COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities "[1])

MOTION FOR REHEARING

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007–2008 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities", hereinafter described as the "Initiative") which the Title Board heard on February 20, 2008.

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple, unrelated, subjects in violation of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5. "The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 282 (Colo. 2006). An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. *In re Title, Ballot Title and Submission Clause 2007-2008,* #17, 172 P.3d 871, 875 (Colo. 2007),

[1] Unofficially captioned **"Criminal and Civil Liability of Businesses and Individuals for Business Activities"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

"We must examine sufficiently on initiatives central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

The Colorado Supreme Court rejected Initiative 55 under the single subject rule stating, "We identify at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits." *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra*, 138 P.3d at 280; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the State Constitution's single-subject requirement). There, the complexity and omnibus provisions were hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative failed to inform voters of the services the passage would affect.

The Supreme Court rejected a proposed ballot initiative which sought to amend the Taxpayer Bill of Rights under the Colorado Constitution because it violated the constitution's single-subject requirement where the proposed initiative created a tax cut, imposed new criteria for voter approval of revenue and spending increases, and imposed likely reductions in state spending on state programs. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999) (citing Colo. Const. art. V, § 1(5.5); art. X, § 20).

In *In re "Public Rights in Waters II,"* 898 P.2d 1076 (Colo. 1995), the Court held that grouping the distinct purposes of water conservation district elections and the "Public Trust Doctrine" under the theme of water did not satisfy the single-subject requirement because such a connection was too broad and too general to make them part of the same subject.

The Colorado Supreme Court has found numerous other situations where the single subject rule was violated. *See e.g., In re the Title, Ballot Title, and Submission Clause for 2007–2008 #17*, 172 P.3d 871 (Colo. 2007) (initiative sought to create an environmental conservation mission; however, a plain reading of the language also revealed the inclusion of a public trust standard for agency decision-making); *In re Title, Ballot Title and Submission Clause 1999–2000 #258(A)*, 4 P.3d 1094 (Colo. 2000) (elimination of school board's power to require bilingual education was not a separate subject so as to violate single-subject requirement); *In re Proposed Initiative for 1997-1998 # 30,* 959 P.2d 822, 823 (Colo. 1998) (court disapproved of an initiative burying unrelated revenue and spending increases within tax cut language).

The Initiative contains multiple provisions, which (1) relate to more than one subject and (2) have at least two distinct and separate purposes that are not dependent upon or connected with each other. *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d at 277. The topics include:

(a) Dramatically expanding existing laws for criminal liability of business entities to all individual employees, officers, directors, high managerial employees, and any other person who is authorized to act on behalf of a business entity. The effect of this is to create dozens of new crimes, with the procedural and substantive changes. The proposed extension would incorporate criminalizing traditional civil concepts including, but not limited to, breach of

fiduciary duties, duty of fidelity, good-faith, loyalty, prudence, exercising business judgment, duty to give warning of a dangerous condition, duty to act, and, duty of supervision. Ultimately, the existence and scope of a legal duty is a question of law. In either event, the proposed measure provides an affirmative defense to criminal charges if such persons disclose to the attorney general all facts known to them concerning a business's criminal conduct provided that this disclosure occurs before the person is charged.

(b) Allowing any Colorado resident to bring an action for civil damages against any business entity, employee, officer, director, high managerial agent, employee, and any other person who is authorized to act on behalf of a business entity. The plain reading of the initiative provides, as described by legislative staff, that the measure provides liability not just for criminal conduct, but all types of civil business activities, including, but not limited to, breach of fiduciary duties, duty of fidelity, good-faith, loyalty, prudence, exercising business judgment, duty to give warning of a dangerous condition, duty to act, and, duty of supervision. The Amendment differentiates itself from traditional private rights of action, because the party bringing the action does not need to have to be injured by the conduct that was allegedly caused by 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.*). [2]

(c) Any such award of damages is paid to the general fund of the State of Colorado. These monies when appropriated shall be exempt from all revenues and spending limits.

[2] An extension of the single subject/clear title limitation applicable to bills, Colorado Constitution prohibits voter initiatives from containing multiple subjects. Here, the civil private right of action clearly fails to fall under the title of Colo. Rev. Stat. §18-1-606 Criminal Liability for Business Entities.

(d) The Title Board accepted the proponents' revised draft of the initiative and assisted the proponent in drafting new "single subject" language: "An amendment to the Colorado Revised Statutes concerning liability for criminal conduct of businesses." The true intent of the initiative does not concern this subject, however. The initiative imposes civil liability for the conduct of a business entity and its "agents" or "high managerial agents." Although the January 18, 2008 Memorandum to the proponents pointed out that "[C.R.S. § 18-1-606 describes the circumstances in which a business may be guilty of an offense, it is not an offense itself." The Memorandum further states that C.R.S. § 18-1-607 is the statute that imposes criminal liability on individuals for their corporate wrongdoing. Thus, the initiative imposes civil liability for failure to discharge a specific duty provided by law. It imposes that liability on business entities, and agents or high managerial agents. It is not limited to criminal conduct of businesses; it may provide criminal charges for alleged tortious actions and other civil wrongs. Further, it is not limited to businesses, only. It is likely to include their agents and high managerial agents.

2. The text of the Initiative is inherently unclear, inaccurate, incomplete, confusing, and misleading as to its reach and purpose, such that the Board is precluded from setting a ballot title. *See In re Proposed Initiative 1999-2000 #37,* 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing). The 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). "In fixing titles and summary, the Board's duty is 'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter

choice." *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity). This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3e 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; *see also, In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082.

