

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, #73

Petitioner:
JOSEPH B. BLAKE,
Objector,

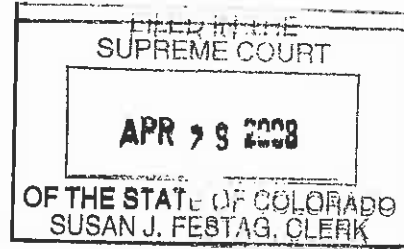
v.

Respondents:
JOANNE KING AND LARRY ELLINGSON,
Proponents,

and

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

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Case No. 08SA118

PETITIONER'S OPENING BRIEF

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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 #73 ("Criminal Conduct by Businesses – Liability") (hereinafter "Initiative").

STATEMENT 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 and § 1-40-106.5.
2. Whether the Initiative's Title, ballot Title, and submission clause are misleading, confusing, insufficient, unclear, and fail to reflect the Initiative's true meaning and intent.

STATEMENT OF THE CASE AND FACTS

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

On March 19, 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 (the "Motion") pursuant to Colo. Rev. Stat. §1-40-108(1) on March 26, 2008. On April 2, 2008, the Title Board granted in part to the extent Board amended Titles, and denied the Motion in all other respects.

Thereafter, Petitioner initiated this original proceeding for review of the Title Board's action, pursuant to Colo. Rev. Stat. § 1-40-107(2).

B. Statement of the Facts

1. Expansion of Criminal Liability to New Defendants.

The Initiative extends liability for criminal conduct by businesses to executive officials. Initiative, § 18-1-606(1.5). Executive officials are defined to mean any natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business entity. Initiative, § 18-1-606(2)(c).

2. Expansion of Criminal Liability to New Conduct.

The Initiative expands liability and provides that an executive official is guilty of an offense if the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law and the executive official knew of the specific duty to be performed and knew that the business entity failed to perform that duty. Initiative, § 18-1-606(1.5).

The Initiative provides that the executive official shall be subject to the payment of a fine within the presumptive ranges authorized by section 18-1.3-401(1)(a)(III). Initiative, § 18-1-606(3). An offense committed by an executive official that would be a misdemeanor or petty offense shall subject the executive official 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 executive official is convicted. *Id.*

3. Any Individual Resident May Bring a Civil Case.

Any individual residing in Colorado may file a private right of action against any business entity or its executive officials for conduct that meets the criteria set forth in the proposed Initiative. Initiative, § 18-1-606(5)(a). If an award is made, the individual filing the lawsuit shall be entitled to reasonable attorney fees and costs for defending the interests of the state. Initiative, § 18-1-606(5)(e).

4. Damages to Government, not Plaintiff, exempt from TABOR.

In a civil action under the Initiative, compensatory or punitive damages may be awarded to any governmental entity that imposed by law the specific duty to be performed by the business entity. Initiative, § 18-1-606(5)(b). Damages awarded from the proceedings are exempt from all revenue and spending limitations provided by law. Initiative, § 18-1-606(5)(d).

5. Complete Affirmative Defense.

An executive official can avoid being held criminally or civilly liable so long as he or she reports to the office of the attorney general, prior to being charged, all facts which he or she is aware of concerning the business entity's conduct that meets the criminal conduct provided by the Initiative. Initiative, § 18-1-606(4).

SUMMARY OF 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 by business entities, and in connection therewith, extending the criminal liability of a business entity to its executive officials” This is not the sole subject of the Initiative, however.

The Initiative actually covers five distinct subjects. First, it expands criminal liability for certain criminal actions of business entities to all of a business entity’s executive officials for “an omission to discharge certain duties of affirmative performance” or certain actions that are “authorized, solicited, requested, commanded, or knowing tolerated” by the company or certain individuals. *See* Final Text of Initiative, Proposed C.R.S. § 18-1-606(1)(a) & (b).

Second, the Initiative adds new crimes in criminalizing the “failure to perform duties required by law,” including the “omission to discharge a specific duty of affirmative performance imposed on the business entity by law” with the executive official’s knowledge. *See id.* at (1.5).

Third, it provides “any individual residing in Colorado may file a private right of action against any business entity or its executive officials” for conduct violating the

Initiative's provisions, even where the resident has suffered no harm from the action or the inaction. Initiative § 18-1-606(5)(a). A successful plaintiff may be awarded attorneys' fees and costs. Awards that are paid to the State are exempt from TABOR.

Fourth, the awards of damages are to be paid "to any governmental entity that imposed by law the specific duty to be performed, free from all spending limitations provided by law. Initiative § 18-1-606(5)(b), (d) and (e).

Fifth, it provides that self-reporting is a "complete affirmative defense" to either civil or criminal liability. Initiative § 18-1-606(4).

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 executive officials. 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 a complete affirmative defense; and that these damages are exempted from all revenue and spending limits.

ARGUMENT

I. THE INITIATIVE VIOLATES THE SINGLE SUBJECT RULE

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).

An initiative with multiple subjects may not be offered as a single subject by stating the subject in broad terms. *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)*, *supra*, 4 P.3d at 1097 (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”).

“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, supra*, 172 P.3d at 875. 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.*

This Court may engage in an inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *See id.* (“While we do not determine an initiative’s efficacy, construction, or future application, we must examine the proposal sufficiently to enable review of the Title Board’s action.”); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002) (“[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.”).

B. The Initiative Embraces Five Distinct Complex Subjects that Cannot be Properly Grouped Together under Colorado Law

Were extending criminal liability of businesses to their executive officials the sole purpose of the Initiative, the voters would not be at risk of surprise based on multiple subjects. This is not the sole subject of the Initiative, however. Numerous subjects have been added to that subject, which will not tend to carry out the general objective of the Initiative. *See Waters Rights II*, 898 P.2d 1076, 1079 (Colo. 1995). These subjects have more than two distinct and separate purposes which are not dependent upon or connected with each other. *Id.*

This Initiative is similar to the one that this Court rejected in *Waters Rights II*. There, an initiative sought to add a “strong public trust doctrine regarding Colorado waters, that water conservancy and water districts hold elections to change their boundaries or discontinue their existence, that the districts also hold elections for directors and that there be dedication of water right use to the public.” *See id.* at 1077.

The Court held that the initiative violated the single subject provision because there was no connection between the two district election requirements paragraphs and the two public trust water rights paragraphs. The common characteristic that the paragraphs all involved water was too general and too broad to constitute a single subject. The Court observed:

The public trust water rights paragraphs of the Initiative impose obligations on the state of Colorado to recognize and protect public ownership of water. The water conservancy or conservation districts have little or no power over the administration of the public water rights or the development of a statewide public trust doctrine because such rights must be administered and defended by the state and not by the local district.

Id. at 1080.

The Initiative has similar flaws to the initiative considered in *Waters Rights II*. It not only extends criminal liability to executive officials, it expands the type of conduct that constitutes criminal liability, allows the bringing of civil actions based on the criminal acts to be brought by any resident, provides damages may be awarded but

are paid to the state or governmental entity, and provides a complete affirmative defense of self-reporting. This is certainly a broader “subject” than that rejected by this Court in *Water Rights II*.

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

1. *The Initiative creates a new class of criminals.*

The first thing the initiative does is make a new class of defendants known as “executive officials.” The measure defines this group of individuals as officers, directors, managing partners, managing members or sole proprietors of a business entity. This new class is generally responsible for all crimes committed by the company itself.

2. *The Initiative criminalizes thousands of new crimes.*

An executive official is guilty of an offense if the conduct constituting the

offense consists of an omission to discharge a specific duty of an affirmative performance imposed on the business entity by law. The language of the Initiative extends these obligations to duties imposed by any governmental entity. Voters will be surprised to learn that the Initiative dramatically expands the types of conduct that falls within the purview of criminal conduct.

The term “governmental entity” is not defined by the Initiative. Given its ordinary meaning, this would necessarily include any agency or department of federal, state, or local government, including, but not limited to any board, commission, bureau, committee, council, authority, institution of higher education, political subdivision, or other unit of the executive, legislative, or judicial branches of the state; and any city, county, city and county, town or other unit of the executive. Each of these governmental entities pass laws, ordinances, regulations and other standards. Under the Initiative, an executive official is both criminally and civilly liable if they fail to “discharge a specific duty of affirmative performance imposed on the business entity by law” by any such governmental entity.

This would include, by way of example only, violations of the following regulations: Worker’s Comp. (7 Colo. Code Regs. § 1101); State Board of Health Colorado Retail Food Establishment Rules and Regulation (6 Colo. Code. Regs. § 1010-2); and, Occupational Safety and Health Standards.

3. *The Initiative creates a new form of civil liability that allows anyone living in Colorado to bring an action on behalf of any governmental entity for punitive and compensatory damages.*

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

This type of action is substantially different than the False Claims Act, 31 U.S.C. §§3729-3733 (the “Act”). In general, the Act provides for liability of treble damages and a penalty ranging from \$5,500 to \$11,000 per claim for anyone who submits or causes the submission of a false or fraudulent claim to the United States. The person who brings the action (the “relator”) receives a share of the total recovery

of a favorable verdict or settlement. Here, the person bringing the civil action can only recover his or her attorney fees, with damages going to the “victimized” government entity.

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

A *qui tam* complaint is not served upon the defendant. Rather, the complaint, and all other filings in the case remain under seal for a period of at least sixty days or longer if requested the United States Attorney. Next, counsel for the government must diligently investigate the allegations of the False Claim Act. At the conclusion of the investigation the Department of Justice must choose one of the following options: (1) intervene in one or more counts of the pending *qui tam* action; (2) decline to intervene in one or all counts of the pending *qui tam* action; and, (3) move to dismiss the relator’s complaint. In practice, two other options exist: (4) settle the pending action;

or, (5) advise the relator that it intends to decline intervention.

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

The successful plaintiff, under the Initiative, can be awarded attorneys' fees. The successful defendant cannot (absent some other basis, such as Rule 11). Thus, the measure creates an uneven playing field. Oddly, this is the only money the successful Plaintiff gets to retain. Voters will also be surprised to learn that the measure creates an uneven playing field where proponents receive attorney fees for prevailing in a lawsuit; however, successful executive officials and businesses do not.

4. *Civil Damages are Paid to the governmental entity, which are then exempt from TABOR.*

Under the Initiative, all damages awarded (other than attorneys' fees) are paid not to the successful plaintiff, but to the governmental entity that was the "victim" of the conduct. Damages from these civil actions are exempt from all revenue and

spending limitations provided by law. A budgetary provision and its exemption from TABOR, has no “necessary connection” with extension of criminal liability of business entities to individuals. Thus, it is a separate topic from the rest of the Initiative, and one voters should be allowed to decide separately. Voters will be surprised to learn that monies received as damages from the civil action could go to a variety of governmental entities such as the federal government or some local governmental entity.

5. *The Get Out of Jail Free Card*

The Initiative also creates a new concept of defense. It provides a “complete affirmative defense” to any person who, prior to being charged in a criminal action or civil action, notifies the attorney general of all facts it is aware of. *See, e.g., In re Regan*, 151 P.3d 1281, n.3 (Colo. 2007) (full payment by homeowner a complete affirmative defense to a lien). In other words, all criminal conduct under this section becomes immune from liability as long as after one commits a crime one timely notifies the attorney general prior to being charged. This “get out of jail free card” is a separate and distinct subject because it not only acts to immunize the perpetrator from the new crimes created by the Initiative, but from all previous crimes chargeable under this section.

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)*, *supra*, 4 P.3d at 1098. "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).

Eliminating a key feature of the initiative from the title alone 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.

A. The Title is Misleading, Confusing and Unfair in Omitting Key Provisions and Failing to Provide Definitions

The Title is misleading, confusing, and unfair in numerous ways; therefore, it

should be stricken. The Title leaves out a number of key features that are likely to lead to misinterpretations by the voters. *See id.* In addition, it fails “to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice.” *In re Ballot Title 1999-2000 #258(A), supra*, 4 P.3d at 1098.

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.

The Initiative is quite like the one at issue in #258(A). It fails to articulate that the Initiative actually concerns both criminal and civil liability. In addition, it omits what specific type of affirmative duties will subject an executive official to liability. While one can presume that a violation of a criminal statute would create criminal liability, the Initiative fails to state which “specific duty of affirmative performance

imposed by law,” and potentially many civil wrongs, fall within the measure.

The Title does 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. See Proposed C.R.S. § 18-1-606(4) (emphasis added); *see also*, Title II. 9–11. In addition, the Title does not reveal that the measure provides complete immunity to any crime or civil charges as long as one reports the criminal conduct prior to being charged. See, e.g., *In re Regan*, 151 P.3d 1281, n.3 (Colo. 2007) (full payment by homeowner a complete affirmative defense to a lien). In other words, all criminal conduct becomes immune from liability as long as after one commits a crime, he absolves himself by notifying the attorney general.

