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SUPREME COURT OF COLORADO
2 East 14th Avenue 4th Floor
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #73

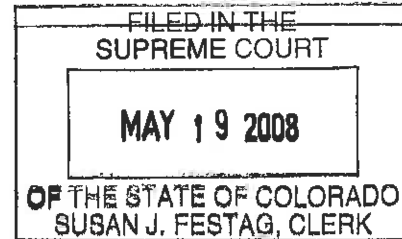
Petitioner:
JOSEPH B. BLAKE,
Objector,

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 ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD

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Joseph B. Blake, a registered elector of the State of Colorado, by and through his attorneys, Fairfield and Woods, P.C., hereby files this Answer Brief to the Title Board's Opening Brief concerning Proposed Initiative 2007-2008 #73 ("Criminal Conduct by Businesses – Liability") (hereinafter "Initiative"). The statement of the issues, statement of the case, statement of the facts, and summary of the arguments are set forth in Petitioner's Opening Brief.

ARGUMENT

I. THE INITIATIVE CONTAINS MULTIPLE SUBJECTS

The Title Board casts a wide net in a irremediable attempt to group the multiple subjects of the Initiative under one overly broad and elastic theme: "establishing the scope of liability for criminal conduct by business entities" (Opening Brief, pp. 3, 5). This effort must fail, because "[g]rouping 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).

Proposed Initiative 2007-2008 #73 ("Criminal Conduct by Businesses-Liability") filed by Respondents, proposes an expansion of criminal and civil liability

for businesses and a newly created class of persons known as "executive officials".[1]

In an ostensible attempt to avoid the multiple subjects created by this Initiative, Respondents also filed Proposed Initiative 2007-2008 #74 ("Liability of Business Entities and Their Executive Officials-**Criminal Liability**"), and Proposed Initiative 2007-2008 #75 ("Liability of Business Entities and Their Executive Officials – **Civil Liability**").

The Title Board aptly recognizes that this Court may engage in an inquiry into the meaning of terms within a proposed measure in order to review whether the measure violates the single subject requirement. *See* Opening Brief, p. 4.

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

In re the Matter of the Title, Ballot Title, Submission Clause, and Summary

[1] Respondents also filed Proposed Initiative 2007-2008 #57, which contained similar provisions.

Adopted April 5, 1995, by the Title Board Pertaining to Proposed Initiative "Public Rights in Waters II, 898 P.2d 1076 (Colo. 1995) considered an initiative that sought to add a "strong public trust doctrine regarding Colorado waters, that water conservancy and water districts hold elections to change their boundaries or discontinue their existence, that the districts also hold elections for directors and that there be dedication of water right use to the public." *See id.* at 1077. The Court held that the initiative violated the single subject provision because there was no connection between the two district election requirements paragraphs and the two public trust water rights paragraphs. The Court observed:

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

Id. at 1080.

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

this Court in *Water Rights II.*

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

A. The Initiative provides for the extension of criminal liability to a new class of persons.

The Initiative *extends* criminal liability under Colo. Rev. Stat. §18-1-606 to a new class of persons: executive officials. The Initiative defines "executive officials" to mean any natural person who is an officer, director, managing partner, managing member, or sole proprietor of a business entity.

B. The Initiative creates a limitless number of new crimes.

The Initiative creates an incomputable number 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 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,

Colo. Rev. Stat. §18-1-606(1.5). The damages section of the measure makes it clear that this applies to any specific duty imposed by law by "any governmental entity." Initiative, Colo. Rev. Stat. §18-1-606(5)(b). In other words, any violation of any statute, ordinance, regulation, health standard, etc., would constitute a criminal offense under the statute.

Given its ordinary meaning, "governmental entity" would 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.[2] Each of these governmental entities pass laws, ordinances, regulations and other standards. This would include, by way of example only, violations of the following regulations: Worker's Comp. (7 Colo. Code Regs. § 1101); State Board of

[2] The term "governmental entity" is not defined by the Initiative. 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. ("[w]e must examine the proposal sufficiently to enable review of the Title Board's action."); *In re Title, Ballot Title and Submission Cause 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."

Health Colorado Retail Food Establishment Rules and Regulation (6 Colo. Code. Regs. § 1010-2); and Occupational Safety and Health Standards.

The plain language of the title criminalizes the failure "to discharge a specific duty of affirmative performance imposed on the business entity by law." "Duties that are required by law" also include civil duties, which are torts when breached. *See* 7 COPRAC § 10.36 (comparing torts, which arise from duties imposed by law, to contractual obligations, which arise from the parties' mutual promises). By way of example, typical business torts might include the breach of a corporation's duty to maintain certain records, *see* C.R.S. § 7-116-101; a corporation's duty to maintain records for inspection by shareholders, *see* C.R.S. § 7-116-102; and a corporation's duty to provide annual reports to the secretary of state, *see* C.R.S. § 7-116-107(5).

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

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

C. In addition to extending criminal liability to executive officials and creating an uncountable number of new crimes, the measure creates a novel form of civil liability allowing any person living in Colorado to sue a business entity or executive official for punitive and compensatory damages.

Allowing anyone residing in Colorado to bring civil claims for relief on behalf of any governmental entity, who then receives the damages, is unrelated to the extension and expansion of criminal liability.

Contrary to the Title Board's claim, the measure does not "merely authorize *qui tam* enforcement." (Opening Brief, p. 8). The Initiative is substantially different than the False Claims Act, 31 U.S.C. §§3729-3733 (the "Act"). The 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. 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 investigates the allegations of the False Claim Act and may intervene in one or more counts of the pending qui tam action and even move to

dismiss the Complaint.

