SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: February 16, 2016 6:41 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2015-2016 #61 ("Food Store License") **Petitioner: Jeanne M. McEvoy** **v.** **Respondents: Blake Harrison and John Grayson Robinson** **and** **Title Board: SUZANNE STAIERT; FREDERICK YARGER ; and SHARON EUBANKS**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2016SA31**
PETITIONER'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐ It contains _____ words.

X It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

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STATEMENT OF ISSUES PRESENTED

1. Did the Title Board err by setting a title for Initiative 2015-2016 #61, because it violates the constitutional single subject requirement by combining the creation of a new liquor license ("food store license") and the abolition of an unrelated liquor license (authorizing the retail off-premises sale of 3.2% beer)?

2. Did the Title Board err by including in the measure's single subject description authority for the sale of "full strength beer and wine" in food stores, even though that phrase appears nowhere in the initiative itself and thus does not accurately or fairly describe the actual text to be considered by voters?

3. Did the Title Board err by including in the title a political slogan, "full strength beer and wine," language used by the proponents prominently at campaign events and determined by the U.S. Supreme Court to be an influential advertising phrase?

4. Did the Title Board err by failing to inform voters that applicants for the newly created food store license, who already hold a license allowing sale of 3.2% beer for off-premises consumption, are not subject to the commonly understood, mandatory showing that new liquor licenses meet the needs and desires of the inhabitants of the neighborhood in which the new licensee is to be located?

STATEMENT OF THE CASE

I. Disposition below

Blake Harrison and John Grayson Robinson (hereafter "Proponents") proposed Initiative 2015-2016 #61 (the "Proposed Initiative"). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, the Proponents submitted final versions of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

A Title Board hearing was held on January 6, 2016 to establish the single subjects of the Proposed Initiative and set their titles. On January 13, 2016, Petitioner filed a Motion for Rehearing, alleging that the titles set were prejudicial, incomplete, and misleading and failed to reflect the complete intent of the Proponents and the central features of the Proposed Initiative. The rehearing was held on January 20, 2016, at which time the Title Board denied portions of the Motion for Rehearing as it pertains to this appeal. A notice of appeal of this decision was timely filed with this Court pursuant to C.R.S. § 1-40-107(2).

II. Statement of the facts

Proponents seek to amend the Colorado Revised Statutes to accomplish two very distinct ends. First, Section 1 of their measure would create a "food store license" to allow for sale of malt and vinous liquors in any facility that earns at

least twenty-five percent of its gross annual income from the sale of food, excluding income received from sale of fuel and lottery tickets. This is a broad-ranging measure, as Initiative 2015-2016 #61 ("#61") would open each grocery store and convenience store in the state to such alcohol sales.

Second, their measure seeks to abolish the license used to sell 3.2% beer for off-premises consumption. In Section 8 of their measure, those subsections of the existing statute, C.R.S. § 12-46-107, that permit a local licensing authority to grant such licenses are repealed.

Part of their measure includes a provision that changes the decades-long practice of requiring a showing of need for such a license in the relevant neighborhood and that such license is consistent with the desires of the inhabitants who reside therein. Instead, this requirement can be waived for persons holding a license for sale of 3.2% beer for off-premises consumption – at the sole and unchallengeable discretion of the local licensing authority. In essence, #61 seeks to silence neighbors by waiving this time honored requirement as a precondition to deciding whether a liquor licensee should locate in their midst. And according to the Proponents themselves, this change will affect 1,500 licensees statewide – certainly hundreds and hundreds of neighborhoods.

The Title Board agreed with portions of the Petitioner's Motion for Rehearing and set the ballot title and submission clause for #61 as follows:

> Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income, excluding income from fuel products and lottery ticket sales, from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption?

See **Exhibit A**, attached hereto.

SUMMARY OF ARGUMENT

The Title Board failed to recognize a single subject violation, the combination of the abolition of one type of liquor license (3.2% beer for off-premises sale) and the creation of a new and not necessarily related one (food store license). Nothing in current law requires that 3.2% beer be sold by entities that will not qualify as food store licensees. Proponents' action simply limits the access to certain alcoholic beverages when it purports to do the opposite.

In setting the title, the Board incorporated a phrase – "full-strength beer and wine" – that simply does not appear in the measure. It has no particular legal or even descriptive significance, except for one aspect. It was used in the Proponents' political jargon on the day they announced their measure. The banners used

prominently reference "full-strength beer" and do so, presumably for a purpose: it has value as political jargon.

Even if the phrase was not a political catch phrase in violation of the Board's statutory duty to set a fair and clear title, it is unwarranted because it does not accurately represent the measure. It has no particular meaning to voters and should have been omitted from the title.

The Board's failure to include the measure's modification to the requirement for neighborhood input as to 1,500 liquor licenses – when that aspect of citizens' voicing their support or opposition to a new or different license is so engrained in the process – was error. Voters should know citizen input will not be mandatory for food store licensees who are switching from their 3.2% beer licenses, but instead will be discretionary – at the option of the local licensing authority.