The Title lacks accuracy in using language that is inconsistent with that of the Initiative. The Title states that it allows “a Colorado resident to bring an action for civil damages against a business or its executive official for such criminal conduct.” Title at II. 5–7 (emphasis added). 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.

The Initiative, however, provides that “any individual residing in Colorado may file a private right of action.” Initiative, § 18-1-606. at ¶ (5)(a) (emphasis added). By definition, an “individual” is a natural person. BLACK’S LAW DICTIONARY 777 (7th ed.

1999) (“Of or relating to a single person or thing, as opposed to a group.”) This inconsistency of identity of potential plaintiffs is likely to create confusion because the voter will not know who may bring these actions based on the plain language of the Title and the Initiative.

The Initiative makes clear that the money collected by the state and governmental entities as damages are “exempt from all revenue and spending limits provided by law.” The Title is silent regarding this subject, though; hiding a potentially controversial feature of the Initiative from the public. The Initiative and the Title are silent as to whom damages will be awarded where the duty that has been breached is not duty imposed by a governmental entity.

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

The Title uses the impermissible catch phrase of “criminal conduct” that is likely to mislead the voters, because it has an accepted meaning that does not reflect the content of the Initiative. Executive officials in Colorado business entities—whether one person companies or large, publicly traded companies—risk criminal liability for failures to make administrative reports or for negligent acts of the company. The words “criminal conduct” are used three times in the Title and provoke thoughts of what most voters would consider “real crimes” rather than unidentified “duties that are

required by law” that should continue to be considered civil wrongs.

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

“A ‘catch phrase’ consists of ‘words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment.’” *In re Proposed Initiative Designated “Governmental Business”*, 875 P.2d 871, 876 (Colo. 1994) (“*Governmental Business*”). “Evaluating whether particular words constitute a slogan or catch phrase must be made in the context of contemporary public debate.” *Id.* (citing *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993)).

Governmental Business disallowed the inclusion of the catch phrases “consumer protection” and “open government,” in spite of that fact that those phrases were included in the Initiative itself. The Court concluded that they could form the basis of slogans for use in a campaign favoring the Initiative, which imposed tort liability on

governmental business activities intended for consumer protection, tax liability on governmental business activities, and restriction of governmental lobbying. *See id.* at 875.

In considering the phrases, the Court decided that:

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

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

Here, the Initiative does not even include the words “criminal conduct.” It uses the words “conduct constituting the offense” instead. *See e.g.*, Proposed C.R.S. § 18-1-606 (1)(a), (1)(b), and (1.5). On the other hand, the Title contains the words “criminal conduct” three times. The words “criminal conduct” are likely to work to the

proposal's favor without contributing to voter understanding. *See* Title at ll. 1, 6, 10.

Criminal conduct is prominent in the minds of many Colorado voters in the wake of business scandals created by actual crimes committed by corporate officers at Enron, for example. Many employees and shareholders of Qwest are frustrated by the reversal and remand of Joe Nacchio's 2007 conviction by the Tenth Circuit Court of Appeals. *See U.S. v. Nacchio*, 519 F.3d 1140, 2008 WL 697382 (10th Cir. 2008).

Even in today's heightened awareness of business crimes, contemporary public debate considers "criminal conduct" of businesses to be acts like insider trading, embezzlement, fraud, and theft. "Criminal conduct" is unlikely to bring to mind civil wrongs, which the Initiative encompasses with "a specific duty of affirmative performance imposed on the business entity by law." That could be something as minor as filing in duplicate a report that was supposed to be filed in triplicate.

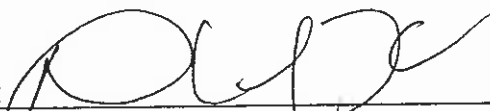
The issue of criminalizing any breach of undefined "duties that are required by law" is complicated and worthy of serious discussion, rather than having voters pre-judge the issue based on a catch phrase.

CONCLUSION

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 #73 to its proponents.

Respectfully submitted this 29th day of April, 2008.

FAIRFIELD AND WOODS, P.C.

By: 

Douglas J. Friednash, #18128

John M. Tanner, # 16233

Susan F. Fisher, #33174

Petitioner's Address:

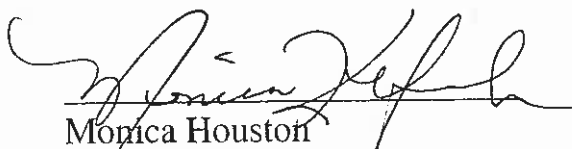
1445 Market Street
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of April, 2008, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was hand delivered to the following:

Mark G. Grueskin, Esq.
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, CO 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203


Monica Houston

RECEIVED

MAR 07 2008

M. 2:28 PM
J. 2:28 PM
W

Proposed Initiative
2007-2008 #73
FINAL

Be it enacted by the People of the State of Colorado:
EXECUTIVE
SECRETARY OF STATE

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

18-1-606. Liability for criminal conduct by businesses.

(1) A business entity is 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.

(1.5) AN EXECUTIVE OFFICIAL IS GUILTY OF AN OFFENSE IF THE CONDUCT CONSTITUTING THE OFFENSE CONSISTS OF AN OMISSION TO DISCHARGE A SPECIFIC DUTY OF AFFIRMATIVE PERFORMANCE IMPOSED ON THE BUSINESS ENTITY BY LAW AND THE EXECUTIVE OFFICIAL KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AND KNEW THAT THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

(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.

(c) "EXECUTIVE OFFICIAL" MEANS ANY NATURAL PERSON WHO IS AN OFFICER, DIRECTOR, MANAGING PARTNER, MANAGING MEMBER, OR SOLE PROPRIETOR OF A BUSINESS ENTITY.

(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. FOR AN OFFENSE COMMITTED ON OR AFTER FEBRUARY 1, 2009, AN EXECUTIVE OFFICIAL 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 AN EXECUTIVE OFFICIAL THAT WOULD BE A MISDEMEANOR OR PETTY OFFENSE SHALL SUBJECT THE EXECUTIVE OFFICIAL 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 EXECUTIVE OFFICIAL IS CONVICTED.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL CHARGED UNDER SUBSECTION (1.5) 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 MET THE CRITERIA SET FORTH IN SUBSECTION (1)(a) OF THIS SECTION.

(5) (a) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY OR ITS EXECUTIVE OFFICIALS FOR THEIR CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OR SUBSECTION (1.5) OF THIS SECTION.

(b) IN A CIVIL ACTION BROUGHT UNDER THIS SECTION, COMPENSATORY OR PUNITIVE DAMAGES MAY BE AWARDED TO ANY GOVERNMENTAL ENTITY THAT IMPOSED BY LAW THE SPECIFIC DUTY TO BE PERFORMED BY THE BUSINESS ENTITY.

(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 ALL REVENUE AND SPENDING LIMITATIONS PROVIDED BY LAW.

(e) IF AN AWARD IS MADE UNDER THIS SUBSECTION (5), THE INDIVIDUAL 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.

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MAR 07 2008

ELECTIONS
SECRETARY OF STATE

25368 W
CA

Mark G. Grueskin
mgrueskin@ir-law.com

Direct Dial
303.256.3941

March 7, 2008

via **HAND DELIVERY**

Ms. Cesi Gomez
Colorado Secretary of State
Elections Division
1700 Broadway, Suite 270
Denver, Colorado 80290

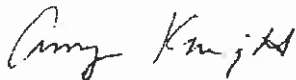
Re: Initiative 2007-08 #73

Dear Ms. Gomez:

Attached please find the required draft of Initiative 2007-08 #73, which our office is filing on behalf of the Proponents for this measure.

Thank you very much.

Sincerely,



Amy Knight
Legal Assistant to Mark G. Grueskin

aak
enclosure
1768878_1.doc

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

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

Ballot Title Setting Board

Proposed Initiative 2007-2008 #73¹

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

An amendment to the Colorado Revised Statutes concerning liability for criminal conduct by business entities, and, in connection therewith, extending the criminal liability of a business entity to its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning an executive official's liability upon his or her knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing a Colorado resident to bring a civil action against a business entity or executive official for such criminal conduct; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty on the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official 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 by business entities, and, in connection therewith, extending the criminal liability of a business entity to its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning an executive official's liability upon his or her knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing a Colorado resident to bring a civil action against a business entity or executive official for such criminal conduct; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty on the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official concerning a business's criminal conduct to use that disclosure as an affirmative defense to criminal or civil charges?

Hearing March 19, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 2:13 p.m.

¹ Unofficially captioned "Criminal Conduct by Businesses - Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing April 2, 2008:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 2:28 p.m.

INITIATIVE TITLE SETTING REVIEW BOARD
Wednesday, March 19, 2008
Secretary of State's Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado

2007-2008 #73
Criminal Conduct by Businesses - Liability

William A. Hobbs, Deputy Secretary of State
Daniel D. Domenico, Solicitor General
Daniel L. Cartin, Deputy Director of the
Office of Legislative Legal Services
Maurice G. Knaizer, Deputy Attorney General
Cesi Gomez, Secretary of State's Office

A P P E A R A N C E S

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MAR 23 2008

FAIRFIELD & WOODS, P.C.

<p style="text-align: right;">Page 2</p> <p>1 PROCEEDINGS</p> <p>2 MR. HOBBS: Good afternoon. Let's go ahead</p> <p>3 and get started.</p> <p>4 We're actually resuming our meeting from this</p> <p>5 morning, but for the record this is a meeting of the</p> <p>6 Title Setting Board pursuant to Article 40 of Title 1,</p> <p>7 Colorado Revised Statutes. Today is March 19, 2008,</p> <p>8 the time is 1:34 p.m., and we're meeting in the</p> <p>9 Secretary of State's Blue Spruce Conference Room, 1700</p> <p>10 Broadway, Denver, Colorado.</p> <p>11 The Title Board this afternoon consists of</p> <p>12 the following: My name is Bill Hobbs, Deputy Secretary</p> <p>13 of State, here on behalf of Secretary of State Mike</p> <p>14 Coffman; to my right is Dan Damaico, Solicitor</p> <p>15 General, who is here on behalf of Attorney General John</p> <p>16 Suthers; and to my left is Dan Curtin, Deputy Director</p> <p>17 of the Office of Legislative Legal Services, who is the</p> <p>18 designee of the Director of the Office of Legislative</p> <p>19 Legal Services Charlie Pike; to my far left is Maury</p> <p>20 Knaizer, Deputy Attorney General, who represents the</p> <p>21 Title Board; and to my far right is Cesar Gomez from the</p> <p>22 Secretary of State's office.</p> <p>23 For the measures -- we have four measures</p> <p>24 this afternoon. There are sign-up sheets for anybody</p> <p>25 who wishes to testify. If anybody does wish to</p>	<p style="text-align: right;">Page 4</p> <p>1 Board has questions.</p> <p>2 MR. HOBBS: Okay. Are there any questions</p> <p>3 for Mr. Grueskin? I don't think I have any so -- it</p> <p>4 doesn't sound like there's questions.</p> <p>5 So let's go ahead and consider whether the</p> <p>6 measure complies with the single-subject requirement.</p> <p>7 And perhaps -- although, Mr. Grueskin, I'm</p> <p>8 assuming you don't have any comments about that issue?</p> <p>9 MR. GRUESKIN: No.</p> <p>10 MR. HOBBS: Then maybe I'll ask Mr. Friednash</p> <p>11 if he does.</p> <p>12 MR. FRIEDNASH: Good afternoon. Doug</p> <p>13 Friednash appearing on behalf of the Law Firm Fairfield</p> <p>14 and Woods, an objector through the Chamber of Commerce,</p> <p>15 Denver Chamber.</p> <p>16 The problem we have here is the same problem</p> <p>17 we revisited last -- a few weeks ago with respect to</p> <p>18 the liability issue. And, again, we have a</p> <p>19 single-subject issue with regard to having the criminal</p> <p>20 liability aspect, the civil liability aspect.</p> <p>21 And I think the -- the exemption from the</p> <p>22 spending which we talked about -- and I understand your</p> <p>23 position on that, although in this instance I think</p> <p>24 it's even more exacerbated by the fact that the monies,</p> <p>25 I guess, are going to be paid to different governmental</p>
<p style="text-align: right;">Page 3</p> <p>1 testify, be sure and identify yourself for the record</p> <p>2 and who you represent.</p> <p>3 The usual procedure is that we will first,</p> <p>4 for each measure, ask proponents -- ask members of the</p> <p>5 Title Board if we have any questions about the measure</p> <p>6 to make sure that we understand the measure; the second</p> <p>7 step is to determine if the Board has jurisdiction to</p> <p>8 set a title, which requires us to determine if the</p> <p>9 measure complies with the single-subject requirement;</p> <p>10 and then, third, if the Board determines that it has</p> <p>11 jurisdiction to set a title, then we will proceed to</p> <p>12 work from a staff-prepared draft. And the</p> <p>13 staff-prepared drafts are on the table by the door.</p> <p>14 With that, let's turn to the first agenda</p> <p>15 item this afternoon 2007-2008 #73, Criminal Conduct by</p> <p>16 Businesses -- Liability.</p> <p>17 Mr. Grueskin, I think you represent</p> <p>18 proponents. Perhaps if you would come forward and --</p> <p>19 do you have any -- introduce yourself and if you have</p> <p>20 any introductory remarks, let us know.</p> <p>21 MR. GRUESKIN: My name is Mark Grueskin. I</p> <p>22 am representing the proponents. And #73 is a reworked</p> <p>23 version of, I believe, Initiative #57, so this issue</p> <p>24 has been before the Board. I don't think that there</p> <p>25 are any comments that I would need to make unless the</p>	<p style="text-align: right;">Page 5</p> <p>1 entities. I'm not sure how that's going to work, quite</p> <p>2 frankly, and I'm not sure what governmental entities</p> <p>3 are contemplated by this.</p> <p>4 If you look, by way of example, maybe at</p> <p>5 Initiative 76 that's before you, there's a pretty broad</p> <p>6 definition of "governmental entities." I'm not clear</p> <p>7 on what the laws are that are contemplated by this</p> <p>8 specifically. It's been tailored down a little to</p> <p>9 define the criminal liability aspect to executive</p> <p>10 officials. I think that's one aspect.</p> <p>11 The bill title or the title of this</p> <p>12 initiative is liability for criminal conduct by a</p> <p>13 business. Obviously, it goes a lot further than that.</p> <p>14 We're talking about executive officials who are, in</p> <p>15 essence, either officers or directors or business</p> <p>16 owners on one hand and then the next -- and those</p> <p>17 people are then subject to fines. And as I understand</p> <p>18 that, not incarceration but fines.</p> <p>19 And then you have a separate civil aspect,</p> <p>20 again, based on monetary damages that can be brought by</p> <p>21 a Colorado resident. Again, I don't know who defines a</p> <p>22 Colorado resident. But, again, that is against a</p> <p>23 business entity or executive official, again, with the</p> <p>24 damages going to -- I think it's more complicated with</p> <p>25 respect to what governmental entity it would go to, and</p>

