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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 OPENING BRIEF OF TITLE BOARD

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STATUTES

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 Title Board's 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 UNRELATED TO THE TITLE BOARD'S OWN DESCRIPTION OF THE SINGLE SUBJECT.

According to the Title Board, the single subject of the Initiative is "establishing civil liability for criminal conduct by a business entity" (Opening Brief, p. 3). This characterization is different than the broader description given by the proponents in their Opening Brief. *See* Respondents' Opening Brief, p. 8. In either event, the Initiative clearly does more than the broad civil description given to it by the Title Board.

The Initiative provides a "complete affirmative defense" for criminal actions that goes well beyond the "civil liability" single subject framed by the Title Board. This defense to criminal charges completely defeats the Title Board's claim that the single

subject of the Initiative only affects 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 all facts of which he or she was aware of concerning the business entity's conduct that met the criteria set forth in Section 18-1-202(1)(a).

(Emphasis added.)

The Initiative generally concerns civil liability, not criminal liability. Hence, the inclusion of the "complete affirmative defense" to criminal liability is clearly a separate subject, unrelated to the civil component.

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 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.

The Initiative provides a private right of action against businesses for conduct that falls within the purview of the existing criminal statute (Colo. Rev. Stat. § 18-1-606(1)(a)). 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. 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. These damages consist of compensatory and punitive damages. These are separate and distinct subjects.

Contrary to the Title Board's assertion, the measure does much more than "merely authorize *qui tam* enforcement" (Opening Brief, p. 6). A review of the mechanics of a *qui tam* lawsuit which is brought under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("Act"), shows the two are quite different.

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. Under the Initiative, the person bringing the civil action can only recover his or her attorney fees, with damages going to the State of Colorado.

Unlike the Initiative, 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; or, (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. Here, the government 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, 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.

"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).

In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17, 172 P.3d 871, 873–74 (Colo. 2007) 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.

Similarly, in the seminal *Water Rights II* case, 898 P.2d 1076, 1079-80 (Colo. 1995), this Court held:

> In order to insure that these bodies properly carry out their responsibilities, the measure requires that certain activities are subject to a vote of the people . . .. Elections merely ensure that the people have a more direct voice to ensure policies are implemented.
>
> We find this position unpersuasive.
>
> No necessary connection exists between the two district election requirements paragraphs and the two public trust water rights paragraphs. 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. For these reasons, the Initiative should be rejected as having multiple subjects.

II. THE INITIATIVE 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), supra*, 4 P.3d 1094 at 1098. 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 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); and, *In re Ballot Title 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. THE PHRASE "CRIMINAL CONDUCT" IS AN IMPERMISSIBLE CATCH PHRASE.

According to the Title Board, the single subject of the Initiative concerns the creation of a civil remedy against businesses and executive officials for certain prohibited 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 liability for the violation of any law or regulation, or for the failure to make administrative reports or for negligent acts of the company. The words "criminal conduct" 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" 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 that surface mining project "may scar the land," was fair and accurate because repeated operative language of proposed amendment).

Here, the Initiative does not include the words "criminal conduct." It uses the words "conduct constituting the offense." 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 without contributing to voter understanding. *See* Title at ll. 1, 6, and 10.

The Proponents improperly liken the phrase "criminal conduct" to "concerning the management of growth" used by the proponents of Initiative 256 proposed in connection with Citizen Management of Growth, in the year 2000. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 No. 256*, 12 P.3d 246 (Colo. 2000). In *#256*, this Court concluded that "concerning the management of growth" was a neutral phrase with none of the catch phrase hallmarks. *Id.* at 257 (contrasting phrase with words "as rapidly and effectively as possible" in relation to teaching children English was an improper catch phrase in *In re Ballot Title 1999-2000*

No. 258(A), 4 P.3d 1094, 1100 (Colo. 2000)). "Criminal conduct" is not a neutral phrase. It contains the hallmarks of a catch phrase.

First, the Initiative does not 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" a total of six 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, and 10.

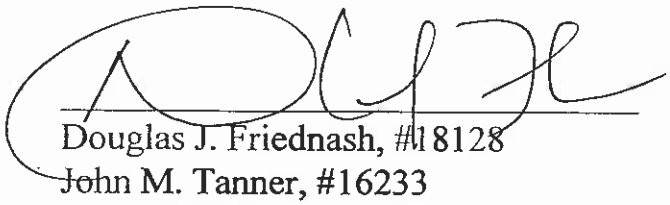
Second, evaluating whether particular words constitute a slogan or catch phrase must be made in the context of contemporary public debate. *Id.* (citing *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993)). Criminal conduct is prominent in the minds of many Colorado voters in the wake of 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), and therefore might be inclined to vote for the Initiative based on this catch phrase.

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."

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.

Respectfully submitted this 19th day of May, 2008.

FAIRFIELD AND WOODS, P.C.



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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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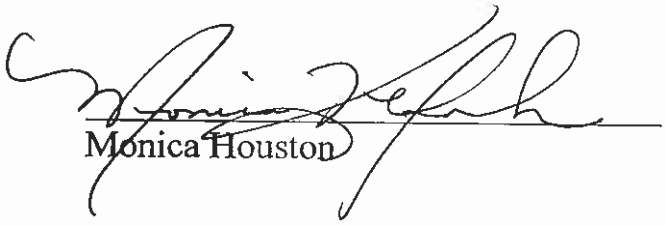

Monica Houston