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SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue, Suite 400 Denver, CO 80203	FILED IN THE SUPREME COURT APR 29 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #73 ("Criminal Conduct by Businesses – Liability") **Petitioner:** JOSEPH B. BLAKE, Objector, v. **Respondents:** JOANNE KING and LARRY ELLINGSON, Proponents, And **Title Board:** WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO.	**▲COURT USE ONLY▲**
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RESPONDENTS' OPENING BRIEF	

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STATEMENT OF ISSUES PRESENTED

1. Whether the Title Board correctly found that an initiative that extends liability for criminal conduct of business entities comprises a single subject.
2. Whether the Title Board adequately conveyed the essential concepts of the criminal and civil liability for executive officials and civil liability of the business entity to voters in the title set.
3. Whether the Title Board's use of the phrase "criminal conduct" is a political catch phrase that taints voter understanding of this measure.

STATEMENT OF THE CASE

Joanne King and Larry Ellingson (hereafter "Proponents") proposed an initiative to extend civil liability to business entities and their executive officials for the failure to perform duties imposed by law. This proposal was denominated as Initiatives 2007-08 #73.

This measure was considered by the offices of Legislative Council and Legislative Legal Services and submitted to the Secretary of State for title setting. The Title Board established titles for each measure on March 19, 2008.

The Denver Metro Chamber of Commerce and Joe Blake (hereafter "Blake") objected to the title set by the Title Board, and a rehearing was held on April 2, 2008. The Board denied the motion, and this appeal followed.

STATEMENT OF FACTS PRESENTED

Initiative 2007-08 #73 addresses criminal and civil liability for criminal wrongdoing by a business entity that fails to perform duties imposed by law. The proposed initiative extends criminal and civil liability to the executive officials of a business entity and civil liability to the entity itself. The initiative permits persons residing in Colorado to sue for compensatory or punitive damages to be paid to the governmental entity that imposed the duty. An affirmative defense is provided for executive officials who, prior to being charged, state to the attorney general all related facts of which they are aware.

The Title Board set the following title:

> 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.

SUMMARY OF ARGUMENT

Blake finds ten (10) different subjects in #73. He cited at least nine (9) inaccuracies in the ballot tile and one (1) catch phrase. Blake's petition for review before this Court did not narrow the issues. It only alluded to broad brush single subject and misleading title objections.

The Board's decision was appropriate in light of what the measure does – and does not – say. Blake's appeal should be dismissed.

LEGAL ARGUMENT

I. Legal standard of review.

In reviewing an action of the Board, this Court liberally construes the requirements for initiatives in order to facilitate the constitutional right of initiative. In re Amend TABOR 32, 908 P.2d 125, 129 (Colo. 1995). All legitimate presumptions must be resolved in favor of the Board. In re Proposed Initiative on Education Tax Refund, 823 P.2d 1353, 1355 (Colo. 1991). An initiative title will only be invalidated in a clear case. Id.

As such, the scope of this Court's review of Title Board actions is limited. The Court will not address the merits, nor interpret the language, nor seek to predict the application of a proposed initiative. Neither will it reverse the actions of the Title Board if improvements could be made to an otherwise legally sufficient

title. In re School Pilot Program, 874 P.2d 1066, 1070 (Colo. 1994). Finally, the Board is not required to describe every nuance and feature of the proposed measure. In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1124 (Colo. 1984).

The goal of the title setting process is "to ensure that persons reviewing the initiative petition and voters are fairly advised of the import of the proposed amendment." In re Proposed Initiative on "Trespass - Streams with Flowing Water," 910 P.2d 21, 23 (Colo. 1996). Only where the titles and submission clause are clearly vague, misleading, or confusing will a decision of the Title Board be overturned. In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito, 873 P.2d 733, 739-40 (Colo. 1994).

II. Initiative #73 contains a single subject.

A. Parameters of the single subject analysis.

Article V, sec. 1(5.5) of the Colorado Constitution requires that "[n]o measure shall be proposed by petition containing more than one subject." The Court has clearly set forth the tests for evaluating an initiative's compliance with the single subject requirement. In order to violate this requirement, a proposed ballot measure must: (1) relate to more than one subject; and (2) have at least two distinct and separate purposes which are not dependent upon or connected with

each other. In re Initiative for "Public Rights in Waters II," 898 P.2d 1076, 1078-79 (Colo. 1995).