<p style="text-align: right;">Page 6</p> <p>1 then attorney's fees and costs to a successful 2 proponent – or litigant who brought the lawsuit. So, 3 in essence, I believe those are the single-subject 4 problems with it.</p> <p>5 I will get to the misleading and confusing 6 aspects of it if we get to that aspect of the title 7 itself. But I think the problems that we previously 8 revisit – we previously looked at are, again, present 9 here and may be more profound in the sense that I'm not 10 clear exactly what conduct violates this, what conduct 11 would then become the elemental nature of a civil case, 12 and then finally who the damages are paid to, what 13 governmental entities, and how that's going to be 14 decided and considered. So those are the issues that I 15 think are before you, which I know you're familiar 16 with.</p> <p>17 MR. HOBBS: Thank you very much. 18 Are there questions for Mr. Friednash? 19 MR. FRIEDNASH: Thank you. 20 MR. HOBBS: I guess not. 21 You know, we have had a – quite a bit of 22 discussion when a predecessor version before us. 23 I don't have anyone else signed up to 24 testify. Is there anybody else who wishes to comment 25 on the question of whether the measure complies with</p>	<p style="text-align: right;">Page 8</p> <p>1 Mr. Carlin, do you have any comments? 2 MR. CARTIN: I don't have much to offer, 3 Mr. Chair, beyond what – beyond my comments the last 4 time. I know that #73 has been craft – recruited from 5 a predecessor version. I think I understand the 6 underlying statute better than I did the first time 7 through.</p> <p>8 And just real – very briefly going through 9 some of the relevant principles – and I appreciate 10 Mr. Domenico's comments and food for thought. Some of 11 the relevant principles, although an initiative may 12 contain several purposes, they must be interrelated. I 13 think the purposes of this measure are interrelated. 14 It goes to the underlying criminal conduct of a 15 business and extending that liability criminally and 16 civilly to a business entity for the civil portion and 17 to the executive officials both civilly and criminally.</p> <p>18 I don't think the measure contains or hides 19 any hidden purposes. I think it's right out there 20 right up front, and I think that the title in the staff 21 draft, when we get to that, has full disclosure in that 22 regard.</p> <p>23 Are there incongruous subjects in the same 24 measure? I can't say that there are incongruous 25 subjects. When you look at the definition of</p>
<p style="text-align: right;">Page 7</p> <p>1 the single-subject requirement? 2 Hearing none, then I'll turn to Board 3 discussion on that question.</p> <p>4 Is there any discussion by the Board? 5 MR. DOMENICO: Well, I'll – I'll start since 6 I've had the problem with the previous version on this. 7 And I don't think it solved kind of the fundamental 8 problem I had with that, although it does – it is a 9 little more straightforward, I think.</p> <p>10 The fundamental problem I had was both 11 creating a new liability for individuals, which this 12 does in subsection (1.5). It's not as broad a class of 13 individuals as the previous version, but it still does 14 that. And then adding onto both for those individuals 15 and business entities a new form of liability for the 16 similar conduct.</p> <p>17 For the same reasons I've stated before, I 18 think it's two subjects that are all, of course, 19 related to the very broad subject of liability for 20 things that business entities do unrelated to one 21 another in a way that would, I think, surprise a lot of 22 people, that those two things would be done at the same 23 time. And so this version, 73, doesn't resolve the 24 issues I've had previously.</p> <p>25 MR. HOBBS: Thank you.</p>	<p style="text-align: right;">Page 9</p> <p>1 "incongruous," it's inharmonious, incompatible. Again, 2 I think that this is all woven together. And so I 3 don't think there are two or more separate and discreet 4 subjects here that aren't related.</p> <p>5 And so – I know I'm repeating myself from 6 the first time, but I would – I would go forward to 7 set a title for this measure because I feel it has a 8 single subject.</p> <p>9 MR. HOBBS: Thank you. 10 And I – I agree. And I do appreciate 11 Mr. Domenico's concerns. And, again, for the – with 12 reference to the discussions that we've had before, I 13 just tend to believe that they're not separate and 14 distinct purposes here and that the measure is 15 concerning basically business liability.</p> <p>16 And I think the staff draft probably does a 17 pretty good job of expressing what I think is a single 18 subject. So I think I'm still a vote in favor of the 19 measure's compliance with the single-subject 20 requirement.</p> <p>21 If there's no other discussion, is there a 22 motion? 23 MR. CARTIN: Mr. Chairman, I'd move that the 24 Title Board find that 2008-2000 – 2007-2008 #73 25 contains a single subject and proceed to setting a</p>

Page 10	Page 12
<p>1 title for the measure. 2 MR. HOBBS: I'll second that. 3 If there's no other discussion, all those in 4 favor say aye. 5 MR. CARTIN: Aye. 6 MR. HOBBS: Aye. 7 All those opposed no. 8 MR. DOMENICO: No. 9 MR. HOBBS: That motion carries 2-1. 10 Let's turn to the staff-prepared draft. 11 Ms. Gomez is displaying the staff draft on the screen. 12 Mr. Grueskin, have you had an opportunity to 13 look at the staff draft and do you have any comments? 14 MR. GRUESKIN: Mr. Chairman, I have had an 15 opportunity to look at the staff draft, and I do have 16 comments. I'd like to pass out for the Boards' 17 purposes . . . 18 Mr. Chairman, I think the staff draft is 19 largely accurate with the exception of the first clause 20 that relates to describing when the liability for the 21 executive officials comes into play. Specifically, the 22 staff draft talks about an executive official who 23 knowingly causes a business entity to fail to perform 24 the duty, whereas what the initiative actually says is 25 that you have to know of the duty and know of the</p>	<p>1 draft. It seems to say that the executive official 2 causes the failure to discharge. And it looks like 3 your - your approach fixes that concern that I had. I 4 was thinking of proposing a different approach to it, 5 but I don't - I don't personally see a problem with 6 the approach that you've taken here. 7 Questions from the Board, or comments? 8 MR. CARTIN: No, I concur with that. 9 MR. HOBBS: Let me hear from Mr. Friednash to 10 see if he - I think he may have some concerns about 11 the staff draft. 12 MR. FRIEDNASH: Thank you. 13 The issue that I think this presents with 14 regard to whether it's misleading or not is really two 15 main pieces. One, you know, the title itself is 16 Criminal Conduct by Businesses - Liability, and I think 17 that's far more narrow than what this really does. 18 Because it's not just liability for business - not 19 just criminal, it's liability for businesses from a 20 civil standpoint as well as liability for what I refer 21 to as executive officials in that. So that's my first 22 concern, is that I think it will be misleading and 23 confusing to voters. 24 The second piece is that, again, it gets to 25 the question of what exactly does this do and what are</p>
<p>Page 11</p> <p>1 failure to perform. 2 There's no real specific causation element 3 specified in the text before you, and therefore I have 4 recrafted that initial phrase after the statement of 5 the single subject to more accurately reflect the fact 6 that there is criminal liability for an executive 7 official for the entity's failure to perform a specific 8 duty imposed by law, which is what the measure and, 9 frankly, the existing statute says; and then taking the 10 elements of knowledge that are specified in Initiative 11 #73 and making them clear so that people know that 12 they're voting upon a criminal liability where an 13 official knows of a duty and knows that the duty hasn't 14 been performed. 15 And then I also put a clause in there 16 relating to defining "executive official" because that 17 may or may not be a term that people typically deal 18 with. I think it is reasonably used here in connection 19 with a business entity. But while I'm not tied to that 20 particular addition, I think it doesn't hurt. 21 With those exceptions, I would ask you to 22 adopt the staff draft and set this matter for a ballot 23 title for petition circulation. 24 MR. HOBBS: Thank you, Mr. Grueskin. I did 25 have that - I think a similar concern about the staff</p>	<p>Page 13</p> <p>1 the elements of what it's doing. What specific duties 2 does this measure contemplate? 3 There are statutory duties that are found in 4 laws and regulations that I think it refers to in part 5 of this measure, and then there are common-law duties 6 and fiduciary duties of due care and things that have 7 evolved from case law. 8 I don't know if they're trying to - the 9 proponents of this measure are trying to incorporate 10 all of those things or certain of those things, but I 11 do think it will be very confusing to someone who's 12 voting on these as to exactly what is being 13 contemplated. 14 On one aspect we talk about an executive 15 official who knowingly causes a business entity to fail 16 to discharge a specific duty of affirmative performance 17 or even how he's redefined this in his amended draft, 18 and then below we talk about damages being awarded to 19 the governmental entity that imposed the specific duty 20 on the business entity. 21 What if we're talking about duties that don't 22 fall within the scope of a governmental entity's duties 23 that have been imposed by law? What happens with those 24 damages? Where do those damages go? Are they even 25 covered by this? So I think that's part of the</p>

4 (Pages 10 to 13)

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1 confusion that lies here.
 2 The next piece is -- it says permitting a
 3 citizen to bring a civil action in this draft and then
 4 I think the -- the draft -- the measure itself talks
 5 about a resident bringing this. So I don't know if
 6 there's a difference between resident, as it's defined
 7 under 18.1.606, that's been -- that's in the text of
 8 this, but that's the language in the text, and the
 9 language in the title talks about -- talks about
 10 citizens. That may be a different definition under
 11 statute or case law than what appears in the text. I
 12 don't know if that's going to create confusion as well.
 13 I would suppose it would.
 14 Putting that for a second aside, I'm still
 15 not clear on why, if this applies to all types of
 16 regulations, we are limiting the individuals that can
 17 bring an action to just residents or citizens of this
 18 state. Because obviously if it applies to federal
 19 issues, since the people don't have to be harmed or
 20 injured to bring a lawsuit in this case, it shouldn't
 21 be limited under this title.
 22 So those are my concerns.
 23 MR. HOBBS: Any questions for Mr. Friednash?
 24 Thank you.
 25 MR. CARTIN: Mr. Chairman?

