponents would be
13 required to have one initiative that terminates the
14 at-will process and a second initiative that
15 establishes just cause. Because if the first
16 initiative would pass and the second wouldn't, what's
17 the standard in Colorado? So that one I don't think
18 really concerns me.
19 The civil service issues, it seems to me
20 that, you know, if what you're trying to do is create
21 a common platform from which all employees may -- you
22 know, under which they work and -- and -- and -- so
23 that they have common conditions and -- and potential
24 circumstances of termination or suspension, then you
25 wouldn't need to have a separate measure as to either

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1 state employees or local employees.
2 If that -- if that level of expansiveness
3 is what proponents desire, then it seems to me you
4 can do that. Now, I don't think, as I said last
5 time, that that's what this does. But I don't see
6 any -- anything in the case law that says that you
7 have to treat similarly situated individuals under
8 separate ballot measures. And that's basically what
9 you're saying. If you perform a governmental
10 function, you are inherently different.
11 If you're a -- if you're a nurse working
12 in a public hospital, you are inherently different
13 and therefore subject to different employment
14 standards than a nurse working in a private hospital.
15 I'm not saying that that makes good policy. All I'm
16 saying is that there's no reason why that can't be
17 part of the same measure.
18 And I'll -- and I'll add just in a
19 15-second blurb that as I said in -- as to Number 57.
20 This process is helpful in terms of fleshing out some
21 of these issues. And I would doubt that this is the
22 last measure that you see that deals with this
23 subject so that there is a greater clarity on issues
24 like that one. But the fact that those other
25 measures might be out there doesn't mean that this

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1 one isn't.
2 MR. HOBBS: Thank you.
3 MR. GRUESKIN: Sure.
4 MR. HOBBS: Thanks. Mr. Friednash, any
5 final remarks?
6 MR. FRIEDNASH: Yeah, please. Thank you.
7 And just for the record, I'd indicate that I think
8 both times I have spoken less than Mr. Grueskin, and
9 I will try to again.
10 Let me start here. Clearly the intent of
11 this, among other things, but the primary intent is
12 to eliminate at-will employment, and Mr. Grueskin
13 acknowledged that specifically to this board when we
14 were here last week.
15 The -- it doesn't say it eliminates
16 at-will employment, but that's the effect of it. It
17 does eliminate at-will employment. It doesn't have
18 to say something to actually have certain effects.
19 And I would point out that, yeah, there are other
20 measures that I think you will see. And one of those
21 other measures tries to clean up some of these
22 ambiguities. And -- and one of them is that
23 clarifies the right to appeal. It discusses the
24 fact, kind of talks about mediation and -- and
25 discusses the fact that there are these certain

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1 appellate rights.
2 It goes through a number of other
3 different pieces that are problematic under this,
4 and -- and those are other initiatives that will go
5 through this process. And it also exempts out state
6 employees and local governmental employees.
7 Recognizing that, again, that is the specific
8 implication. It doesn't have to say something to
9 have that effect. And that's the point of hidden
10 purposes and hidden effects. You can't just turn a
11 blind eye and -- and not understand that these are
12 the things that happen as a result of this language.
13 It doesn't have to say it in here to have that
14 impact, but that's what it does.
15 The reality is this does, in fact, create
16 certain obstacles to the court system. You can't go
17 in and argue a separate case in the court system
18 because the first thing that either the employer or
19 employee is going to do, the prevailing party, is
20 they're going to challenge that on issue preclusion
21 or claim preclusion and they're going to win, because
22 you've already had your day in court. And your day
23 in court is this, quote, unquote, mediation process.
24 So that is what this will do. That is the effect.
25 All of these things that I believe it

