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<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from Ballot Title Setting Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #73 JOSEPH B. BLAKE, OBJECTOR,  Petitioner,  v.  JOANNE KING AND LARRY ELLINGSON, PROponents; AND WILLIAM A. HOBBS, DANIEL L. CARTIN AND DANIEL DOMENICO, TITLE BOARD,  RESPONDENTS.</p>	<p>Case No.: 08SA118</p>
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<p><b>ANSWER BRIEF OF TITLE BOARD</b></p>	

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William A. Hobbs, Daniel Cartin and Daniel Domenico, members of the Title Board (“Board”), hereby submit their Answer Brief.

The Board incorporates the statements of the issues, statement of the case, statement of the facts, and summary of the argument from its Opening Brief.

## **ARGUMENT**

### **I. The measure contains a single subject.**

The Objector raised the same arguments in his Motion for Rehearing before the Board and in his Opening Brief. The Board responded to these arguments in its Opening Brief. This Answer Brief will not repeat the arguments made in the Board’s Opening Brief.

Objector concedes that extending criminal liability to executive officials is a single subject. (Objector’s Opening Brief, pp. 8, 10). As noted in the Board’s Opening Brief, this is the single subject.

Objector also contends that the measure criminalizes thousands of new crimes. Objector interprets the measure to impose new duties, including compliance with administrative regulations, and new penalties for violations of the new duties. (Objector’s Opening Brief, pp. 10-11.) This argument misreads the measure. Presently, § 18-1-606(1), C.R.S. (2007) states that “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”. This section does not provide a definition of “law” and it does not identify the governmental entities enacting the laws.

#73 would add section (1.5), which states: “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 the business entity failed to perform.” Like section 1, it does not define “law” and it does not identify the governmental entities enacting the laws.

Contrary to Objector’s argument, #73 does not add offenses. It merely extends liability for existing offenses to executive officials of business entities.

Objector also asserts that the measure creates a new form of civil liability that allows anyone living in Colorado to bring an action on behalf of any governmental entity. (Objector’s Opening Brief, pp. 11-14.) The Board addressed this argument at pp. 7-8 of its Opening Brief. Subsequent to the submission of the Opening Briefs, a California Court of Appeals issued a decision discussing a single subject challenge to a law containing both civil and criminal penalties. *People v. Calhoun*, 2008WL1932810 (May 5, 2008) (Cal. App. 5<sup>th</sup> Dist.). A California citizen challenged an initiative that modified California’s law regarding sexually

violent predators. It included criminal provisions, including expanded definitions of sex offenses and an increase in penalties for certain sex offenses. It also contained civil provisions, including a bar against registered offenders living within 2,000 feet of a school or park. The appellate court rejected the challenge, noting that the single subject “rule does not require that the collateral parts of an initiative be equivalent, for example, all civil, all criminal....The only requirement is that the provisions work together to further the initiative’s stated purpose” *Id.* at \*8.

Objector argues that the enforcement provision is not a true *qui tam* action and constitutes a separate subject. Objector argues that the enforcement action must be separate because the government is not involved in any way in the prosecution of the civil action. This argument misses the point. The actions are enforcement actions brought by citizens on behalf of the government. “Mere implementation or enforcement details directly tied to the initiative’s single subject will not, in and of themselves, constitute a separate subject. *In re Title, Ballot Title and Submission Clause and Summary for 2005-2006 #73*, 135 P.2d 736, 738 (Colo. 2006). The means of enforcement and the identity of the enforcers does not alter the character of the provision.

Moreover, Objector's argument assumes that the Federal False Claims Act provides the only template for *qui tam* actions. This assumption is incorrect. A *qui tam* action is generally created by statute, and the procedures governing the prosecution of the action are subject to the procedures set forth in the enabling law. Some *qui tam* laws require significant participation by the government, 31 U.S.C. §§ 3729-3733, while others require no governmental participation, 18 U.S.C. § 962 (private individual may seek forfeiture of vessel which has been illegally armed). *See also*, Colo. const. art. XXVIII, § 9(2)(a) (allows citizens to file a complaint seeking penalties for violating the campaign and political finance laws with no government involvement.)

Objector claims that the measure creates an uneven playing field because it does not authorize an award of attorneys to successful defendants. He also claims that the persons bringing the *qui tam* actions will compete with private citizens for claims against limited assets. (Objector's Opening Brief, p. 14.) These arguments address policy concerns and are not relevant to the single subject analysis.