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1 MR. HOBBS: Oh, Mr. Cartin. Sorry.
 2 MR. CARTIN: Mr. Friednash, when I looked at
 3 the staff draft, your first -- your first argument
 4 relative to the first line -- or the subject of the
 5 measure as stated concerning liability for criminal
 6 conduct by business entities, I think that that's
 7 accurate because the -- I think that the liability does
 8 flow from the conduct of the business entity.
 9 And when I was looking at the staff draft,
 10 I -- I played with whether or not it might be more
 11 specific to say concerning the liability of certain
 12 executive officials for criminal conduct by business
 13 entities, but I wasn't sure that that was -- would be
 14 completely accurate. Because in 18-1-606(1.5) that
 15 speaks to the criminal liability of an executive
 16 official and in subsection (5)(a) that speaks to a
 17 private right of action against any business entity or
 18 its executive officials for conduct that meets the
 19 provisions of subsection (1.5).
 20 And so I guess that was why I didn't think
 21 that it may do more harm than good to try and clarify
 22 that by inserting "liability of the executive
 23 officials," because I think it does -- when you have
 24 the civil portion of it, I think it talks about
 25 liability of the business and the -- or the executive

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1 official. So I would leave it as -- I understand your
 2 issue --
 3 MR. FRIEDNASH: Okay.
 4 MR. CARTIN: -- but I think that may be the
 5 best way to craft it given the text.
 6 MR. FRIEDNASH: I understand your position.
 7 I guess my concern is that it doesn't truly capture the
 8 scope and breadth of what it's really doing. That's
 9 why I raised that point.
 10 MR. DOMENICO: Well, and I would just point
 11 out that that's exactly why I don't think this is a
 12 single subject, because it's impossible to fix that
 13 clause in such a way to really capture what's going on
 14 here. And leaving it as is I think -- while, sure, if
 15 you give all those words the broadest meaning you can,
 16 you can fit what's going on here under the concept of
 17 criminal conduct by business -- liability for criminal
 18 conduct by business entities.
 19 But I really think it's true that an average
 20 voter reading that would be surprised to learn that
 21 that includes extending both the concept of creating
 22 personal liability on certain individuals and creating
 23 civil liability for both those individuals and the
 24 business entity itself. And I agree there's not a way
 25 to fix it, and that's why I have felt that these aren't

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1 a single subject all along.
 2 MR. FRIEDNASH: And I guess I'd just hasten
 3 to add that I think that's why you're going to see 74
 4 and 75 in a few minutes. It's, you know, with all due
 5 respect, somewhat of an insurance policy. So it's --
 6 but I think that's the way it has to be crafted, in two
 7 separate measures.
 8 Thank you.
 9 MR. HOBBS: Thank you.
 10 Mr. Grueskin, do you have anything further?
 11 MR. GRUESKIN: Just a note of thanks to
 12 Mr. Friednash. He's correct in terms of the reference
 13 to "citizen" on what is my line 9. I think that that
 14 is a leftover from an earlier draft on #57 when the
 15 language did use "citizen." I think you could insert,
 16 instead of "a citizen," "an individual." Other than
 17 that, I think that the arguments are arguments that
 18 you've considered before.
 19 And I don't want to use an extraordinary
 20 amount of time, but I would remind you that the
 21 existing statute talks about a business entity is
 22 guilty of an offense and then it sets forth certain
 23 conditions.
 24 So in terms of the breadth of duties, I think
 25 that there is clarity that -- in the existing criminal

Page 18	1 statute that it is specific to offenses that arise 2 under the -- under specific kinds of statutes as 3 opposed to -- or for specific kinds of crimes which can 4 only be penalized by a statute. But I just don't share 5 Mr. Friednash's point of view. 6 MR. HOBBS: Thank you. 7 MR. GRUESKIN: Thank you. 8 MR. HOBBS: I don't have anyone else signed 9 up to testify. Is there anybody else who wishes to 10 testify? 11 Seeing none, then I'll turn to Board 12 discussion on the title. 13 I think Mr. Grueskin's alternative is a 14 better version because I think it does fix a problem 15 that I think the staff draft has. And I also agree 16 with Mr. Friednash and Mr. Grueskin that the reference 17 to a citizen bringing a lawsuit should change to an 18 individual. 19 I understand Mr. Domenico's concerns. It 20 is -- it is a point in your favor, Mr. Domenico, that 21 it's hard to express the single subject, I think, but I 22 do feel that stating that the subject is liability for 23 criminal conduct by business entities is accurate. 24 It's an -- underlying, it's a -- you know, I think it 25 is a criminal statute even though the measure also	Page 20	1 MR. HOBBS: I think the point's well-taken. 2 What if -- I guess I'll make a suggestion. 3 On line 6 -- well, line -- I guess the end of line 5, 4 is that where we are? 5 MR. DOMENICO: Are we talking about my 6 last -- 7 MR. HOBBS: Yeah. 8 MR. DOMENICO: Yeah. Deleting "requiring" 9 that" and just replacing it with "allowing" I think 10 would solve that issue. 11 MR. HOBBS: I guess I'd like to take a little 12 bit deeper run at it. 13 Go ahead and strike "requiring." That would 14 leave us -- and saying "allowing." And then it would 15 say "allowing that damages" -- I kind of wanted to 16 reword that a little bit. 17 MR. DOMENICO: Well, I would get rid of 18 "that" and then you'd have to -- then you'd have to 19 put, I think somewhere in there, probably between 20 "action" and "be," the word "to," t-o, I think would -- 21 MR. HOBBS: Could I -- maybe an alternative 22 suggestion. 23 MR. DOMENICO: Of course. 24 MR. HOBBS: I don't know whether this is 25 better or not, but could we say "allowing an award of
Page 19	1 imposes what I think is kind of a civil penalty for 2 executive officials that are involved with that 3 criminal conduct of the business entity. But I 4 think -- I don't see a better way to express what I do 5 think is the single subject. I'm still open to the 6 possibilities. 7 Is there any other discussion about the staff 8 draft? 9 MR. DOMENICO: Well, I'll just point out I 10 think Mr. Grueskin's -- even though I'm going to end up 11 voting against him, Mr. Grueskin's changes are an 12 improvement, including the change of "citizen" to 13 "individual." 14 One other change that was prompted by 15 something Mr. Friednash mentioned is the language about 16 requiring that damages in the civil action be awarded 17 to the governmental entity is a little -- I mean, what 18 the measure actually says is that those damages may be 19 awarded to any governmental entity. 20 And so I would suggest that instead of 21 "requiring" something along the lines of "allowing 22 damages" to replace that. I don't know how exactly 23 that will work, but I think that makes it a little -- 24 MR. HOBBS: Thank you. 25 MR. DOMENICO: -- more accurate.	Page 21	1 damages in the civil action"? Well -- yeah, I don't 2 know whether -- maybe that just creates another 3 problem. 4 But what I'm trying to get at is "allowing an 5 award of damages to the governmental entity." And I 6 don't know -- now I'm not so sure that reads any 7 better, because I was going to have them strike it 8 later in the sentence. But, see, that would read: 9 "Allowing an award of damages in a civil action to the 10 governmental entity that imposed the specific duty." 11 Is that better or worse? 12 MR. CARTIN: That's better. 13 MR. HOBBS: If that reads okay, I guess that 14 would be my suggestion. 15 MR. DOMENICO: I think that's probably 16 actually better. Because it's not really clear to me, 17 from the language, whether all the damages are supposed 18 to go to this governmental entity or if part. I mean, 19 I don't really understand how the damages aspect is 20 going to work, and this is kind of -- sort of reflects 21 that uncertainty, I think. 22 MR. HOBBS: Well, and a related point that I 23 wanted to raise is whether we want to include the 24 phrase that's in the measure "compensatory or punitive 25 damages." Does it matter what kind of damages it is?

6 (Pages 18 to 21)

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1 The measure says, "In a civil action brought
2 under this section, compensatory or punitive damages
3 may be awarded to any governmental entity that
4 imposed," et cetera. Is that significant, that it's
5 compensatory or punitive damages?
6 MR. CARTIN: I don't think it is.
7 MR. HOBBS: Okay. Mr. Cartin thinks that
8 it's not significant.
9 MR. DOMENICO: As I say, I don't -- I'm not
10 sure how that's going to work, but that pretty much
11 captures most of the universe of potential damages, I
12 think. So just leaving it out in the title is probably
13 okay.
14 MR. HOBBS: All right. Well, I guess I'll
15 move that change to the staff draft so that that clause
16 would read: "Allowing an award of damages in the civil
17 action to the governmental entity that imposed the
18 specific duty on the business entity."
19 MR. CARTIN: Second.
20 MR. HOBBS: Any further discussion? If not,
21 all those in favor say aye.
22 Aye.
23 MR. CARTIN: Aye.
24 MR. DOMENICO: Aye.
25 MR. HOBBS: All those opposed no.

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1 That motion carries 3-0.
2 I think Ms. Gomez is making some other
3 changes on the version on the screen that we have
4 talked about. In what is now line 7, she struck "a
5 citizen" and substituted "an individual."
6 I'll go ahead and move that change.
7 MR. CARTIN: Seconded.
8 MR. HOBBS: That's been moved and seconded.
9 Any further discussion? If not --
10 MR. DOMENICO: I'll --
11 MR. HOBBS: Mr. Domenico?
12 MR. DOMENICO: I just would like to discuss
13 the spelling of individual. It's not quite right up
14 there. On line 8, I think -- yeah. All right.
15 MR. HOBBS: With that change then, all those
16 in favor of that change please say aye.
17 Aye.
18 MR. CARTIN: Aye.
19 MR. DOMENICO: Aye.
20 MR. HOBBS: All those opposed no.
21 That motion carries 3-0.
22 And then I think the other changes that I
23 would support and that were suggested by Mr. Grueskin
24 were to make some changes at the beginning of the
25 measure and -- which I think Ms. Gomez has finished

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1 reflecting on -- in the version on the screen.
2 So after the "in connection therewith," the
3 title would read: "Extending the criminal liability of
4 a business entity to its executive officials for the
5 entity's failure to perform a specific duty imposed by
6 law, semicolon, conditioning an executive official's
7 liability upon his or her knowledge of the duty imposed
8 by law and of the business entity's failure to perform
9 such duty," and I think at this point I'll stop.
10 I see Mr. Grueskin also wanted to see
11 defining -- or suggested that we say "defining an
12 executive official." I think I'd like to have separate
13 discussion on that.
14 But my motion would be to incorporate those
15 changes in the title as I read them.
16 MR. CARTIN: Second.
17 MR. HOBBS: That's been moved and seconded.
18 We'll provide an opportunity to read and reread that.
19 Is there any further discussion on that
20 motion? If not, all those in favor say aye.
21 Aye.
22 MR. CARTIN: Aye.
23 MR. DOMENICO: Aye.
24 MR. HOBBS: All those opposed no.
25 That motion carries 3-0.

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1 And then I did want to ask about
2 Mr. Grueskin's suggestion to include a clause that says
3 "defining, quote, executive official, unquote." I'm
4 not sure that that adds very much. The definition is
5 significant. I'm curious what the other Board members
6 think of that suggestion.
7 MR. CARTIN: Mr. Chairman, I think I agree
8 with you. As -- as it's written, I'm not sure that it
9 adds much. From a drafting standpoint, I think that if
10 you are going to talk about how an executive -- how you
11 define "executive official" in the title, you probably
12 want to go -- you probably want to say "defining an
13 executive official as" and then include what an
14 official -- executive official is under this measure.
15 I guess given the fact that I'm not sure that
16 it's necessary for the title to include that definition
17 and that simply stating defining executive official
18 standing alone doesn't add that much in my mind either.
19 With all due respect to Mr. Grueskin, I'm not sure
20 it's necessary to include that unless the proponents
21 feel that that's absolutely necessary in this title.
22 MR. HOBBS: Mr. Grueskin?
23 MR. GRUESKIN: I'll take that as a question.
24 And the answer -- I think as I couched this originally
25 was that we weren't particularly tied to it. I think

<p style="text-align: right;">Page 26</p> <p>1 the fact that "business entity" is specifically defined 2 under existing law and those executive officials and 3 their roles stem from that existing definition provide 4 added comfort in not getting into a lot of detail on 5 that issue in the ballot title. So I'm fine deferring 6 to your judgment on that. 7 MR. HOBBS: Okay. Thank you. 8 MR. DOMENICO: I actually would refer to keep 9 it in there or put it in even though I think I agree 10 that it's not probably absolutely necessary. 11 I do think -- you know, part of what we're 12 supposed to do, I think, in the titles is, since we 13 weren't supposed to just repeat the entire measure 14 itself, is give people a hint that if they're concerned 15 about a certain concept -- capture all the concepts in 16 the measure, and then if people are concerned about it 17 they can look to the measure itself for the details. 18 And so it seems to me that there may be 19 people who read this and aren't quite sure of the title 20 as is and wonder, well -- and see executive officials 21 and may sort of be curious of that. And stating in the 22 title that the measure defines who they are would give 23 people who care about that enough information that they 24 could look to the specifics of the measure. 25 So I don't think that by including it you</p>	<p style="text-align: right;">Page 28</p> <p>1 think I'll make a motion to make a change. 2 MR. DOMENICO: I won't bother either. 3 MR. HOBBS: Are there any other changes to 4 the staff draft as we've amended it so far? If not, is 5 there a motion to adopt the staff draft as amended with 6 the understanding that the same changes would be made 7 in the ballot title and submission clause which begins 8 on what is now line 13? 9 MR. CARTIN: So moved. 10 MR. HOBBS: I'll second that. 11 Any further discussion? If not, all those in 12 favor please say aye. 13 Aye. 14 MR. CARTIN: Aye. 15 MR. HOBBS: All those opposed no. 16 MR. DOMENICO: No. 17 MR. HOBBS: That motion carries 2-1, and that 18 completes action on #73. The time is 2:13 p.m. 19 (The proceedings concluded at 2:13 p.m. on 20 the 19th day of March, 2008.) 21 22 23 24 25</p>
<p style="text-align: right;">Page 27</p> <p>1 would have to include the entire definition. I mean, 2 while at the same time I do think it provides the hint 3 that some people might want to look at it if that's 4 something they're interested in. 5 So I would -- I would think it adds 6 something, probably not something without which the 7 title is incomplete in the sense that it would be 8 thrown out, but I do think it would help some voters 9 possibly and probably ought to be included. 10 MR. HOBBS: Well, I think I still would 11 prefer not to put it in as Mr. Grueskin suggested, and 12 I would -- you know, I agree with Mr. Cartin that if 13 we're going to do it, maybe we say what the definition 14 is or summarize it, but I don't -- I don't think the 15 definition is surprising. 16 I'd be more interested in doing that if there 17 was something in the definition that would surprise 18 somebody. But it strikes me that "executive officials" 19 is a term that's defined to be pretty much like I think 20 it might be, it's officers, directors, managing 21 partners, managing members, or sole proprietor of a 22 business entity. I mean, it's not just supervisors, 23 it's somebody who seem like an executive official of a 24 company. 25 I would -- I probably would not -- I don't</p>	