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1 misleads voters and I -- rather than just articulate,
2 they're on Page 7 of the motion, and they go into,
3 you know, great detail about the different things
4 that I think it fails to express and -- and do. But
5 this clearly eliminates the civil service system.
6 It's just the effect of it. That's what this does.
7 The civil service system gives you the opportunity to
8 go from administrative law judge and appeal that
9 decision to the personnel board and take that to the
10 court system. This doesn't exempt that out. It
11 should have, but it doesn't. So what does that mean?
12 It means that's the effect. You don't have to have
13 this litigated to understand that's what this does.
14 These aren't just hypotheticals; they are the
15 implicit realities of it.
16 There's no process in here that gives you
17 the ability to challenge that mediation decision.
18 But you know what, in the new measure that you may
19 see down the road that's been filed, it does specify
20 an appellate process, clearly specifies the time
21 period, the fact that you get to go into the court of
22 appeals and lays that out. Why? Because this is a
23 constitutional amendment that doesn't clarify it.
24 And you know what, legislature doesn't get to fix
25 this, but you can by granting the motion for

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1 rehearing and allowing the proponents of this to get
2 this right.
3 MR. HOBBS: Thank you. I'll turn to board
4 discussion. Any discussion by the board?
5 I think I'll start in this case. I -- I
6 do see this as a single subject. I think it's about
7 just cause, requiring just cause in all employment.
8 And although it may be -- I don't know -- I suggested
9 to Mr. Grueskin that maybe the purpose is to
10 eliminate the at-will doctrine. I don't know. It's
11 just as easily stated, I think, that the purpose is
12 to require just cause. They're kind of two sides of
13 the same point.
14 And it just seems to me that what the
15 measure does is require just cause for employment
16 terminations or -- or actions. And everything else
17 is -- seems to be kind of an effect from that. It
18 does have an impact on the state personnel system,
19 and that's -- that's an employment situation. And it
20 seems to me that the proponents can -- whatever
21 standards that they want to apply to actions against
22 employees, they can apply that to the state personnel
23 system as -- as well.
24 So I -- that's just kind of the way that
25 I'm looking at it, is that it's about just cause and

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1 the other things that are identified in the motion
2 for rehearing are not really separate subjects, but
3 effects of the measure, which the Supreme Court has,
4 I think, given us some guidance as to believe that
5 there -- those are not necessarily separate subjects,
6 so that's kind of my point of view at this point.
7 Any other discussion?
8 MR. DOMENICO: I agree with your
9 conclusion, but I -- I -- there are two parts of this
10 that would trouble me, and I'm -- certainly sounds
11 like there's something that may be a better option
12 out there in the future, but the arguments really to
13 me go more to the merits than to the single-subject
14 issue. I mean, if this really did change the entire
15 civil service system, I would have trouble with it,
16 although I probably would agree with Mr. Grueskin
17 that you could do that in a measure, but I would
18 be -- I would think that might be -- this measure
19 doesn't do it clearly enough. I would think that
20 would be a hidden impact that would really trouble
21 me, and I would think that would be kind of a
22 surreptitious thing.
23 And so the way I interpret it is more
24 consistent with Mr. Grueskin that -- in order partly,
25 at least, to avoid that very problem a court is

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1 unlikely to try to apply this to the civil service
2 section would instead read the two provisions of the
3 constitution so they aren't read to conflict with
4 each other and apply this only to those parts --
5 those employers to which the civil service amendment
6 doesn't apply.
7 Similarly if this, as I said, really did
8 remove these cases completely from the court system,
9 create only one way to resolve employment disputes, I
10 would be troubled by that. But Mr. Grueskin assured
11 me that that's not a proper interpretation. I think
12 it's ambiguous at best on that, and -- and so
13 similarly I think the proper interpretation is that
14 it wouldn't create that problem. And so since I
15 interpret it as not causing those problems, it does
16 seem to meet the single-subject requirement.
17 MR. HOBBS: Any comment, Mr. Cartin?
18 MR. CARTIN: I think that -- and I think I
19 articulated this at the last -- in our last meeting
20 on this. I think the measure, without a doubt, if
21 we're -- it may be conjecture, but I -- I do think
22 that it does by the -- by the plain language of the
23 measure will have a number of effects. And whether
24 those effects amount to purposes that are
25 interrelated, whether if they're interrelated they're