Here, 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 initiates the action openly and publicly, litigates the matter, and can eventually even settle the matter without the governmental entity's knowledge or consent. Further, unlike any other action, the resident can seek compensatory and punitive damages on behalf of the governmental entity. The measure further encourages litigation by providing attorney fees only to a successful plaintiff, but not the successful defendant.

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

as here, the resident was not even injured by the alleged conduct.

The Title Board offers two non-Colorado state cases to buttress its argument that a civil remedy is not a separate subject in a criminal statute. Neither case applies Colorado law. Each one considers the application of an enacted law, rather than whether an initiative to be presented to the voters contains more than one subject. Thus, neither is dispositive or even particularly instructive in this situation.

The Title Board relies on *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344 (1999), for the proposition that private rights of action are not additional subjects in an initiative that extends criminal liability to businesses. *Oja* is a New York state case and so it is not precedential in a Colorado case. *Oja* considered whether plaintiffs had met the case law-established elements for an implied private right of action, where a seventeen year old died as a result of fraternity hazing involving alcohol. *Id.* at 346.

Oja went through a three-prong test, set forth in *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 325, 451 N.E.2d 459, 464 N.Y.S.2d 712, (N.Y. 1983), to determine that there was an implied private right of action under the anti-hazing statute. The plaintiffs had to prove that the victim was a person for whom the law had been enacted, that the legislative purpose was to deter

dangerous hazing activities, and that "the existence of laws governing the imposition of civil liability in connection with the furnishing of alcoholic beverages inhibits recognition of a private cause of action based upon the anti-hazing statute, particularly where, as here, the acts decried go beyond just supplying the alcoholic beverages." *Id.* at 346. On its face, the application of this test shows that the anti-hazing statute did not provide for a private right of action and that it was a subject separate from the underlying statute.

The Board also mentions a California state case, *Animal Legal Defense Fund v. Mendes*, 160 Cal. App. 4th 136 (2008) (setting forth three that alleged violations of criminal law can result in civil actions), for the proposition that attachment of civil penalties to criminal laws is not unusual. *See* Opening Brief at pp.7–8. *Animal Legal Defense Fund* considered whether under some circumstances, a governmental or quasi-governmental agency can sue to enjoin further breaches of the statute on a public nuisance or related theory. *Id.* at 556. The court refused to apply a private right of action to a California state animal cruelty statute because there was no clear legislative intent that this was the goal of the law. *See id.* at 556–57.

Here, the issue is the consideration of an Initiative to be placed before the voters on the ballot. 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 executive officials.

The Initiative has similar flaws to the initiative considered in *Waters Rights II*. The Initiative extends criminal liability to executive officials, expands the type of conduct that constitutes criminal liability, allows civil actions based on the criminal acts to be brought by any resident, provides damages 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*.

II. THE TITLE IS UNFAIR, UNCLEAR AND INACCURATE

The title fails to inform the voter that the measure does much more than merely extend criminal liability to executive officials. The Initiative is unfair, unclear, and inaccurate as it fails to specify the type of affirmative duties that will subject an executive official to criminal liability, to-wit: any specific duty imposed by law by any governmental entity. This is a fatal defect and the Title Board's

excuse that the Initiative does not create new offenses lacks merit.

The title fails to define who falls within the purview of "executive official". Indeed, an executive official does not include an agent or high managerial agent as defined by the current statute. An executive is generally understood to include a supervisor or manager; however, under this measure it would not include a person of that level of authority. This is also confusing and misleading to the voter or signer of the petition. Clearly, the title would suggest that the Initiative is much more far reaching than it truly is. This is a significant and material provision that must be included in the title. Indeed, according to the Title Board, the very nature of this Initiative is to extend liability to this class of persons, yet the title fails to identify what persons actually constitute this class.

The title fails to inform the voters that in order to avail himself of the affirmative defense, he must make his full disclosure to the attorney general <u>prior to being charged</u>. *See* Proposed C.R.S. § 18-1-606(4) (emphasis added); *see also*, Title ll. 9–11.

In addition, the title does not reveal that the measure provides <u>complete</u> affirmative defense 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. Clearly, voters will be surprised to learn that by voting for this Initiative, the Initiative will have the complete opposite effect than that which is being advanced by its proponents. In other words, voters will be surprised to learn that this measure exonerate businesses and executive officials as long as they win the race to the attorney general's office prior to being charged.

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.

In *In re Title, Ballot Title and Submission Clause & Summary for 1999-2000 #258(A),* 4 P.3d 1094 (Colo. 2000), the titles were materially defective for failure to include a key feature of the initiative which resulted in misleading and confusing the voters. The title board failed to articulate in the titles that school districts and schools cannot be required to offer bilingual programs. Voters could assume that parents of

non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program, and thus, favor the proposal as assuring both programs.

"It is well established that the use of catch phrase or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *Id. at* 1100; *In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995). This rule recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion. *Id.*; *see also, In Re Ballot Title 1999-2000 # 215,* 3 P.3d 11, 14 (Colo. 2000) (allowing the term "open mining" as sufficiently clear because defined by statute).

Respectfully submitted this 19th day of May, 2008.

FAIRFIELD AND WOODS, P.C.

By: ______________________
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of May 2008, a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD** was hand delivered to the following:

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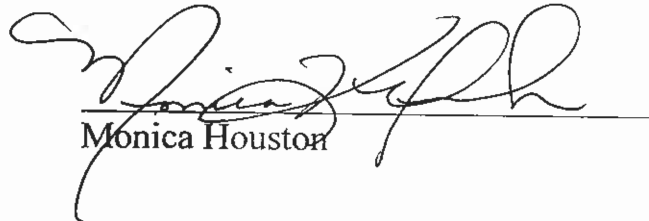

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