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<p>A</p> <p>absolutely 25:21 26:30</p> <p>accurate 10:19 15:7 15:14 18:23 19:25</p> <p>accurately 11:5</p> <p>action 14:3,17 15:17 19:16 20:20 21:1,9 22:1,17 28:18 29:14,15</p> <p>add 17:3 25:18</p> <p>added 26:4</p> <p>adding 7:14</p> <p>addition 11:20</p> <p>adds 25:4,9 27:5</p> <p>administer 29:6</p> <p>adopt 11:22 28:5</p> <p>affirmative 13:16</p> <p>affixed 29:16</p> <p>aforsaid 29:9</p> <p>afternoon 2:2,11,24 3:15 4:12</p> <p>agenda 3:14</p> <p>ago 4:17</p> <p>agree 9:10 16:24 18:15 25:7 26:9 27:12</p> <p>ahead 2:2 4:5 20:13 23:6</p> <p>allowing 19:21 20:9 20:14,15,25 21:4 21:9 22:16</p> <p>alternative 18:13 20:21</p> <p>amended 13:17 28:4,5</p> <p>amount 17:20</p> <p>answer 25:24</p> <p>anybody 2:24,25 6:24 18:9</p> <p>appearing 4:13</p> <p>appears 14:11</p> <p>applies 14:15,18</p> <p>appreciate 8:9 9:10</p> <p>approach 12:3,4,6</p> <p>argument 15:3</p> <p>arguments 17:17,17</p> <p>Article 2:6</p> <p>aside 14:14</p> <p>aspect 4:20,20 5:9 5:10,19 6:6 13:14 21:19</p> <p>aspects 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Exhibits

STATE OF COLORADO
Department of State
1700 Broadway
Suite 270
Denver, CO 80290



Mike Coffman
Secretary of State

Holly Z. Lowder
Director, Elections Division

March 10, 2008

NOTICE OF MEETING

You are hereby notified that the Secretary of State,
Attorney General, and the Director of the Office of Legislative

Legal Services will meet for a hearing

for a proposed initiative concerning

2007 - 2008 #73*

Wednesday, March 19, 2008 at 1:30 p.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

Mike Coffman
Secretary of State

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* Unofficially captioned "Criminal Conduct by Businesses - Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

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Proposed Initiative
2007-2008 #73
FINAL

Be it enacted by the People of the State of Colorado:
EXECUTIVE OFFICIALS
SECRETARY OF STATE

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

18-1-606. Liability for criminal conduct by businesses.

(1) A business entity is 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.

(1.5) AN EXECUTIVE OFFICIAL IS GUILTY OF AN OFFENSE IF THE CONDUCT CONSTITUTING THE OFFENSE CONSISTS OF AN OMISSION TO DISCHARGE A SPECIFIC DUTY OF AFFIRMATIVE PERFORMANCE IMPOSED ON THE BUSINESS ENTITY BY LAW AND THE EXECUTIVE OFFICIAL KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AND KNEW THAT THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

(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.

(c) "EXECUTIVE OFFICIAL" MEANS ANY NATURAL PERSON WHO IS AN OFFICER, DIRECTOR, MANAGING PARTNER, MANAGING MEMBER, OR SOLE PROPRIETOR OF A BUSINESS ENTITY.

(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. FOR AN OFFENSE COMMITTED ON OR AFTER FEBRUARY 1, 2009, AN EXECUTIVE OFFICIAL 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 AN EXECUTIVE OFFICIAL THAT WOULD BE A MISDEMEANOR OR PETTY OFFENSE SHALL SUBJECT THE EXECUTIVE OFFICIAL 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 EXECUTIVE OFFICIAL IS CONVICTED.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL CHARGED UNDER SUBSECTION (1.5) 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 MET THE CRITERIA SET FORTH IN SUBSECTION (1)(a) OF THIS SECTION.

(5) (a) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY OR ITS EXECUTIVE OFFICIALS FOR THEIR CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SUBSECTION (1) OR SUBSECTION (1.5) OF THIS SECTION.

(b) IN A CIVIL ACTION BROUGHT UNDER THIS SECTION, COMPENSATORY OR PUNITIVE DAMAGES MAY BE AWARDED TO ANY GOVERNMENTAL ENTITY THAT IMPOSED BY LAW THE SPECIFIC DUTY TO BE PERFORMED BY THE BUSINESS ENTITY.

(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 ALL REVENUE AND SPENDING LIMITATIONS PROVIDED BY LAW.

(e) IF AN AWARD IS MADE UNDER THIS SUBSECTION (5), THE INDIVIDUAL 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.

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ELECTIONS
SECRETARY OF STATE

*25368 Mc
CA*

Mark G. Grueskin
mgrueskin@lr-law.com

Direct Dial
303.256.3941

March 7, 2008

via **HAND DELIVERY**
Ms. Cesi Gomez
Colorado Secretary of State
Elections Division
1700 Broadway, Suite 270
Denver, Colorado 80290

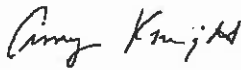
Re: Initiative 2007-08 #73

Dear Ms. Gomez:

Attached please find the required draft of Initiative 2007-08 #73, which our office is filing on behalf of the Proponents for this measure.

Thank you very much.

Sincerely,



Amy Knight
Legal Assistant to Mark G. Grueskin

aak
enclosure
1768878_1.doc

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

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

Ballot Title Setting Board

Proposed Initiative 2007-2008 #73¹

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

1 An amendment to the Colorado Revised Statutes concerning liability for criminal conduct
2 by business entities, and, in connection therewith, extending the criminal liability of a business
3 entity to an executive official who knowingly causes a business entity to fail to discharge a
4 specific duty of affirmative performance imposed by law; allowing a Colorado resident to bring
5 an action for civil damages against a business entity or executive official for such criminal
6 conduct; requiring that damages in the civil action be awarded to the governmental entity that
7 imposed the specific duty on the business entity; permitting a citizen who brings a successful civil
8 action to be awarded attorney fees and costs; and allowing an executive official who discloses to
9 the attorney general all facts known to the official concerning a business's criminal conduct to use
10 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:

11 Shall there be an amendment to the Colorado Revised Statutes concerning liability for
12 criminal conduct by business entities, and, in connection therewith, extending the criminal
13 liability of a business entity to an executive official who knowingly causes a business entity to fail
14 to discharge a specific duty of affirmative performance imposed by law; allowing a Colorado
15 resident to bring an action for civil damages against a business entity or executive official for such
16 criminal conduct; requiring that damages in the civil action be awarded to the governmental entity
17 that imposed the specific duty on the business entity; permitting a citizen who brings a successful
18 civil action to be awarded attorney fees and costs; and allowing an executive who discloses to the
19 attorney general all facts known to the executive concerning a business's criminal conduct to use
20 that disclosure as an affirmative defense to criminal or civil charges?

¹ Unofficially captioned "Criminal Conduct by Businesses - Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

INITIATIVE TITLE SETTING REVIEW BOARD
Wednesday, April 2, 2008
Secretary of State's Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado

2007-2008 #73
Criminal Conduct by Businesses - Civil Liability

William A. Hobbs, Deputy Secretary of State
Daniel D. Domenico, Solicitor General
Daniel L. Cartin, Deputy Director of the Office
of Legislative Legal Services
Maurice G. Knaizer, Deputy Attorney General
Cesi Gomez, Secretary of State's Office

A P P E A R A N C E S

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For the Objectors: Douglas J. Friednash, Esq.
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1 WHEREUPON, the following proceedings
2 were taken:
3 CHAIRMAN HOBBS: Good afternoon.
4 Let's resume our meeting from this morning.
5 This is a meeting of the Title Setting Board,
6 Title 1, and the date is April 2nd, 2008, and
7 the time is 1:38 p.m. The Title Board this
8 afternoon consists of the following: My name is
9 Bill Hobbs, Deputy Secretary of State, appearing
10 for Secretary of State Mike Coffman.
11 To my right is Dan Domenico,
12 Solicitor General, who is here on behalf of
13 Attorney General John Suthers, and to my left is
14 Dan Cartin, Deputy Director of the Office of
15 Legislative Legal Services, who is designated
16 this afternoon for Director of the Office of
17 Legislative Legal Services, Charlie Pike.
18 Also to my far left is Maurice
19 Knaizer, Deputy Attorney General, who represents
20 the Title Board, and to my far right is Cesi
21 Gomez of the Secretary of State's Office.
22 Let's go ahead and turn to the
23 agenda. The first item is a motion for
24 rehearing concerning 2007-2008, No. 73, Criminal
25 Conduct by Businesses, Civil Liability. This is

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1 a Motion for Rehearing filed on behalf of
2 Joseph B. Blake by Doug Friednash.
3 Mr. Friednash, if we could hear from
4 you -- we have the benefit of your written
5 motion for rehearing, but if you would like to
6 summarize that for the Board.
7 MR. FRIEDNASH: That would be great.
8 Good afternoon, Doug Friednash appearing on
9 behalf of Fairfield & Woods and the objector,
10 Joe Blake. The first part of this discussion
11 concerns the fact that we believe this violates
12 a single-subject requirement insofar that it
13 relates to more than one subject and has two
14 separate and distinct purposes that are not
15 connected to each other.
16 With respect to the different
17 subjects, the measure dramatically expands the
18 criminal liability of businesses to executive
19 officials, and not just the expansion in terms
20 of the parties but expansion in terms of crimes.
21 It impacts health regulations and any other duty
22 imposed by governmental entities.
23 It also allows a private right of
24 action for all residents against executive
25 officials and businesses. In this context, it's

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1 not just an extension and expansion. It is a
2 whole new area of civil liability that creates
3 problems within itself, and we'll talk about
4 that later with regard to Initiative 75 as well.
5 The resident is not defined in the
6 measure. The damages to the governmental
7 entities -- governmental entities aren't defined
8 in this measure, and the primary right of action
9 applies to all residents, without regard to
10 whether or not they have suffered actual injury
11 as a result of it.
12 The funds to the governmental
13 entities are all exempt from all revenue and
14 spending limits. I believe that voters are
15 going to be surprised to know the extent to
16 which this law applies. I think they'll be
17 surprised to know that, as I read this, the
18 damages could go to the federal government and
19 that Colorado residents are the only ones that
20 could bring these claims that could be that far-
21 reaching.
22 I think voters will be surprised to
23 know that the federal government or other
24 governmental entities can collect punitive
25 damages from businesses and executive officials

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1 as well as compensatory damages that aren't
2 defined in the measure. I think voters will be
3 surprised to know that if a frivolous case moves
4 forward on behalf of the federal government or
5 state, local government, that, while a
6 successful plaintiff may recover fees, a
7 successful defendant will not be entitled to
8 such fees, and I know, obviously, there is a
9 Rule 11 procedure for frivolous and groundless
10 cases.
11 I can tell you, as a practicing
12 litigant, I don't recall a single case that I've
13 been involved with or recall to memory where
14 that's actually been awarded, and, very
15 specifically, this creates an incentive to file
16 lawsuits.
17 The title is unclear, confusing,
18 misleading. It's misleading as to the liability
19 of criminal conduct by a business entity, which
20 is the title and subject of this matter. In
21 essence, it not only creates a new standard of
22 conduct covering executive officials' liability.
23 That could be statutory, regulatory,
24 and health standards and so forth. It extends
25 and expands. I think voters will be surprised

1 to learn and it's unclear by the very measure
2 that undocumented, illegal aliens can bring a
3 case. The aspect of the governmental entity is
4 particularly perplexing. It's unclear where
5 money goes, what happens when you have
6 overlapping regulations or laws amongst
7 different governmental entities.