In applying this test, the Court will assess whether the initiative tends to effectuate "one general objective or purpose" (in which case it presents only one subject) or whether it "addresses subjects that have no necessary or proper connection to one another" (in which case it will be disallowed as containing more than one subject). In re Initiative for 1999-2000 #25, 974 P.2d 458, 463 (Colo. 1999).

Further, a ballot measure encompasses a single subject, even if it includes "provisions that are not wholly integral to the basic idea of a proposed initiative." Amend TABOR 32, supra, 908 P.2d at 129. Thus, the fact that one or more of these provisions might stand alone as another initiative or that the measure itself is comprehensive or multi-faceted does not automatically make any aspect of the proposal a separate and distinct subject.

The Court analyzes whether implementation provisions tend "to effect or to carry out" the "one general object or purpose of the initiative." In re "Public Rights in Water II", 898 P.2d 1076, 1079 (Colo. 1995). Where details are "directly tied" to a proposal's "central focus," the Court will not find that a separate subject exists. In re Initiative for 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000).

B. Blake's challenges.

Blake objects to the following as separate subjects within the measure:

1. New claims may be brought against a business entity and its executive officials;

2. New crimes created from violations of civil duties;

3. No traditional standing requirement is set forth in initiative;

4. Measure does not define "government entity;"

5. Measure does not specify how and to what entities damages are allocated;

6. Measure does not specify whether damages are available if no specific law is violated;

7. Measure does not specify how to apportion damages where parallel laws are violated;

8. New sources of revenue are created for government;

9. New sources of revenue are exempt from TABOR; and

10. Measure's affirmative defense requires full disclosure if it is to be effective.

Blake's counsel confuses the single subject analysis with a political campaign on the merits of the measure. The putative subjects are really questions

about or political attacks on the measure. They are not distinct purposes that need to be advanced as independent initiatives. "In determining whether a proposed initiative comports with the single subject requirement, '[w]e do not address the merits of a proposed initiative, nor do we interpret its language or predict its application if adopted by the electorate.'" In re Initiative for 1997-1998 No. 64, 960 P.2d 1192, 1197 (Colo. 1998), quoting In re Initiative for an Amendment Adding Section 2 to Article VII (Petitions), 907 P.2d 586, 590 (Colo. 1995). Blake exceeds the degree to which the Court ought to entertain creativity in the nature of single subject objections by an initiative's opponents. "Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. *Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.*" In re Initiative for 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998) (emphasis added).

Put simply, Blake's litany of provisions does not reflect a combination of multiple subjects. Proponents are not bound by objectors' view of what provisions should have been included in the measure. To the same degree, the Board was not bound by Blake's proposal to treat the measure as if minutiae really did represent

separate subjects. The goal of this measure is to create an enforcement scheme so that businesses and their executives are motivated to perform all duties imposed by law. Extending that liability in a measure such as this one is a single subject. See, e.g., In re Initiative for 2005-2006 #73, 135 P.3d 736 (Colo. 2006) (upheld Title Board's single subject finding for pay-to-play measure that was to be enforced by lawsuits and remedies of invalidating elections and requiring refunds of revenue collected due to such elections); In re Initiative for 1997-98 #113, 962 P.2d 970, 971-72 (Colo. 1998) (per curiam) (no single subject violation in proposed initiative to limit pollution from hog farms that specified implementation measures and reporting requirements; In re Proposed Initiative "Petitions", 907 P.2d 586, 591 (Colo. 1995) (proposed initiative establishing rules governing petitions did not violate the single subject requirement because it set forth detailed procedures and authorized citizen lawsuits to ensure compliance).

The single subject requirement must be applied to initiatives in the same manner the General Assembly applies it to proposed legislation. § 1-40-106.5(3), C.R.S.. The comprehensive remedies and procedures in an enacted statute has not offended the constitutional requirement that the General Assembly comply with a

single subject requirement.[1] The legislature and the people would be frustrated in the exercise of their legislative prerogatives, should Blake's argument be granted here. And since the people's reserved power to legislate is actually the greater of the two legislative powers provided in the Constitution, Colo. Const., art V, sec. 1, it would be particularly anomalous to begin to draw a line here because a statute provided for civil and criminal remedies.