In 258(A) 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. *In re Ballot Title 1999-2000 #258(A)*, *supra*, 4 P.3d at 1100; *In re Amend Tabor No. 32*, 908 P2d 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).

3. The initiative is misleading, incomplete, confusing and inaccurate for the following reasons:

(a) Fails to properly define the parties that are specifically affected by the civil provisions. The criminal component of the ballot title provides that it applies to "directors, officers, employee and high managerial agents who formulate a business's policies or supervise employees". Conversely, the civil reference of the Ballot Title merely provides that liability exists with respect to "agents". This variance implies a more limited civil component, which is inaccurate and misleading.

(b) Fails to properly reference the numerous new substantive crimes that apply to employees, officers, directors, high managerial agents and those persons who are affiliated with the entity.

(c) Improperly suggests that civil liability only attaches to criminal conduct when the statute goes far beyond such a restrictive application by applying to traditionally civil duties created by law.

(d) "Criminal conduct" is a catch phrase. Clearly, the measure criminalizes the mere failure to perform duties that are clearly not criminal in nature. Catch phrases are words that work to a proposal's favor without contributing to voter understanding. *See In re Ballot Title 1999-2000 #258(A), supra.* By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of each phrase. *Id.* at 1100.

Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment, thus further prejudicing voter understanding of the issues actually presented. Slogans are catch phrases tailored for political campaigns-brief striking phrases for use in advertising or promotion. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposals merits. *Id.* (*i.e.*, be taught English "as rapidly and effectively as possible"). They mask the policy question.

(e) Fails to specify that disclosure must occur prior to being charged.

(f) Fails to identify that damages awarded and appropriated to the general fund are exempted from popular revenue and spending limits.

4. Proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

The proponents submitted an amended title to the title board at the February 20, 2008 Title Board Hearing without having first submitted it to the directors of the Legislative Council and Office of Legislative Legal Services. Because proponents made substantive changes to the title, these bodies must be given a new opportunity to review the title. "The requirement that the original draft be submitted to the legislative council and office of legislative legal services permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) (citing *See In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992)).

The original text that the proponents submitted to the directors included a definition of "Associated Person," which was defined as "any natural person who is an officer, director, member, partner, or sole proprietor of a business entity covered by this section." Original Text, proposed § 18-10-106(2)(a.1). In the initiative submitted to the Title Board, this provision was deleted and new provisions to proposed § 18-1-606(1) included the new terms, "Agent, or High Managerial Agent § 18-10-106(2)(1)":

> "Agent" means any director, officer, or employee of a business entity, or any other person who is authorized to act in behalf of the business entity, and "high managerial agent" means an officer of a business entity or any other agent in a position of comparable authority with respect to the formulation of the business entity's policy or the supervision in a managerial capacity of subordinate employees."

The directors of the Legislative Council and Office of Legislative Legal Services had not seen or commented on this new, substitute term. Nonetheless, this became the final text for the Title.

Had the directors of the Legislative Council and Office of Legislative Legal Services directed the proponents to make this material change in the draft, it might have been proper. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256, supra*, 12 P.3d at 251. The directors did not give such an instruction, however. The terms do not share a common definition. The term "agent" is defined in current statute at Colo. Rev. Stat. § 18-6-606(2)(a), as "any director, officer, or employee . . . or any person who is authorized to act on behalf of the business entity." The same section defines the term "high managerial agent" as "an officer . . . or any other agent in a position of comparable authority with respect to the formulation of . . . business policy . . .or supervision of . . . subordinate employees." *Id.*

The proponents had defined the excised term, "associated person," to include persons that are neither "agent" nor "high managerial agent;" namely they now include, a "member" and a "partner." Members of a limited liability company or partners of a general partnership or limited partnership may or may not possess the authority of an "agent" or a "high managerial agent." The change of definition changes the persons to whom the statute applies. This is a substantive change. The proponents must refile their initiative with the directors of the Legislative Council and the Office of Legislative Legal Services.

Furthermore, the proponents should be required to resubmit the initiative for further review and comment because it did not provide the Title Board with a final text of their initiative that fairly and accurately amends the Colorado Revised Statutes. The Legislative Council Staff and the Office of Legislative Legal Services expressly states:

> The change to the introductory portion of subsection (1) of the proposed initiative states "business entity AND ASSOCIATED PERSON is guilty." If the proponents intended to use the "AND" then, the "is" should be changed to "ARE" or if the proponents intend to use "is", then it should be "business entity OR ASSOCIATED PERSON." Proponents draft to the Title Board read: "(1) a business entity, AGENT OR HIGH MANAGERIAL AGENT ARE guilty of an offense if: . . ."

It must be AND or OR. If it is AND, the verb agreement must be to the plural subject, or "are." If it is OR, the agreement must be to the singular, or "is." As written, voters and the courts could interpret the language to refer to a joint liability rather than several liability. The language could mean that the business and the Agent or High Managerial Agent are guilty of an offense only if a crime is committed in concert or it could mean that either the business or its Agent or High Managerial Agent is guilty of any offense, but not both.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 27th day of February, 2008.

FAIRFIELD AND WOODS, P.C.

By: *Original signature of Douglas J. Friednash on file*
Douglas J. Friednash, #18128
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

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s/ Monica Houston
Monica Houston