8 If you look at the definition, just
9 by way of example only, of a governmental entity
10 that's involved in the Initiative 76, the just-
11 cause initiative, you can see how far-reaching
12 the proponents of that measure deem a
13 governmental entity to go. It's the same
14 proponents that are advanced in this measure.

15 The governmental entities could be
16 federal, state, local governmental agencies, can
17 be boards, commissions. It can be enterprises.
18 It can be school districts, special districts.
19 It's really pretty far-reaching, and this does
20 not address a lot of things. It's unclear and
21 confusing as to how this will apply.

22 The title refers to civil damages
23 when, in fact, we're dealing with compensatory
24 or punitive. It doesn't indicate what type of
25 civil damages are involved. I think voters will

1 that it tells voters that you have an
2 affirmative defense if you provide the Attorney
3 General all facts that are known to you, but it
4 doesn't say prior to being in charge, and I
5 think that's important because it leaves the
6 impression amongst a voter who probably doesn't
7 understand what an affirmative defense actually
8 means, although that's a defense to the charge
9 itself, that as long as they come clean, they
10 don't need to worry about this.

11 In fact, the fact that it has to
12 happen before, I think, is an essential element
13 of this measure. The title is unclear as to --
14 and misleading in the sense it does not define
15 who an executive official is. A common
16 definition of "Executive" that you would find in
17 the dictionary would refer to somebody who is an
18 administrative or managerial, some type of
19 supervisory authority, when, in fact, this case
20 and this measure deals with a much more narrow
21 group of executives and executive officials, and
22 I think that will be misleading to the voter and
23 I think they will be surprised to know that it
24 doesn't apply to a supervisor or particular
25 executives of companies, as the concept or term

1 be surprised to know they're punitive damages.
2 It's unclear what compensatory damages these
3 governmental entities will suffer as a result of
4 these, and I think voters will be surprised to
5 learn that these actions will actually result in
6 competition between governmental entities and
7 truly injured parties for legitimate claims.

8 In other words, a governmental
9 entity that may have filed a case first may get
10 a judgment which could either, A, bankrupt a
11 company or an executive official or, B, they
12 will get damages collected before a private
13 party that was injured, or limit that ability to
14 collect damages.

15 The title is unclear, confusing, and
16 misleading because it refers to the fact that a
17 successful plaintiff gets the fees, which
18 obviously encourages frivolous cases, whereas a
19 successful defendant does not. It doesn't
20 specify what happens, in fact, to the successful
21 business or executive official.

22 In fact, this creates an uneven
23 playing field that voters aren't aware of. It's
24 misleading in that context, and that should have
25 been addressed. It's misleading in the context

1 "Executive" would suggest, and I think that's a
2 fundamental problem as well.

3 I think the failure to include the
4 mention of the exemption of damages when it
5 applies to this many potential governmental
6 entities is an essential problem with this
7 measure, and I think it also is confusing in the
8 term of whether or not the government needs to
9 be a party to a lawsuit, and let me tell you why
10 I think that's important and it's confusing in
11 terms of how this works together.

12 You have parties who bring a lawsuit
13 on behalf of a government. They are then going
14 to potentially enter into settlement
15 negotiations with the defendant without the
16 knowledge, consent of a governmental entity? I
17 think that's truly problematic, and then,
18 finally, I think, to the extent it talks about
19 bringing -- the title talks about bringing -- or
20 the measure talks about bringing civil action
21 for such criminal conduct in the concept -- it
22 says, "Allowing an award of damages in a civil
23 action to the governmental entity that imposes
24 the civil duty" is misleading to the extent they
25 talk about those damages for such criminal

1 conduct, which it does in the line above that.
2 The problem is this: This goes
3 beyond criminal conduct. We are
4 criminalizing -- we are actually
5 criminalizing -- new conduct. That is a
6 byproduct of this measure. It is not criminal
7 conduct to violate a health standard, by way of
8 example, but under this measure, it is, and it
9 misleads the voter into believing a much more
10 narrow structure of this measure as it pertains
11 to civil measures, which is not accurate, so in
12 view of that, you know, we ask that this measure
13 be stricken and returned, and I'm happy to take
14 any questions or I'll leave it there.

15 I know you've been fully briefed on
16 this from prior discussions on this in the
17 related measures, so I appreciate your time.

18 CHAIRMAN HOBBS: Questions for
19 Mr. Friednash?

20 I guess not. Thank you very much.

21 MR. FRIEDNASH: Thank you. I
22 appreciate it.

23 CHAIRMAN HOBBS: Mr. Grueskin, would
24 you like to respond?

25 MR. GRUESKIN: Thank you,

1 Mr. Chairman. My name is Mark Grueskin. I'm
2 with Isaacson, Rosenbaum and I represent the
3 proponents. I think what you've heard is a very
4 thoughtful and forceful discussion of the
5 political arguments that will surface during the
6 campaign, if there is one on this, but primarily
7 the arguments you've heard are policy-based
8 arguments that suggest that this isn't the way
9 to go.

10 Well, that may be true. It may not
11 be, but that's not really, as you know, the
12 Board's issue. The motion itself has a fair
13 amount of political rhetoric in it, talking
14 about racists in the courthouse and the fact
15 that there are going to be undocumented aliens
16 bringing you lawsuits all over the state of
17 Colorado.

18 Some of the arguments that you've
19 heard are retreads of arguments you've already
20 heard and I'm not going to spend a lot of time
21 on them, but I do think we ought to talk about
22 what the motion appears to be saying about the
23 title, since that's really this Board's concern.

24 As I said, the argument about
25 whether or not the single-subject statement is

1 correct is one that's been discussed before.
2 I'm not going to go there with you now. The
3 question is asked: Where does the money go?
4 Where do the damages go?

5 But, frankly, this is a statute.
6 It's not a constitutional amendment. It doesn't
7 have to spell out everything, and the General
8 Assembly can certainly supplement if it's
9 required, but that doesn't go to the ballot
10 title and, frankly, if the measure doesn't say
11 it, then the ballot title doesn't have to
12 project it.

13 I'm going to skip a couple of issues
14 and talk about the suggestion that there be a
15 definition of an executive official. I don't
16 really share Mr. Friednash's concern that
17 somehow "Executive Official" is a commonly
18 understood term that has an exceedingly narrow
19 application.

20 He may be right, but I also don't
21 think this is a central feature of the measure,
22 that being the particular individuals who may be
23 subject to this measure. Now, frankly, if the
24 Board wants to include a definition of
25 "Executive Official," I'm fine with that, but I

1 don't think that it is probably all that central
2 and, to the extent that it is a phrase that will
3 give people cause to read further, they can
4 certainly do that.

5 I think this Board generally is
6 reluctant just to say that a measure defines a
7 term and not provide a lot of detail. The
8 question of whether or not there ought to be
9 some reference to the Tabor aspects, the
10 exemption from revenue and spending limits,
11 because there's a great number of government
12 entities, I'm not really sure why that's
13 relevant to the extent that the question is
14 whether or not there will be any significant
15 number of lawsuits and whether they will be
16 successful and whether there will be damages and
17 whether, then, that would be apportioned out
18 among a wide variety of public entities are all
19 preconditions to worrying about Tabor, and so I
20 think the Board has correctly decided that issue
21 in the past.

22 Mr. Friednash asks whether or not
23 government needs to be a party to a lawsuit and
24 how are you going to have settlement discussions
25 without the government in the room? And it,

1 frankly, seems to me that may be something the
2 proponents could have and, in Mr. Friednash's
3 view, should have addressed, but they didn't,
4 and the question is whether or not the title
5 reflects what they did address, so inserting
6 that kind of conjecture into the title would be
7 inappropriate.

8 There has often been a discussion of
9 whether or not you are criminalizing civil
10 responsibilities, and I come back to the base
11 statute which talks about whether or not a
12 person or an entity is guilty of an offense.
13 I'm just having the toughest time understanding
14 how you can take that phraseology and say that
15 it applies to civil duties or fiduciary duties
16 or anything of the sort.

17 I don't think there's going to be
18 voter surprise coming back to this
19 single-subject argument. This issue about the
20 damages to the federal government, I suppose, is
21 interesting, albeit to the extent that this
22 initiative built off existing state statute.

23 Existing state statute talks about
24 being guilty of particular offenses and there's
25 no suggestion in current law that somehow

1 one, and we certainly have no problem including
2 that language here.

3 Again, I think that the reference to
4 damages is clear, but I think that the fact that
5 there are compensatory or punitive damages and
6 to the extent that that is specifically couched
7 in disjunctive rather than the conjunctive
8 probably makes it worthwhile for the Title Board
9 to include, and it doesn't lengthen the title by
10 any significant amount and allows, frankly --
11 let me be candid about this.

12 Obviously much of the position that
13 happens in front of you is the position in front
14 of the Supreme Court. Let's take away one of
15 the arguments that there's something wrong with
16 the title by including three more words. The
17 discussion of whether or not the affirmative
18 defense should be specific, that all information
19 has to be divulged prior to charging, I don't
20 see that subelement of the affirmative defense,
21 which is a subelement of the criminal piece of
22 this, which is, you know, frankly, a subelement
23 of the whole, to be a central feature, but I
24 know that you sit and revise more titles than
25 I've ever been involved in and I would leave

1 federal laws are incorporated in a state statute
2 that provides for the existing criminal revenue,
3 and so it seems, to me, to be, as I say, a
4 political argument and maybe an interesting one
5 but not something that the Title Board needs to
6 concern itself with.

7 In terms of the payment of
8 attorneys' fees, well, there's nothing in here
9 that undoes or countermands or in any way
10 undermines Rule 11 or the existing statute on
11 frivolous lawsuits, and so I know the argument
12 has been made publicly about how defendants
13 won't be able to recoup their legal fees for
14 frivolous lawsuits, but there's nothing in here
15 that particularly -- or excuse me --
16 specifically prohibits them from pursuing the
17 remedies they currently have.

18 If there was, then that should be in
19 the title, but because there isn't, I don't see
20 how you get to where Mr. Friednash is. Now, he
21 raises two issues and, you know, I'd like to
22 think of myself as a generally reasonable
23 person. I'd suggest to you that the point that
24 he raises about compensatory and punitive
25 damages is one that is probably a reasonable

1 that to you.

2 We don't have any objection to it.
3 I don't know that it's pivotal, but, again, in
4 terms of removing quivers from Mr. Blake's --
5 arrows from Mr. Blake's quiver, I'm all for
6 that, so if that's something the Board feels is
7 important, I'm fine with that. I don't think
8 that there are any other, frankly, major
9 arguments that are raised here. I'd be happy to
10 respond to any that you've seen that I've failed
11 to highlight.

12 CHAIRMAN HOBBS: Mr. Domenico?

13 MR. DOMENICO: I think I've already
14 expressed, you know, my concern about this
15 structure both extending liability to
16 individuals and extending this
17 private right of action of a sort, so I don't
18 need to get back into that, but I do have two
19 questions.

20 One, I think I agree with you that
21 this doesn't criminalize civil conduct, but I
22 just want to make sure we're all in agreement on
23 why that is because it is a little bit
24 confusing. The way it's written in the new 1.5
25 says, "An executive official is guilty of an

1 offense if the conduct constituting the offense
2 consists of an omission to discharge a specific
3 duty," et cetera, "imposed on the business
4 entity by law," and the confusion there is, if
5 you just read that, there's multiple use of
6 "Offense," right?

7 And in 1.5, it says, "Is guilty of
8 an offense if the conduct constituting the
9 offense consists of an omission to discharge a
10 specific duty." Reading just that, it seems to
11 me, Mr. Friednash's reading is plausible in that
12 this is creating an offense if you omitted to
13 discharge a specific duty or affirmative
14 performance imposed on the business entity by
15 law.

16 The only way to read it the way you
17 are suggesting to read it, which is that it
18 already basically has to be an offense, is to
19 read sort of the second offense in 1.5 as
20 referring back to Section 1, right, that the
21 executive official is guilty of his own offense
22 only if the business has engaged in conduct that
23 consists of an offense under Subsection 1; is
24 that right?

25 MR. GRUESKIN: That's correct.

1 the suing would have to show damage themselves,
2 the typical standing-type inquiry, and I'm just
3 curious how you see this fitting in, because if,
4 in fact, it's neither of those -- it's some new
5 type of suit -- then I do see a problem, a
6 standing problem, that you've created a new type
7 of standing that is kind of a big deal.

8 Maybe it's really just a
9 constitutional problem and not our problem, if
10 you try to create a new standing, but I'm just
11 curious how you see the private right of action
12 actually working.