Blake's reliance on In re Initiative 2005-06 #55, 138 P.3d 273 (Colo. 2006), does not affect these conclusions. #55 does not stand for the proposition that measures of broad impact or general applicability offend the single subject requirement. There, the measure restricted the provision of "non-emergency services" to certain persons in the state of Colorado. Of concern to this Court was

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[1] See, e.g, Goldberg v. Musim, 427 P.2d 698, 704 (Colo. 1967), upholding the following legislative bill title as comprising a single subject:

> "AN ACT TO PROMOTE PUBLIC MORALS, BY ABOLISHING CIVIL CAUSE OF ACTION FOR BREACH OF PROMISE TO MARRY, ALIENATION OF AFFECTIONS, CRIMINAL CONVERSATION, AND CERTAIN CAUSES OF ACTION FOR SEDUCTION, PROHIBITING THE BRINGING, PROSECUTION OR SETTLEMENT OF ANY SUCH ACTIONS, ESTABLISHING LIMITATIONS THEREON, REGULATING THE PROCEDURE IN SUCH ACTIONS AND IN ACTIONS AND PROCEEDINGS FOR DIVORCE, SEPARATE MAINTENANCE, ANNULMENT OF MARRIAGE, AND FOR CUSTODY OR SUPPORT OF CHILDREN, PRESCRIBING PENALTIES FOR THE VIOLATION OF THIS ACT."

the very real possibility that voters would not understand that the services targeted by the amendment went beyond non-emergency medical or social services. In failing to define "services" – the key term in the entire initiative – proponents of that measure intended to and did craft a measure that contained "the additional purpose of restricting access to unrelated administrative services." Id. at 282. In their own campaign materials, the proponents admitted they had both of these purposes in crafting the measure in the way that they did. Id. at 280-81. The Court found that the multiple levels on which the measure could be understood and applied would constitute a surprise to many votes and thus found it to violate the single subject requirement.

No such infirmity springs from failing to define "government entity," "resident," or any other term in this measure. This initiative contains no "facial vagueness" that "makes it impossible for a voter to be informed as to the consequences of his or her vote." Id. at 282. Thus, #55 does not mandate a reversal of the Title Board's decision.

C. Creation of a new revenue source and exemption from spending and revenue limits are not separate subjects.

Blake also suggests that allocating damages to government entities and exempting such revenue from spending limits comprise a single subject. This revenue stream could not be created without the measure's substantive provisions.

Likewise, it would be odd for voters to de-Bruce a non-existent revenue source as a single measure. Blake's interpretation would compound the TABOR quagmire for initiatives and legislation in ways that were never anticipated by the adoption of the single subject requirement. Provisions such as this one are necessary elements of virtually all post-TABOR measures that create revenue streams for government.

D. Blake's contention that tortuous acts and civil wrongs will be treated as "crimes" is unfounded and does not reflect a single subject concern.

Blake claimed before the Title Board that the duties covered by the initiative included those imposed by common law and corporate law, rather than just by the criminal laws.

This claim ignores the clear language of the statute. Section 18-1-606, C.R.S., currently creates liability for "offenses" where a business entity or agent is found to be "guilty." Initiative #73 retains this wording and thus applies to duties, the nonperformance of which would be treated by law as criminal acts.[2]

Further, Blake's assertion is just that. It calls for a level of interpretation of "duties imposed by law" that is a step beyond the inquiry given to a single subject claim. The title setting process is not one where projected interpretations of the

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[2] Ironically, Objectors complain both that the title contains a catch phrase in referring to "criminal conduct" and that, here, such reference is accurate but incomplete.

measure may be entertained. In re Proposed Initiative 1999-2000 #104, 987 P.2d 249, 254 (Colo. 2000). Given that Blake's interpretation departs from the express wording of existing law and the specific wording of the initiative, it is not a legal basis for preventing this measure from proceeding to the next phase of the initiative process.