The titles should be returned to the Proponents or to the Board for appropriate corrective action.

LEGAL ARGUMENT

I. Initiative #61 contains multiple subjects, contrary to the single subject requirement for citizen initiatives.

A. Standard of review; preservation of issue below.

The Title Board is required to establish that a proposed ballot measure contains only one subject. Colo. Const., art. V, § 1(5.5). This inquiry requires that

the Board establish whether a proposal has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for Initiative 2007-2008 #62,* 184 P.3d 52, 57 (Colo. 2008) (citation omitted). A ballot measure may violate the single subject requirement through either the proposal or the repeal of multiple subjects. *Id.* While the right of initiative is to be liberally construed, "[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider." *Id.* (citations and internal quotation marks omitted).

This issue was raised in the Motion for Rehearing before the Title Board. **Exhibit A**, Motion for Rehearing at 1-2.

B. #61 violates the single subject requirement by combining the creation of one license category and eliminating an unrelated license category.

Initiative #61 adds to its companion, Initiative #60, the element of eliminating any licenses that would allow the sale of 3.2% beer for purposes of off-premises consumption. *See* Sections 1 and 8 of Initiative #61. The two statutory changes fail the test for single subject: a "necessary connection exist(s)" between the two provisions, a connection "so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it." *In re Title, Ballot Title &*

Submission Clause, & Summary for 1999–2000 # 25, 974 P.2d 458, 462 (Colo.1999); Colo. Const., art. V, § 1(5.5).

No such connection can be found. Authorizing a license for sales of "full-strength" beer and wine are not necessarily or obviously inconsistent with eliminating 3.2% beer licenses associated with off-premises consumption. Nothing about creating a grocery/convenience store liquor license necessitates that no other retail outlet could ever sell 3.2% beer or even implicates such class of liquor license, except that food store licensees would transition from one to the other. And the fact that one is authorized while the other is eliminated would not be readily apparent, and would come as a surprise, to voters. *See In re Title, Ballot Title & Submission Clause, & Summary for2001-2002 #43*, 46 P.3d 438. 447 (Colo. 2002) (a measure that is surreptitiously folded into another violated the single subject requirement).

The distinct nature of the two very different elements of #61 is clear. For example, *The Denver Business Journal* ran a story that contained the headline, "Grocery stores submit Colorado ballot language seeking sales of beer and wine – but not spirits,"[1] whereas *The Denver Post*'s headline read, "Campaign files ballot initiatives to end Colorado's 3.2 beer law."[2] The reports both dealt with the

[1] http://tinyurl.com/DBJfullstrength (last viewed Jan. 15, 2016).

[2] http://tinyurl.com/DPfullstrength (last viewed Jan. 15, 2016).

submission of #60 and #61, and the Journal even noted that one measure also repealed authority for the lower strength beer. But the topics were clearly distinct. And proponents expressed their own concern in the *Journal* story that #61 might comprise two subjects. "Organizers hope to ask the Legislative Council whether they can repeal the Prohibition-era law at the same time they enact a new statute, or whether that would have to be done in separate actions."

It is certainly conceivable that voters would be forced to weigh a "yes" vote on one aspect of this measure as against a "no" vote on the other. "The single subject requirement eliminates 'the practice of combining several unrelated subjects in a single measure for the purpose of enlisting support from advocates of each subject and thus securing the enactment of measures which might not otherwise be approved by voters on the basis of the merits of those discrete measures.'" *In re Proposed Initiative 1996-4*, 916 P.2d 528, 531 (Colo. 1996). Voters who want to do away with 3.2% beer might not be in favor of the proliferation of liquor licenses, authorized by this measure. And voters who want beer and wine sales in supermarkets and convenience stores might not want to do away with one of their product options for off-premises consumption. Neither voter should have to accept the policy trade-off implicated by this multi-subject initiative.

The ballot title itself establishes that the Board's conclusion about a single subject is erroneous. The title reads, "Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption..." But there is not "a change" to the statutes; there are multiple "changes" that affect separate provisions and areas of interest relating to alcohol regulation. The title's misstatement establishes the vulnerability of this measure on single subject grounds.

The Court should reverse the decision of the Board that #61 contains a single subject.

II. The titles are not clear, accurate, or fair in the language used to describe Initaitive #61.

A. Standard of review; preservation of issues below.

The Board is required to set a title that "correctly and fairly express[es] the true intent and meaning" of the initiative. C.R.S. § 1-40-106(3)(b). The title need not be perfect, but similarly, it cannot mislead voters. *#62, supra*, 184 P.3d at 58. A title is flawed where its words will unfairly push voters to support or oppose a measure, which occurs where there is "a material and significant omission, misstatement, or misrepresentation." *Id.* The title need not set out every last detail of a measure. Still, the Board's work product falls short where it is not "fair, clear,

accurate, and complete," such that the resulting title is "insufficient, unfair, or misleading." *Id.* at 60.