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1 hidden. Again, it's not that I'm unwilling to do the
2 work; it's just that I think that as a title board
3 member that -- there's a tension there between kind
4 of going through that exercise and the line of cases
5 that say that we -- that the title board should
6 afford generally the proponent the benefit of the
7 doubt in moving forward with an initiative.
8 Would a state employee voting on this
9 measure who is supportive of discharge for cause be
10 surprised to learn that their administrative process
11 and -- and due process under the relevant personnel
12 board rules has -- has been impacted and perhaps
13 removed and replaced by this? Would they be
14 surprised? They might.
15 Again, I guess that's one of the reasons
16 why I'm -- I'm kind of reluctant to go down the road
17 of kind of speculating on -- on who would be
18 surprised and what amounts to a hidden purpose in the
19 coils of a measure. I do -- again, I think there are
20 a number of effects here. I do think that they
21 relate to a single subject. I think the single
22 subject is articulated in the title that was set by
23 the board at the last meeting.
24 I'm respectful of Mr. Friednash's
25 arguments with regard to multiple -- the

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1 single-subject argument and also with his arguments
2 relevant to the text of the title set by the board.
3 I think the title accurately reflects the measure. I
4 also think that the changes that were made by the
5 proponents be -- after the review and comment meeting
6 and before submittal to the title board were in
7 response to the questions and comments of the
8 legislative staff. And so for those -- for those
9 reasons, although, again, I think that with a measure
10 like this, it has -- it has a number of impacts.
11 and -- but I'm reluctant say that those -- whatever
12 effects -- whatever purposes are somehow unrelated or
13 that there are some hidden purposes, at this point, I
14 don't see that with this measure and so I would stay
15 with my vote the last time and find that this has a
16 single subject.
17 MR. HOBBS: Thank you very much. I'll go
18 ahead and make a motion then. I'll move that the
19 board deny the motion for rehearing.
20 MR. CARTIN: Second.
21 MR. HOBBS: That has been moved with a
22 second. Any further discussion?
23 MR. DOMENICO: Can I just say that I'm
24 starting to be a little bit troubled by the fact that
25 the three of us seem to have some serious

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1 disagreements about what this actually would do,
2 which suggests to me we may not understand it as well
3 as we might. But I'm still not quite far enough
4 along to vote no, although I'm getting nervous.
5 MR. HOBBS: Thank you. All that's in
6 favor say aye.
7 MR. CARTIN: Aye.
8 MR. DOMENICO: Aye.
9 MR. HOBBS: All that are opposed say no.
10 That motion carries three to zero. And that
11 concludes action on Number 62. The time is
12 12:37 p.m. Thank you very much.
13 MR. FRIEDNASH: Thank you.
14 (The hearing concluded at 12:37 p.m.,
15 March 5, 2008.)
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19 (Pages 70 to 72)

RECEIVED

FEB 08 2008

Be it enacted by the People of the State of Colorado:

ELECTIONS DIVISION
1000

Final Text #57
2007-2008

SECTION 1. Section 18-1-606, Colorado Revised Statutes, is amended to read:

18-1-606. Criminal liability of business entities.

(1) A business entity, AGENT, OR HIGH MANAGERIAL AGENT ARE guilty of an offense if:

(a) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law; or

(b) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the governing body or individual authorized to manage the affairs of the business entity or by a high managerial agent acting within the scope of his or her employment or in behalf of the business entity.

(2) As used in this section:

(a) "Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees.

(b) "Business entity" means a corporation or other entity that is subject to the provisions of title 7, C.R.S.; foreign corporations qualified to do business in this state pursuant to article 115 of title 7, C.R.S., specifically including federally chartered or authorized financial institutions; a corporation or other entity that is subject to the provisions of title 11, C.R.S.; or a sole proprietorship or other association or group of individuals doing business in the state.