Objector next contends that the affirmative defense created by the measure applies "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." (Objector's Opening Brief, p. 15). Thus, it entails a separate subject because it immunizes the

perpetrator from both new crimes created by the measure and “previous crimes chargeable under this section.”

Objector’s argument is contrary to the express terms of the measure. The affirmative defense provision (subsection 4) excuses executive officials who would otherwise be liable under section (1.5) of the measure. Section (1.5) is a new section of the law and will not be effective unless the measure passes. Nothing in the language of the measure indicates that it is retrospective. Thus, executive officials will not be held liable for “previous crimes charged under this section”.

## **II. The titles are fair, clear and accurate**

Objector argues that the titles do not fairly and accurately summarize the measure. The Court must reject this argument.

First, Objector asserts that the titles fail “to articulate that the Initiative actually concerns both civil and criminal liability.” (Objector’s Opening Brief, p. 17.) To the contrary, the titles accurately relate the terms of the measure. The titles state that the measure extends “the criminal liability of a business entity to its executive officials.” The titles then state that the measure allows “a Colorado resident to bring a civil action against a business entity or executive official for such criminal conduct” and allows “an award of compensatory or punitive



damages in the civil action to the governmental entity that imposed the specific duty on the business entity.”

Objector criticizes the titles because they do not “state which ‘specific duty of affirmative performance imposed by law,’ and potentially many civil wrongs, fall within the measure.” (Objector’s Opening Brief, p.p. 17-18). The measure does not define the terms or provide the details demanded by Objector. The Board is not usually required to fill the gaps in the substance of the measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 498 (Colo. 2000) (#255).

Objector next asserts that the titles are incomplete because they do not inform the voters that the defendant must make a full disclosure to the attorney general prior to being charged. (Objector’s Opening Brief, p. 18.) The failure to include a statement that the disclosures must be made prior to being charged is not significant in this instance. The timing of the disclosure is a part of the affirmative defense. The important fact is that an executive official may assert an affirmative defense. The voters should know that a business entity or an executive official may have his action excused by reporting the incident. However, the details concerning the elements of an affirmative defense are not significant.

Objector contends that the titles inaccurately identify individuals who can file civil actions. (Objector's Opening Brief, pp. 18019) The measure provides that "any individual residing in Colorado may file a private right of action." The titles state that the measure allows "a Colorado resident to bring a civil action against a business entity." According to Objector, an individual is a natural person, while a resident may be a business entity, a legal alien or an illegal alien.

In support of his argument, Objector cites the definition of "individual" in *Black's Law Dictionary* 777 (7<sup>th</sup> ed. 1999). The definition contradicts his conclusion. The definition of "individual" includes "a single person or *thing*, as opposed to a group." (Emphasis added.) A "thing" is not a natural person. Thus, the commonly-accepted definition of individual includes a natural person who is a citizen, a natural person who is a legal alien, a corporation or any other person or entity residing in the state. The term "Colorado resident" accurately reflects the measure.

Objector also asserts that the titles do not disclose that the measure exempts damages from the limits contained in Colo. Const. art. X, § 20. (Objector's Opening Brief, p. 19.) As noted earlier, the constitution already exempts damages. Therefore, this is not a key feature of the measure.

### **III. The term “criminal conduct” is not a catch phrase.**

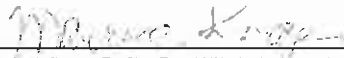
The term “criminal conduct” is a fair and accurate paraphrase of language within the measure. The measure extends criminal liability to executive officials for offenses consisting of an omission to discharge a specific duty of affirmative performance imposed on the business entity by law” when “the executive official knew of the specific duty to be performed and knew that the business entity failed to perform that duty.”

The Court has approved titles containing similar language. #255, 4 P.3d at 501 (“establishing criminal penalties” used in titles for initiative requiring background check at gun shows); *In re Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 320 (Colo. 1994) (titles for campaign finance initiative included the phrase “to provide civil and criminal sanction for violations of the proposed amendment.”) Objector has not provided any evidence that these titles, or similar titles, have created prejudice for or against a measure.

### **CONCLUSION**

For the reasons set forth in this Brief and the Board’s Opening Brief, the Court must affirm the Board’s action.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by Express Mail, postage prepaid, at Denver, Colorado, this 19<sup>th</sup> day of May 2008 addressed as follows:

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