13 MR. GRUESKIN: Well, I'd defer to
14 the eloquence of the Attorney General in his
15 recent brief to the Colorado Supreme Court on a
16 predecessor measure where he argued that this
17 was more of the quitam variety and that it was
18 entirely consistent with that manner of lawsuit,
19 albeit not a carbon copy, and that this is a
20 mechanism that is known, accepted, and
21 understood in terms of vindication of public
22 rights by private citizens, and so it seems to
23 me that I would not be accurate if I said to you
24 that it was anything but that, that it was -- as
25 I think I said, it's not a carbon copy but it is

1 MR. DOMENICO: All right. So my
2 second question, then, is I really don't
3 understand how this private suit is supposed to
4 work. There's two kinds of private rights of
5 action outside of tort law, as far as I
6 understand. There's sort of quitam stuff where
7 an individual sues on behalf of the government,
8 where there's damage to the government entity
9 and an individual is authorized to sue, and then
10 there's some kind of splitting up of the money
11 they get.

12 Then there's others where there's
13 kind of a statutory duty created and, if a
14 defendant has violated that duty, there's a
15 debate sometimes if it's not clearly stated
16 where individuals who are harmed by the failure
17 to live up to that duty have the right to sue or
18 they don't and, in this case, there's kind of a
19 missing step.

20 It doesn't -- it's not a quitam
21 where -- or it's not clearly that -- where any
22 individual has the right to sue if they discover
23 damage to the government, but it's also not
24 clear to me that this would be a more typical
25 private right of action where the person doing

1 very much in that mold.

2 MR. DOMENICO: Okay, thanks.

3 CHAIRMAN HOBBS: Any questions of
4 Mr. Grueskin?

5 Thank you very much.

6 Mr. Friednash, do you have any --

7 MR. FRIEDNASH: Just real briefly.

8 CHAIRMAN HOBBS: Okay.

9 MR. FRIEDNASH: First, with respect
10 to -- Mr. Grueskin pointed out that, you know,
11 the measure could just simply say -- that the
12 title could just simply say that -- create a
13 definition of "Executive Official." This
14 doesn't say that. In terms of criminalizing a
15 civil statute, you know, I would tell you that I
16 would read closely 1.5, paragraph 5-A, and then
17 what's the point of the statute in the context
18 of 18.1607 if you're not creating new offenses,
19 first of all?

20 Second, the ability to collect
21 damages is based on these violations of these
22 new governmental duties and I think, assuming
23 he's right, that it's not intended to create new
24 offenses. This thing's confusing at best, but I
25 think, much differently, this is a little

1 different than the prior version you read in 57
2 because they've carved out a very specific
3 subsection dealing with executive officials and
4 what constitutes, you know, a violation of that
5 duty, and I think it applies to all governmental
6 regulations on every level imaginable, and
7 that's just what it does, and, otherwise, why
8 are you collecting damages based on that, and
9 what's the point of the statute if I'm wrong?

10 With respect to the payment of
11 attorneys' fees, having a one-sided view of
12 this, I think permitting individuals to bring a
13 civil action, to be awarded attorneys' fees and
14 costs and not stating in the same sentence that,
15 you know, that no such right exists for
16 defendant, a successful defendant, is a problem
17 and it doesn't paint the clear picture of what
18 this does, and, again, if we're just relying on
19 Rule 11, we don't need to put that in there at
20 all. Otherwise it creates a very uneven playing
21 field, Rule 11 or the frivolous and groundless
22 fixation statute in Title 13.

23 MR. DOMENICO: Well, obviously the
24 measure creates an uneven playing field.

25 MR. FRIEDNASH: Absolutely.

1 think there is a step missing, and I think it is
2 confusing and misleading, and obviously I think
3 it will risk constitutional considerations, and
4 it's nice to sit here consistently and be able
5 to say, you know, "That's not our job," but, you
6 know, ultimately, people deal with it.

7 I understand what the rules are of
8 the game, but I think it's part of the
9 confusing, misleading nature of this. Thank
10 you.

11 CHAIRMAN HOBBS: Thank you.
12 Discussion by the Board?

13 MR. DOMENICO: Well, I've already,
14 you know, I think, voted against this the first
15 time, because I really do think that there are
16 two subjects here creating this new type of
17 civil action and then also making individuals
18 liable where previously only businesses were. I
19 don't think the title statement of the subject
20 gives much hint about what's going on and, you
21 know, the fact that this is a weird, hybrid sort
22 of quitam feeds into that a little bit, that
23 it's not the sort of thing that is generally
24 going to be -- is generally going to be
25 understood as contained within the concept of

1 MR. DOMENICO: But shouldn't the
2 title reflect the uneven playing field?

3 MR. FRIEDNASH: I think, absolutely,
4 it should. I think officials and businesses and
5 primarily the voters should know that they don't
6 get, while they're at risk for punitive and
7 compensatory damages, they don't have a right to
8 recover their fees in defending this case
9 successfully, and I think that's a problem, and,
10 also, in terms of the quitam, I need to
11 investigate this further, but I'm pretty certain
12 that, when you bring a quitam action, that the
13 United States Attorney has the first right to
14 kind of co-op that case, and I will research it
15 further and you may want to as well, but I'm not
16 certain a quitam case involves -- and one of the
17 attorneys in my office has done a lot of this,
18 has handled a lot of these cases -- but I'm
19 pretty sure that when quitam -- you have the
20 person who is complaining of the quitam, who is
21 affected by it, and then I think the U.S.
22 Attorney has a right to step in -- it might even
23 be the Colorado Attorney General as well -- has
24 a right to step in and kind of take over that
25 case, so it is a different type of animal, and I

1 liability for criminal conduct by business
2 entities.

3 It's really something else, and
4 obviously it's related to that concept, but I
5 think it's really sort of surprising and, unless
6 you raise the level of generality of the subject
7 really high, which is what we've done here, in
8 which case, you could fit almost anything under
9 it, I think it's too distinct, too surprising,
10 too much of a risk, that people will say, "Well,
11 yeah, I'd like to hold executives liable when
12 the businesses that they run violate the law,
13 but do I also want to start creating this
14 entirely new form of lawsuit to deal with it?"

15 And that's something that seems, to
16 me, really, voters should be given a choice
17 between the two. Most of the rest of the
18 arguments I don't think I'm persuaded by. I do
19 think the title could be improved a little bit,
20 but I'm still where I was and, the more I think
21 about the form of the private cause of action,
22 the more, frankly, I'm confused by it and the
23 more convinced I am that, if you're going to do
24 something like that, it's got to be pretty clear
25 that that's what's going on and can't be tacked

1 onto something else like this, so I would grant
2 the motion on that basis.

3 CHAIRMAN HOBBS: Mr. Cartin?

4 MR. CARTIN: Thank you,

5 Mr. Chairman, and, again, I appreciate the
6 arguments and the discussions put forth by
7 Mr. Friednash and Mr. Grueskin here. Briefly --
8 and perhaps I'm repeating myself somewhat from
9 prior hearings on this measure and similar
10 measures -- I think that I'd acknowledge that
11 there may be a couple of purposes, a couple of
12 main purposes in this measure, one being
13 imposing criminal liability on an executive
14 official for actions of a business entity, and I
15 go back, way back, to the fact that I think
16 we're dealing with a statute, 18.1606, that, as
17 currently stands, is a different type of
18 criminal statute, but I think that the amendment
19 that is made to that statute in 73 is consistent
20 with the language in 1.5, is consistent with
21 I-A, and that there's congruity there and I
22 think that a Court would interpret it that way.

23 I think the second main purpose may
24 be to give a civil cause of action against
25 executive officials or the business entity, and

1 In fact, the disclosure must occur prior to
2 being charged. The title is silent as to this
3 provision and would mislead voters into
4 believing that they could disclose information
5 at any time and not be subject to liability."

6 I don't think adding that particular
7 disclosure to the title is necessary. I don't
8 think that the fact that the title currently
9 doesn't contain the provision that damage awards
10 are paid to the governmental entity and then
11 exempt from revenue spending limits is
12 necessarily a component that should be included
13 in this particular ballot title.

14 Mr. Friednash argues that "The title
15 fails to define who falls within the purview of
16 Executive Official," and, again, based on some
17 of the discussion here, I don't think the title
18 necessarily needs to address that particular
19 point, and I guess I would be open to talking
20 about amending the title language with the three
21 words that Mr. Grueskin has posited here in the
22 clause talking about award of civil damages,
23 allowing award of compensatory and punitive
24 damages in a civil action.

25 I think the fact that it says,

1 I think Mr. Domenico has ably stated his
2 concerns with that, perhaps being a separate
3 subject, but I feel as though those two purposes
4 are interrelated, that the imposition of
5 criminal liability and the civil action -- that
6 they're not incongruous, and I don't see any
7 hidden or surreptitiousness arising from those
8 particular provisions, and so I would still
9 adhere to my initial position that this measure
10 contains a single subject.

11 As far as the title goes, just,
12 again, very briefly, addressing some of
13 Mr. Friednash's points, I don't think that the
14 fact that the ballot title does not currently
15 define a governmental entity is fatal to the
16 title, given the relevant precedent that we have
17 to rely on, and I think I kind of agree with
18 Mr. Grueskin's points in response to this
19 particular argument.

20 I think the fact that the title is
21 silent as to -- well, Mr. Friednash argues that
22 "The measure misleads the voter into believing
23 that a party can disclose all facts known to him
24 or her to the Attorney General at any time in
25 order to utilize this as an affirmative defense.

1 "Allowing an award of damages in a civil
2 action," the noninclusion of "compensatory
3 punitive damages," again, I'm not sold that that
4 is misleading. Otherwise, it is necessary to
5 the title. And then my final point, again, to
6 the title -- and I think Mr. Friednash argued
7 that the language permitting an individual who
8 brings a successful civil action to be awarded
9 attorneys' fees and costs doesn't disclose that,
10 if the other side prevails, they don't get their
11 fees and costs.

12 I think that was basically your
13 argument, that that should be included in the
14 title, that type of disclosure, and, again, I'm
15 just -- I don't feel that's a necessary
16 component of the title language and so I would
17 be open to granting the motion to the extent of
18 adding or modifying the title language but not
19 as to the single-subject issue.

20 CHAIRMAN HOBBS: Well, I'll briefly
21 summarize my position: I do still think that
22 the measure is a single subject. I think what
23 it is about is business liability, or
24 accountability of businesses for misconduct,
25 criminal misconduct, I believe, and I think the

1 expression of a single subject in the title,
2 although we certainly have wrestled with it
3 quite a bit, but I think it's a fair expression
4 of a single subject in describing it as
5 liability for criminal conduct by business
6 entities, you know, and I recognize that there's
7 two different means by which the measure
8 proposes to address liability by a business
9 entity, and one is extending liability to
10 executive officials and the other is to provide
11 for a private right of action, but it seems to
12 me that a measure can have multiple ways of
13 addressing a subject and it just doesn't strike
14 me that those means are separate and distinct
15 purposes that have no connection to each other.

16 I think that a number of the issues
17 raised in the motion for rehearing concerning
18 either surprising provisions of the measure or
19 unclear provisions of the measure, assuming that
20 that's true, I don't think they go to
21 single-subject issues.

22 I think, you know, even if -- and
23 using attorneys' fees as an example -- that may
24 be a surprising policy choice. It may be an
25 unequal treatment of litigants. I believe we've

1 MR. DOMENICO: I'm sure it's futile,
2 but just to respond a little bit, obviously the
3 two things that are going on are not unrelated.
4 They are tied together by the same motivation
5 and the same basic purpose. I completely
6 acknowledge that, but the closest case that I
7 can think of is the public trust case.

8 I mean, in that case, clearly
9 everything that was going on was pointed in the
10 same direction, served all the same purpose, but
11 the Supreme Court said, "No, this public trust
12 thing, while it's related clearly to what you're
13 trying to do here, is a separate subject that is
14 sort of not clear from everything else you're
15 doing," wouldn't strike someone when they hear,
16 "Hey, there's a measure on the ballot about, in
17 this case, liability for criminal conduct by
18 business entities."

19 In this case, there the Supreme
20 Court threw it out because there was this
21 public-trust doctrine hidden inside the measure.
22 Here we're creating a novel, new form of private
23 right of action that may be essentially or very
24 similar to quitam, but this is really something
25 new that has no real direct precedent in the law

1 seen measures like that before. I think Tabor
2 may be an example of that, but to me it's a
3 policy choice and it's a surprising policy
4 choice.

5 It does not make the measure
6 surreptitious or in violation of the
7 single-subject rule, and I feel pretty much the
8 same way about provisions that may be unclear,
9 or arguably, for example, I believe the
10 definition of "Executive official," for example,
11 in the event it's not uncommon for measures to
12 have unanswered questions -- and, again, I don't
13 look at those normally as single-subject issues
14 unless a measure is so unclear that we're unable
15 to determine what it is about, and I don't think
16 this measure rises to that level, so as I said,
17 I still believe the measure is a single subject.