(3) Every offense committed by a corporation prior to July 1, 1985, which would be a felony if committed by an individual shall subject the corporation to the payment of a fine of not less than one thousand dollars nor more than fifteen thousand dollars. For such offenses committed on or after July 1, 1985, the corporation shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). Every offense committed by a corporation which would be a misdemeanor or petty offense if committed by an individual shall subject the corporation to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the corporation is convicted. For an offense committed on or after July 1, 2003, a business entity shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401 (1) (a) (III). An offense committed by a business entity that would be a misdemeanor or petty offense if committed by an individual shall subject the business entity to the payment of a fine within the minimum and maximum fines authorized by sections 18-1.3-501 and 18-1.3-503 for the particular offense of which the business entity is convicted.

ATTACHMENT

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PERCAB-Seymour, N. J.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY INDIVIDUAL CHARGED AS AN AGENT OR HIGH MANAGERIAL AGENT UNDER SUBSECTION (1) OF THIS SECTION THAT, PRIOR TO BEING CHARGED, HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OF THIS SECTION.

(5) (a) ANY INDIVIDUAL RESIDING IN COLORADO MAY SEEK CIVIL DAMAGES AGAINST ANY BUSINESS ENTITY, AGENT, OR HIGH MANAGERIAL AGENT FOR THEIR CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OF THIS SECTION.

(b) ANY SUCH AWARD OF DAMAGES SHALL BE PAID TO THE GENERAL FUND OF THE STATE OF COLORADO TO BE APPROPRIATED BY THE GENERAL ASSEMBLY.

(c) THE AFFIRMATIVE DEFENSE SET FORTH IN SUBSECTION (4) OF THIS SECTION SHALL APPLY TO CIVIL ACTIONS INITIATED UNDER THIS SUBSECTION (5).

(d) SUCH MONEYS, WHEN APPROPRIATED, SHALL BE EXEMPT FROM THE PROVISIONS OF SECTION 24-75-201.1, COLORADO REVISED STATUTES.

(e) IF AN AWARD IS MADE UNDER THIS SUBSECTION (5), THE CITIZEN FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS FOR DEFENDING THE INTERESTS OF THE STATE. NO SUCH AWARD SHALL BE MADE FOR CLAIMS THAT LACKED SUBSTANTIAL JUSTIFICATION OR WERE INTERPOSED FOR DELAY OR HARASSMENT.

Joanne King
8306 Katherine Way
Denver, CO 80221
303-429-2191

Larry Ellingson
8517 Bluegrass Circle
Parker, CO 80134
720-530-5592

Ballot Title Setting Board

Proposed Initiative 2007-2008 #57¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity's directors, officers, and employees and agents who formulate a business's policies or supervise employees, if the business fails to perform duties that are required by law or if management engages in, authorizes, solicits, requests, commands, or knowingly tolerates the business's criminal conduct; allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the state of Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action; and allowing persons who disclose to the attorney general all facts known to them concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges.

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 liability for criminal conduct of businesses, and, in connection therewith, extending criminal liability to a business entity's directors, officers, and employees and agents who formulate a business's policies or supervise employees, if the business fails to perform duties that are required by law or if management engages in, authorizes, solicits, requests, commands, or knowingly tolerates the business's criminal conduct; allowing any Colorado resident to bring an action for civil damages against a business or its agent for such criminal conduct; requiring that awards in civil actions be paid to the general fund of the state of Colorado; permitting an award of attorney fees and costs to a citizen who brings a successful civil action; and allowing persons who disclose to the attorney general all facts known to them concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges?

Hearing February 20, 2008:

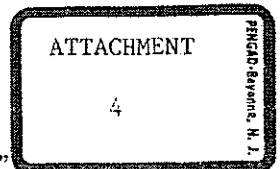
Single subject approved; staff draft amended; titles set.

Hearing adjourned 10:19 a.m.

Hearing March 5, 2008:

Motion for Rehearing denied.

Hearing adjourned 12:07 p.m.



¹ Unofficially captioned "Criminal and Civil Liability of Businesses and Individuals for Business Activities" legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