III. The title is clear and accurate.

A. The Title Board did not err by refusing to catalog potential effects of the measure in the title.

Blake argued before the Board that the title was incomplete for failure to refer to:

1. coverage of executive officials in the initial clause of the ballot title;
2. assertion that new substantive crimes are created;
3. absence of a definition of "resident";
4. absence of a definition of "civil damages";
5. payor of attorneys fees;
6. damages are paid to a government entity;
7. revenue is exempt from TABOR;
8. type of damages that could be assessed (compensatory and punitive);
9. the definition of "executive officials"; and

10. the affirmative defense requires full disclosure before charges are brought.

See Motion for Rehearing at 8-10.

The various elements that Blake claims should be inserted are addressed by the ballot title: when viewed as a whole (coverage of executive officials and type of damages available); as a matter of conjecture (new substantive crimes and liability for violations of duties imposed by federal law and traditionally civil duties); not specified in the measure (definitions of "civil damages," "resident," and "government entity") or not central elements of this measure (full definition of "executive officials," TABOR exemption, requirement in affirmative defense of disclosure to Attorney General, payment of damages, payor of legal fees). The proposed ballot title would be a wordy exercise, so much so that it would run headlong the requirement that the Board be concise in titling a measure. § 1-40-106(3)(b), C.R.S. The title is intended to be a "relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters" rather than "an item-by item paraphrase of the proposed constitutional amendment or statutory provision." In re Proposed Initiative 1997-98 No. 62, 961 P.2d 1077, 1082 (Colo. 1998). A title need only provide voters with an overview of the "central features" of an initiative, In re Amendment to Article XVI, Section 6,

Colorado Constitution, Entitled "W.A.T.E.R.", 875 P.2d 861, 864-65 (Colo. 1994), and it need not set forth each and every nuance and subtlety of a measure. In re Proposed Initiative Designated Governmental Business, 875 P.2d 871, 878 (Colo. 1994). Given these standards, the Board did not err in setting this title.

B. "Criminal conduct" is not a catch phrase.

Blake claims that the ballot title impermissibly contains a catch phrase, "criminal conduct."

Title 18 of the Colorado Revised Statutes sets forth crimes under state law. It is replete with elements, circumstances, definitions, and punishments applicable to such crimes. The specific statute that this initiative would amend, § 18-1-606, C.R.S., refers to "conduct" that is undertaken by a business entity or its executive officials, including its high managerial executive officials. Under current law, when such "conduct" becomes an "offense" for which a business or agent may be "guilty," § 18-1-606(1), C.R.S., the criminal laws are triggered. Id. This initiative merely extends the liability for that conduct, which now applies only to business entities, to executive officials working for those entities. It also allows businesses and executive officials to be civilly liable for their criminal acts, the very same acts that could be addressed under the state's criminal laws. Given that, how else could the Title Board have accurately described this measure without referring to

"criminal conduct"? Had the Board omitted such a reference, Blake would likely have argued that the title was misleading since the voting public was not informed as to the true basis for this measure.

In any event, "criminal conduct" is not the type of political slogan of which this Court has been wary. "'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." In re Initiative 1999-2000 # 258(A), 4 P.3d 1094, 1100 (Colo. 2000). As noted above, "criminal conduct" is a description of the initiative, similar to "concerning the management of growth," which the Court found to be "a neutral phrase, with none of the hallmarks that have characterized catch phrases in the past." In re Proposed Initiative 1999-2000 #256, 12 P.3d 246, 257 (Colo. 2000). It is certainly no more inflammatory than "protect the environment and human health" which does not rise to the level of a catch phrase. #112, 962 P.2d at 256.

The mere assertion by Blake that "criminal conduct" is a politically loaded phrase does not satisfy his burden for this claim to be sustained. Blake was required to adduce some evidence that this phrase is something other than merely

descriptive of the proposal. #256, 12 P.3d at 257. Having failed to do so, this claim cannot be the basis for a successful appeal to this Court.

CONCLUSION

Blake used the proverbial shotgun at the Title Board. He did not provide Proponents with any narrowing of those issues in filing this appeal. The Board properly performed its duty, and that conclusion should be affirmed as quickly as possible by this Court.

Respectfully submitted this 29th day of April, 2008.

ISAACSON ROSENBAUM P.C.

By: _____
Mark G. Grueskin

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

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

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