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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, #75

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. 08SA119

PETITIONER'S ANSWER BRIEF TO RESPONDENTS' OPENING BRIEF

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On behalf of 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 Respondents' Opening Brief concerning Proposed Initiative 2007-2008 #75 ("Liability of Business Entities and Their Executive Officials – Civil Liability") ("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. RESPONDENTS' ATTEMPT TO ALLEVIATE THIS PROBLEM BY FILING SEPARATE INITIATIVES TO ADDRESS THE CRIMINAL AND CIVIL LIABILITY PROVISIONS FAILED TO FIX THIS PROBLEM.[1]

Proposed Initiative 2007-2008 #73 ("Criminal Conduct by Businesses-Liability") ("#73"), filed by Respondents, proposed an expansion of criminal and civil liability for businesses and a newly created class of persons known as "executive officials".[2] In an ostensible attempt to avoid the multiple subjects created therein, Respondents filed Proposed Initiative 2007-2008 #74 ("Liability of Business Entities

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[1] Petitioner relies on the legal standards portion of its Opening Brief to the extent it sets forth the basic framework for the legal standards that apply in reviewing the Title Board's decision.

[2] Respondents also filed Proposed Initiative 2007-2008 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities"), which contained

and Their Executive Officials – Criminal Liability"), and Proposed Initiative 2007-2008 #75 ("Liability of Business Entities and Their Executive Officials – Civil Liability"). Despite Respondents attempt to fix the single subject problems created in #73, the Initiative still contains multiple, unrelated subjects in violation of Colo. Const. art. V, Sec. 1(5.5) and Colo. Rev. Stat. Sec. 1-40-106.5.

Initiative 75 groups multiple provisions under a broad concept of liability, which relate to more than one subject and have at least two distinct and separate purposes that are not dependent upon or connected to each other. *See In re Initiative #55, supra,* 138 P.3d at 277. The staff draft of the title of the Initiative portrays this measure as civil liability for criminal conduct by business entities. Indeed, the Initiative, even in the civil context, does much more than that.

Noticeably absent in the Respondents' single subject analysis, is any reference to the "get-out-of-jail free card" that is created for criminal offenses under this new civil liability scheme.[3] Voters will be surprised to learn that they are not just voting for a

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similar provisions.

[3] The Initiative allows any Colorado resident to bring an action against any business entity or its executive officials for conduct that violates Colo. Rev. Stat. § 18-1-606(1)(a) *or* against the business entity's executive officials where such officials knew of the specific duty to be performed as required by law and knew that the business entity failed to perform that duty. The Initiative eliminates the need for the plaintiff to have suffered any harm from the defendant's actions or failures to act.

new form of civil liability.

The Initiative also creates a new concept of defense for criminal actions: it provides a "complete affirmative defense" for any executive official who, **prior to being charged in a criminal action under C.R.S. § 18-1-606(1)(a)** or this civil action, notifies the attorney general of all facts of which it is aware concerning the business entity's conduct. Specifically, subsection (4) of the Initiative provides:

> It shall be a complete affirmative defense for any executive official who is a defendant in an action filed under subsection (1) of this section that, prior to filing of such civil action **or any criminal charges under section 18-1-606(1)(a),** he or she reported to the office of the Attorney General all facts of which he or she reported to the Attorney General all facts of which he or she was aware of concerning the business entity's conduct that met the criteria set forth in Section 18-1-606(1)(a).

(Emphasis supplied).

The Initiative concerns establishing a private right of action for conduct that falls within the purview of Colo. Rev. Stat. § 18-1-606(1)(a) or against executive officials of a business in circumstances in which the officials knew of the duty to be performed and the business entity failed to perform that duty. Therefore, the inclusion of the "complete affirmative defense" to criminal liability is clearly a separate subject, unrelated to the civil component.

This is an extraordinary departure from the longstanding doctrine of standing.