18 I'm certainly open to amending the
19 title to -- in the manner that Mr. Grueskin
20 suggested, but other than that, I would probably
21 vote to deny the motion for rehearing with that
22 one exception, that one exception being the
23 change to the title.

24 MR. DOMENICO: Can I just --

25 CHAIRMAN HOBBS: Mr. Domenico.

1 and it's not clear from the title or the measure
2 itself exactly how that will work, and to me
3 that's very similar, in fact, goes beyond the
4 public-trust doctrine.

5 I voted in favor of that measure,
6 and maybe I would vote in favor of this one if
7 the Supreme Court hadn't come out that way, but
8 I really think that, just because these are
9 related to each other and just because they
10 serve the purpose of trying to punish criminal
11 conduct by business entities doesn't resolve the
12 single-subject question.

13 I think we have to go a little bit
14 beyond that, and so I'm still not convinced, and
15 that's the concern I have. I'm not going to
16 make a motion, though, unless I've won everybody
17 over, so . . .

18 CHAIRMAN HOBBS: And I do appreciate
19 what you have to say. I think you've
20 legitimately raised and described an issue, and
21 I don't mean to imply that it's open and shut.
22 I think the Public Rights in Water case is one
23 of the best to always go back to.

24 I think, in my mind, a couple of
25 things that I use to not reach the same result

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1 is it seems to me the Public Rights in Water
2 case involve a broader subject, a very broad
3 subject, and I think the Court was saying, just
4 because everything fits under that broad
5 subject, that doesn't mean there's not a
6 violation of single subject.
7 Here I think there may be a
8 difference of opinion. I think you could view,
9 if the topic here is business liability, that
10 could be an awfully broad subject, but, on the
11 other hand, it's just a single, statutory
12 section of many thousands, and I take the view
13 that is a narrower subject than --
14 MR. DOMENICO: Sorry to interrupt.
15 CHAIRMAN HOBBS: No, that's all
16 right.
17 MR. DOMENICO: But that's only
18 because it incorporates by reference every other
19 part of the law that imposes a criminal
20 liability on a business. I mean, it really
21 reaches quite a bit.
22 CHAIRMAN HOBBS: And I think that's
23 a fair comment. I do think that, you know, the
24 fact that there is a novel right of action
25 that's created here is something that needs to

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1 be taken seriously. I come out on that
2 believing that it's just -- that it's important
3 that the title clearly identify and make sure
4 that the voters are aware of that in the title.
5 I don't come out from that issue
6 thinking that it's a single-subject violation,
7 but I don't know. It's just two different ways
8 of looking at a difficult issue, I think. If
9 there's no other discussion, I guess -- well,
10 let's see if there's support for changing the
11 title as suggested by Mr. Grueskin.
12 Mr. Cartin?
13 MR. CARTIN: I think, procedurally,
14 I'm not sure what the next step is, but if it
15 would be appropriate -- perhaps Cesi could
16 answer it -- the amendment that Mr. Grueskin has
17 proposed, and we could either vote on that
18 particular amendment or vote on the entire
19 motion.
20 CHAIRMAN HOBBS: I guess my
21 suggestion might be just to go ahead and move a
22 change to the title and, if it's adopted, then I
23 think a subsequent motion would be to grant the
24 Motion for Hearing to the extent the Board has
25 amended the titles and deny the motion in all

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1 other respects, if that works.
2 MR. CARTIN: And I would move that
3 change.
4 MR. DOMENICO: I have a slight
5 variation on it if you want it.
6 CHAIRMAN HOBBS: Okay.
7 MR. DOMENICO: It actually is just
8 adding something.
9 CHAIRMAN HOBBS: On the same issue?
10 MR. DOMENICO: On the same basic
11 issue, yeah.
12 CHAIRMAN HOBBS: Okay.
13 Did you make a motion yet?
14 MR. CARTIN: I just did, but it
15 wasn't seconded so I'll withdraw that motion for
16 purposes of discussion.
17 CHAIRMAN HOBBS: Now there is a
18 suggestion by Mr. Cartin to insert the words
19 "Compensatory or punitive" before the word
20 "Damages" on Line 7.
21 Mr. Domenico?
22 MR. DOMENICO: My suggestion is to
23 leave that as suggested by Mr. Cartin but to
24 clarify what's going on a little bit, I think,
25 in the previous line -- I guess it's actually on

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1 Line 5 on the screen -- would be, after "Bring,"
2 insert "A civil" and delete "An," and then
3 delete "For civil damages" that's now on Line 6.
4 I think that is closer to the actual way the
5 measure reads and may resolve -- I'd delete
6 "Damages."
7 MS. GOMEZ: Delete "Damages"?
8 MR. DOMENICO: Yeah. I think that's
9 pretty close to what the measure says, and I
10 don't think it ever references "Civil damages."
11 It references "Civil action" and then
12 "Compensatory or punitive damages," so with
13 those two changes, I think it's a pretty good
14 reflection of what's going on.
15 CHAIRMAN HOBBS: I like that. I
16 think that clause then refers to allowing a
17 civil action and the next clause then says that
18 it -- that it follows up on that, that it's
19 allowing an award of damages in the civil
20 action, so I think they work together well.
21 Is there any comment from proponent
22 or proponents?
23 MR. GRUESKIN: I think it's fine. I
24 think it's a good change.
25 CHAIRMAN HOBBS: I will go ahead

1 and --
 2 Well, Mr. Cartin, do you want to
 3 move that?
 4 MR. CARTIN: Sure, I'll move both of
 5 those changes.
 6 CHAIRMAN HOBBS: I'll second that.
 7 Any further discussion? If not, all
 8 those in favor say, "Aye."
 9 MR. DOMENICO: Aye.
 10 CHAIRMAN HOBBS: Aye.
 11 MR. CARTIN: Aye.
 12 CHAIRMAN HOBBS: All those opposed,
 13 "No."
 14 That motion carries, three to zero.
 15 Any other motions?
 16 MR. CARTIN: Mr. Chairman, I would
 17 move to -- I'll give this a shot -- I would move
 18 to grant the motion for rehearing to the extent
 19 changes have been made to the ballot title and
 20 to deny the motion in all other respects.
 21 CHAIRMAN HOBBS: And I'll second
 22 that.
 23 Any further discussion? If not, all
 24 those in favor say, "Aye."
 25 MR. CARTIN: Aye.

1
 2 CERTIFICATION
 3
 4 I, Mary S. Parker, Registered
 5 Professional Reporter, Registered Merit
 6 Reporter, and Certified Realtime Reporter,
 7 certify that the above proceedings were had;
 8 then reduced to typewritten form, by means of
 9 computer-aided transcription.
 10 I further certify that I am not
 11 related to any party herein or their counsel and
 12 have no interest in the result of this matter.
 13 IN WITNESS WHEREOF, I have hereunto
 14 set my hand and seal.
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 17 _____
 18 Mary S. Parker
 19 Registered Professional Reporter
 20 Registered Merit Reporter
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 22
 23
 24
 25

1 CHAIRMAN HOBBS: Aye.
 2 All those opposed, "No."
 3 MR. DOMENICO: No.
 4 CHAIRMAN HOBBS: That motion
 5 carries, two to one. That completes action on
 6 No. 73. The time is 2:28 p.m.
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INITIATIVE TITLE SETTING REVIEW BOARD
Wednesday, April 2, 2008
Secretary of State's Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado

2007-2008 #74
Liability of Business Entities and Their
Executive Officials - Criminal Liability

William A. Hobbs, Deputy Secretary of State
Daniel D. Domenico, Solicitor General
Daniel L. Cartin, Deputy Director of the Office
of Legislative Legal Services
Maurice G. Knaizer, Deputy Attorney General
Cesi Gomez, Secretary of State's Office

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Page 2

1 WHEREUPON, the following proceedings
2 were taken:
3 CHAIRMAN HOBBS: The next agenda
4 item is 2007-2008, No. 74, Liability of Business
5 Entities and Their Executive Officials -
6 Criminal Liability. This is on a Motion for
7 Rehearing.
8 Mr. Friednash, if you would like to
9 present the Motion for Rehearing.
10 MR. FRIEDNASH: Yeah, real briefly,
11 with respect to my comments on the last one and
12 pertaining to the criminal portion of this, I
13 really would just re-incorporate that and rely
14 on the motion itself. I don't think we need
15 much discussion on this one. The challenge is
16 basically that the title is misleading,
17 confusing, and unclear.
18 I would say -- note that the aspect
19 of the actual subject is much different in this
20 than what we saw in 73 and 57, and my concerns
21 over -- greater concerns were not just about
22 extending the aspect of liability. With that,
23 unless there's any questions, I'll stop there.
24 CHAIRMAN HOBBS: I don't think so,
25 although I guess my role versus Mr. Domenico's

Page 3

1 are kind of opposite here, whereas I think I was
2 a "No" vote last time, but I believe my concern
3 was that the title did not clearly express the
4 single subject, but, in any event, I don't think
5 you're raising it as an issue, as far as I
6 recall.
7 I think you're satisfied with that
8 expression of the single subject. You disagree
9 with respect to the fact that it is a single
10 subject?
11 MR. FRIEDNASH: Yeah, I thought we
12 did raise that. I need to go back through the
13 motion.
14 CHAIRMAN HOBBS: Okay.
15 MR. FRIEDNASH: But I thought we did
16 raise that, and perhaps I didn't.
17 CHAIRMAN HOBBS: Well, no, I think
18 you did, now that I see it, page 2, the first
19 full paragraph. I think that, when you say,
20 "The first single-subject statement is different
21 from what was accepted in 57 and 73" --
22 MR. FRIEDNASH: Right.
23 CHAIRMAN HOBBS: So I think you have
24 implied that.
25 MR. FRIEDNASH: Right.

Page 4

1 CHAIRMAN HOBBS: Okay, any questions
2 for Mr. Friednash?
3 Thank you.
4 MR. FRIEDNASH: Thank you.
5 CHAIRMAN HOBBS: Mr. Grueskin, would
6 you like to respond to the motion for rehearing?
7 MR. GRUESKIN: I have no comment.
8 CHAIRMAN HOBBS: Okay, no comments
9 from Mr. Grueskin.
10 MR. GRUESKIN: I've said it all.
11 CHAIRMAN HOBBS: You don't have
12 anyone else signed up to testify?
13 Discussion by the Board?
14 MR. DOMENICO: I think this was one
15 that sort of was a compromise between various
16 positions and I would have preferred, I think,
17 that we get rid of that "In connection
18 therewith" language in this one because I just
19 think it would be clearer. That said, I don't
20 think it's misleading.
21 I think it does state the single
22 subject and I share some of the concerns that
23 the petition or the motion raised about implying
24 that it's already existing law that executive
25 officials have liability, but I don't think I

Page 5

1 agree that it necessarily implies that. I think
2 it's clear enough, so I'm still content with it,
3 if not -- even though I think it could be
4 pretty --
5 CHAIRMAN HOBBS: You know, I think
6 it's, although I probably would still grant the
7 motion for rehearing on the issue of the
8 expression of a single subject, it's a
9 relatively minor point, especially with this
10 particular measure, and I think, Mr. Domenico,
11 you're correct.
12 I think this is kind of a
13 compromise. I don't think it's misleading. I
14 don't want to imply that. I'm more concerned
15 about the possible precedent for future
16 measures, where we don't state -- don't clearly
17 express the single subject as a subject, and I
18 don't know that I'm articulating that very well,
19 but when we start to describe what a measure
20 does, instead of what it is, what it is about,
21 then that starts to concern me as a matter of
22 precedent, and this particular measure -- I
23 think it's not misleading.
24 I'm just concerned about where that
25 leads us, so I'm probably still on the other

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1 side of that, but, again, it's not a huge issue
2 for me.
3 Any other discussion? Is there a
4 motion?
5 MR. CARTIN: I move to deny the
6 Motion for Rehearing on Proposed Initiative
7 2007-2008 No. 74.
8 MR. DOMENICO: I second the motion.
9 CHAIRMAN HOBBS: If there's no other
10 discussion, all those in favor say, "Aye."
11 MR. DOMENICO: Aye.
12 CHAIRMAN HOBBS: Aye.
13 MR. CARTIN: Aye.
14 CHAIRMAN HOBBS: All those opposed,
15 "No."
16 No.
17 That motion carries two to one.
18 That concludes the action on No. 74. The time
19 is 2:34 p.m.
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Page 7

1
2 CERTIFICATION
3
4 I, Mary S. Parker, Registered
5 Professional Reporter, Registered Merit
6 Reporter, and Certified Realtime Reporter,
7 certify that the above proceedings were had;
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12 have no interest in the result of this matter.
13 IN WITNESS WHEREOF, I have hereunto
14 set my hand and seal.
15
16
17 _____
18 Mary S. Parker
19 Registered Professional Reporter
20 Registered Merit Reporter
21 Certified Realtime Reporter
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23
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25

3 (Pages 6 to 7)