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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,

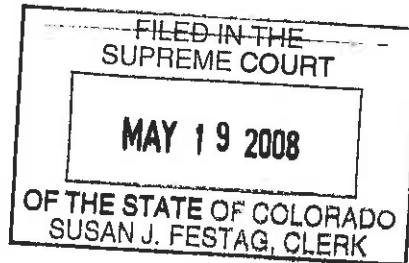
and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
DANIEL DOMENICO.

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Case No. 08SA118

PETITIONER'S ANSWER BRIEF TO RESPONDENTS' OPENING BRIEF

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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 Respondents' Opening Brief concerning Proposed Initiative 2007-2008 #73 ("Criminal Conduct by Businesses – 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

- A. Respondents filed four proposals designed to create, modify and expand existing criminal and civil laws. Two of the initiatives (Nos. 74 and 75) were clearly drafted to escape the obvious single subject problems created by the other two initiatives (Nos. 57 and 73).

In addition to this Initiative, Respondents filed Proposed Initiative 2007-2008 Nos. 57, 73, 74 and 75. Each of these proposed initiatives are variations of the others. The earliest version Proposed Initiative #57 was originally submitted by the Respondents and addressed both the criminal and civil aspects of expanding and extending liability of businesses to all of a business entity's employees. Initiative #73 was filed in order to address the confusion created by #57.

Proposed Initiative Nos. 2007-2008 #74 ("Liability of Business Entities and Their Executive Officials – **Criminal Liability**") and 2007-2008 #75 ("Liability of

Business Entities and Their Executive Officials-Civil Liability”), was designed to partition the criminal and civil aspects contained in #73, into two separate and distinct initiatives (emphasis supplied).

With little exception, Respondents’ Opening Brief is virtually identical to its Opening Brief in Proposed Initiative 2007-2008 No. 75. In fact, despite their substantive differences, a review of Respondents’ Opening Brief in both initiatives (#73 and #75) contain the exact same single subject: “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 Respondents’ Opening Brief #73, p. 8; Respondents’ Opening Brief #75, p. 8.

B. Respondents’ Opening Brief completely ignores the fact that Initiative expands the class of persons affected by the change in the criminal statutory scheme.

Specifically, 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.

C. Despite the plain language of the Initiative, Respondents attempt to assert that the Initiative does not create new crimes.

The Initiative creates an incomputable number of new crimes that this class of individuals can be held criminally liable. Specifically, it provides that 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.¹ 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 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 include civil duties, which, when breached are torts. *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

¹ 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.* (“While we do not determine an initiative’s efficacy, construction, or future application, we 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) (“[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.”).

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.

D. In addition to extending criminal liability to executive officials and creating an uncountable number of new crimes, the measure next creates a novel form of civil liability by anyone living in Colorado on behalf of any governmental entity for punitive and compensatory damages.

The Initiative provides that “any individual residing in Colorado may file a private right of action against any business entity or its executive officials” for conduct violating the Initiative’s provisions, even where the resident has suffered no harm from the action or the inaction. Initiative § 18-1-606(5)(a). Unlike a successful defendant, a successful plaintiff may be awarded attorneys’ fees and costs. Punitive and

compensatory damages are then paid to any governmental entity that imposed by law the specific duty to be performed, free from all spending limitations provided by law. Initiative, § 18-1-606(5)(b), (d) and (e).

E. Respondents ignore the Complete Affirmative Defense providing immunity from criminal and civil prosecution of all claims under the Initiative.

The Initiative provides a “complete affirmative defense” 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. *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 and civil conduct attributable to any executive official is immune from liability as long as after one commits a crime one timely notifies the attorney general prior to being charged. This “get out of jail free card” is a separate and distinct subject because it not only acts to immunize the perpetrator from the new crimes created by the Initiative, but from all previous crimes chargeable under this section.

F. Damages paid to the governmental entity are exempt from TABOR.

Under the Initiative, all damages awarded (other than attorneys’ fees) are paid not to the successful plaintiff, but to the governmental entity that was the “victim” of the conduct. Damages from these civil actions are exempt from all revenue and spending limitations provided by law. A budgetary provision and its exemption from

TABOR, has no “necessary connection” with extension of criminal liability of business entities to individuals. Thus, it is a separate topic from the rest of the Initiative, and one voters should be allowed to decide separately. Voters will be surprised to learn that monies received as damages from the civil action could go to a variety of governmental entities such as the federal government or some local governmental entity.

II. THE TITLE IS UNFAIR, UNCLEAR AND INACCURATE.

Despite the substantial differences, Respondents’ Opening Brief again follows precisely the same verbiage and arguments articulated in their Opening Brief in Proposed Initiative 2007-2008 #75.

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles. Colo. Rev. Stat. § 1-40-106(3)(b). Although a title need not catalog the potential effects of an initiative, it cannot simply not mention or hide its central features. *Cf. In re Amendment to Art. XVI, Sect. 6, Colorado Const., Entitled “W.A.T.E.R.”*, 875 P.2d 861, 864-65 (Colo. 1994). 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); *In re Ballot Title 1997-1998 #62, supra*, 961 P.2d at 1082.

The title fails to inform the voter that the measure does much more than merely extend criminal liability to executive officials. The title 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." The definition of executive official does not include an agent or high managerial agent as defined by the current statute. Further, an executive is commonly understood to include a supervisor or person in a managerial capacity; 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. Respondents' own characterization of the single subject of this Initiative makes this point: "the goal of this measure is to create an enforcement scheme so that businesses and executive are motivated to perform all duties imposed by law"

(Respondents' Opening Brief, p. 8). Clearly, the new class of persons are a considerably more limited group than that which is suggested by the term "executive" or the phrase "executive officials", which are not defined in the title. This definition 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, prior to being charged. See Proposed C.R.S. § 18-1-606(4) (emphasis added); *see also*, Title II. 9–11.

In addition, the title does not reveal that the measure provides complete immunity 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.

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.

III. **“CRIMINAL CONDUCT” IS AN IMPERMISSIBLE CATCH PHRASE.**

Respondents repeat verbatim their argument from Proposed Initiative 2007-2008 #75, that “criminal conduct” is not an impermissible catch phrase.

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. The words “criminal conduct” are used three times in the title and provoke thoughts of what most voters would consider “real crimes” rather than unidentified “duties that are required by law” by any governmental entity.

“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*”). “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)).

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 words surface mining project "may scar the land," was fair and accurate because repeated operative language of proposed amendment).

The words "criminal conduct" are likely to work to the proposal's favor without contributing to voter understanding. See Title at ll. 1, 6, 10. 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.” That could be something as minor as filing in duplicate a report that was supposed to be filed in triplicate.

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.

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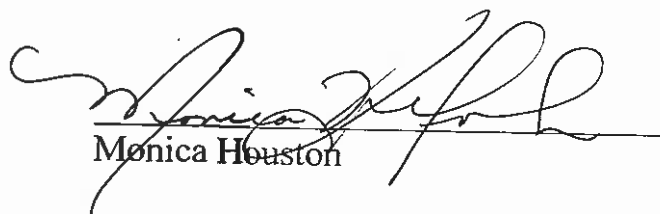
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CERTIFICATE OF SERVICE

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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