In addition to the foregoing, the Initiative creates a unique statutory scheme that violates the single subject requirement. First, the Initiative provides a private right of action against businesses and executive officials for conduct that falls within the purview of the existing criminal statute (Colo. Rev. Stat. § 18-1-606(1)(a)). Generally, to establish standing to sue, the plaintiff must show (1) an injury in fact (2) to a legally protected interest. *See Wimberly v. Ettenberg*, 194 Colo. 163, 570 P.2d 535 (1977). The Initiative is distinguishable from traditional private rights of action in allowing a person to bring an action without requiring any injury to arise from the allegedly wrongful conduct of the business, its employees, or agents. *Cf. Coors v. Security Life of Denver Co.*, 91 P.3d 393, 398 (Colo. App. 2003) (citing Colo. Rev. Stat. § 6-1-101 *et. seq.*).

The Initiative provides that a new class of persons known as "executive officials", who unlike businesses, are not covered by the criminal statute, may also be sued by anyone living in Colorado. This class of persons is different than the "agents" who already fall within the purview of Colo. Rev. Stat. § 18-1-606.

Next, the Initiative does not merely provide for damages, but requires that the damages do not necessarily go to the injured person, but rather to the governmental entity, which is not defined by the Initiative. Compensatory or punitive damages may

be awarded to any governmental entity[4] that imposed by law the specific duty to be performed by the business entity.

Finally, once received by the governmental entity, if the governmental entity is subject to TABOR, they are exempt from TABOR's provisions. Each of these are separate and distinct subjects from merely imposing a unique form of civil liability.

This Initiative is dissimilar from the cases relied upon by the Respondents. *In re Initiative for 2005-2006 #73*, 135 P.3d 736 (Colo. 2006), this Court concluded that the enforcement provision was directly tied to the initiative's purpose of eliminating pay-to-play contributions and therefore was not a separate subject. *Id.* at 739 (revenues collected must be refunded to taxpayers). This Initiative goes beyond supplying enforcement provisions for the extension of criminal liabilities of business entities to individuals. It applies civil remedies to crimes and actually creates an entirely new category of crimes, and creates an unrelated affirmative defense for criminal actions,

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[4] The Initiative does not define "governmental entity." Governmental entity could 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; any city, county, city and county, town, or other unit of the executive, legislative or judicial branches thereof; any special district, school district, local improvement district, or special taxing district at the state or local levels of government; any enterprise as defined in Section 20 of Article X of the Colorado Constitution; or any other kind of municipal, public, or

which are not at issue.

In *In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000), this Court was asked to determine whether the initiative violated the multiple subject prohibition because there was no reasonable or necessary connection between a woman's right to be informed prior to an abortion and the collection of statistical data of that communication. *See id.* at 29. The Court held that it did not. *Id.* Thus, the various penalties discussed by Respondents were not a part of the single subject challenge. This case should not be relied upon to support the contention that the provision of penalties does not violate the single subject rule.

In re Initiative for 1997-98 #113, 962 P.2d 970 (Colo. 1998), also relied on by Respondents, the court held that the single subject was not violated because the controversy concerned two beneficial effects of the regulation of swine operations—the reduction of both air and water pollution. *Id.* at 971–72. Here, the Initiative also applies to the affirmative defense for criminal liability, and provides for the recovery of civil damages to a criminal statute, and exempts those damages from TABOR. None of these items are necessarily beneficial and each should be debated and voted upon on its own merits.

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quasi-public corporation.

In re the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by the Title Board Pertaining to Proposed Initiative "Public Rights in Waters II, 898 P.2d 1076 (Colo. 1995) ("Water Rights II") 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 *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". *See In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

In re Initiative for 1997-98 #113, 962 P.2d 970, 971–72 (Colo. 1998) stated that "an initiative may be intended to achieve more than one beneficial *effect*, *i.e.*, the reduction of both air and water pollution." *Id.* (Emphasis in the original.) *Initiative #113* concerned the regulation of swine operations. The control of various types of pollution fell under the single subject of that regulation. *See id.*

Here, by contrast, the Initiative is not merely "an enforcement scheme so that businesses and their executive are motivated to perform all duties imposed by law." *See* Respondents' Opening Brief, p. 8. Rather, the Initiative (1) creates new civil liability for criminal conduct by business entities, (2) creates a new right of action that allows anyone living in Colorado to bring an action on behalf of any governmental entity for punitive and compensatory damages, (3) provides that any damages awarded go to the governmental entity are exempt from TABOR, and (4) provides a complete, affirmative defense for civil and criminal charges.

In addition, the title for *Initiative #113* was very specific as to the enforcement scheme that it would impose. *See In re Initiative for 1997-98 #113*, *id.* It specified that the operations "employ technology to minimize odor emissions; requiring

operations to cover waste impoundments. . . recover, incinerate or manage odorous gases . . .establish[] minimum distances between new land waste application sites . . . and [populated areas]." *Id.* Here, the Initiative's enforcement language is so vague as to be meaningless, or at a minimum, to be confusing.

II. THE TITLE IS UNFAIR, UNCLEAR AND INACCURATE.

The Title Board's chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). The Court 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) (stating "we must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated").

This Court "has repeatedly stated it will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions." *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). This Court characterizes proposals to determine unstated purposes and their relationship to the central theme of an initiative. *See id.* Thus, this Court must examine sufficiently the

Initiative to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme. *See id.* at 279.

Eliminating a key feature of the initiative from the titles 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) and *In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

The title provides, "concerning civil liability for criminal conduct by business entities..." The title fails to articulate that the Initiative actually concerns both criminal and civil liability (the affirmative defense applies to civil and criminal liability). This is a fatal defect. Voters will be surprised to learn that by voting for this measure they are providing business entities who commit crimes complete immunity from prosecution so long as they notify the attorney general of all facts they are aware of before being charged.

The title also provides that it allows an executive official who discloses to the attorney general all facts known to the official concerning a business criminal conduct to use that disclosure as an affirmative defense to the civil charges. The title, however,

fails to explain that: (1) it is a complete affirmative defense providing full immunity; and, (2) the notification must occur prior to being charged.

The title 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 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.

While the title provides that the person who brings a successful action is entitled to a recovery of attorney fees, the title fails to disclose that a successful defendant is not also entitled to an award. Voters will be surprised to learn that the Initiative creates an uneven playing field that encourages bringing lawsuits against defendants; whereas, the successful defendant does not have the same claim for attorney fees and costs.

Finally, the title fails to define "executive officials." The Initiative defines an executive official as an officer, director, managing partner, managing member, or sole proprietor of a business entity. The Initiative makes these persons subject to an award of compensatory or punitive damages brought by residents who may not have even been harmed by the alleged wrongful conduct. Since the Initiative seeks to create a private right of action against a new class of persons that are not already defined by statute, it is essential that the title define them accordingly. The term "executive" is typically defined as including a person having administrative or managerial authority in an organization. Thus, voters will also be surprised to learn that the affected group is much smaller than that which the term denotes. This is misleading.

III. "CRIMINAL CONDUCT" IS AN IMPERMISSIBLE CATCH PHRASE.

Despite the fact that the text of the Initiative does not even include the phrase "criminal conduct," Respondents argue that "criminal conduct" is not an impermissible catch phrase in an Initiative that creates a new form of civil liability.

"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)).

Here, the Initiative does not include the words "criminal conduct," using instead "conduct constituting the offense." *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" two times. The words "criminal conduct" are likely to work to the proposal's favor twice without contributing to voter understanding. *See* Title at ll. 1, 6, 10. This is particularly significant in light of the fact that the single subject of this measure concerns civil liability, not criminal liability.

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 Colorado voters 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."

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 RESPONDENTS' OPENING BRIEF** was hand delivered to the following:

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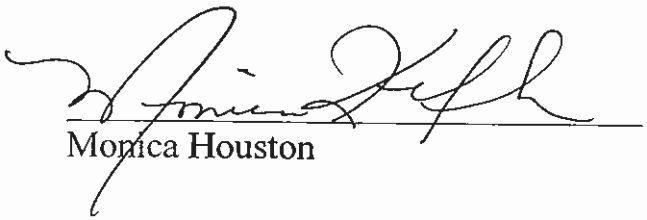

Monica Houston