As part of the Board's responsibility to set a clear and fair title, the title may not include a political slogan or catch phrase. "Catch phrases are words that work to a proposal's favor without contributing to voter understanding... [and] generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *Id.* (citation omitted).

These issues were raised in the Motion for Rehearing before the Title Board. **Exhibit A**, Motion for Rehearing at 2-3, 4-5.

B. The title should not include the phrase, "full-strength beer and wine."

1. "Full-strength beer and wine" is a contrived phrase that is not even used in the measure's text.

For the title setting process, the Board agreed to use the invented phrase, "full-strength beer and wine." It did so twice, first in the single subject statement and again in the body of the title. In so doing, the Board erred.

As it pertains to this initiative, this phrase has no identifiable meaning. It is not used in the initiative itself. It is not used in existing statute. It cannot be found in Colorado case law. It was simply a contrived phrase that is used to denominate the malt and vinous liquors that are governed by this measure.

The responsibility of the Title Board is to reflect the measure itself in the ballot title. The purpose of the ballot title and submission clause is "only to fairly reflect the content of the measure." *Matter of Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994). The Board achieves this objective where "the titles track the Initiative." *#62, supra*, 184 P.3d at 60. The Board does not err where it "utilize[s] the language of the initiative nearly verbatim." *Matter of Proposed Constitutional Amendment under the Designation "Pregnancy,"* 757 P.2d 132, 136 (Colo. 1988).

There is clear precedent for requiring specificity about the type of alcohol to be sold in neighborhood food stores in Colorado. In *Matter of Title, Ballot Title and Submission Clause, and Summary Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916 (Colo. 1982), the proposed measure would have allowed a grocery store to sell "table wine." That phrase was defined as "all wine not exceeding fourteen percent of alcohol by volume." *Id.* at 920. As a result, the Title Board set a title that pertained to grocery store sale of "wine containing not more than fourteen percent of alcohol by volume in sealed containers." *Id.* at 924.

Presumably, by using "full-strength beer," the Board intended to allude to beer that is a "malt liquor" as specifically referred to in the measure and defined in existing statute. Proposed § 12-47-425(1); C.R.S. § 12-47-102(19) ("malt liquor"

is a fermented beverage such as beer containing more than 3.2% alcohol by weight). But "full-strength" is a non-specific reference. For instance, "full-strength beer" is beer that contains 3.7% alcohol by weight. *A B C Brewing Corp. v. Commission of Internal Revenue*, 20 T.C. 515, 522 (1953). Just as easily, the maximum alcohol content of beer can be more than double that amount – 8% by weight. *Hoehne v. Oregon Liquor Control Comm'n*, 588 P.2d 87, 88 (Or. 1978). There is no singular or clear definition of what a "full-strength" beer is. No evidence was placed before the Title Board as to the contours of "full-strength" beer. Thus, there is no specific, understandable meaning for voters.

Courts do not take judicial notice of the strength of beer because it is a variable concept. It is unreasonable to think that if the judicial branch requires this level of specificity and clarity, voters do not. Courts will not take judicial notice of the intoxicating nature of malt liquor and beer "because of the varying percentages of alcohol in such drinks." *Defusion Co. v. Utah Liquor Control Comm'n*, 613 P.2d 1120, 1124 (Utah 1980). Neither will courts "take judicial notice that a beverage has a certain alcoholic content, merely upon proof that it is beer." *State v. Henry*, 254 S.W.2d 307, 309 (Mo. 1953). If the courts cannot intuit the level of alcoholic strength of beer due to the array of possible alcohol percentages contained therein, voters cannot be presumed to do so either. It was a failure on

the part of the Title Board to include this confusing, non-textual reference in the ballot title.

2. "Full-strength beer and wine" is a political catch phrase.

"Full-strength beer and wine" is a political catch phrase and is thus prohibited from being included in the title. 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 the Matter of the Proposed Initiative on Casino Gaming*, 649 P.2d 303, 308 (Colo.1982). Evaluating whether particular words constitute a slogan or catch phrase must be made "in the context of contemporary public debate." *In the Matter of the Proposed Initiative on Workers Compensation*, 850 P.2d 144, 147 (Colo.1993).

When Proponents announced this measure last year, their speakers appeared before two oversized campaign banners that read:

- "42 States Sell **Full-Strength Beer or Wine** in Grocery Stores. Why Not Colorado?" (emphasis added); and
- "Want to Buy Wine and **Full-Strength Beer**?" (emphasis added).

The two banners were placed so that they could be displayed in news stories, and they were.[3] There can be no question that Proponents seek to make "full-strength

[3] *See, e.g.*, http://tinyurl.com/DBJfullstrength; http://tinyurl.com/CPRfullstrength; http://tinyurl.com/GVfullstrength (all last viewed Feb. 15, 2016).

beer and wine" a prominent part of contemporary political discourse over this issue.

Literally and figuratively, this invented phrase is the backdrop of the Proponents' campaign, and their political rhetoric is intertwined with the ballot title. As the Court found in connection with other phrases deemed to be prohibited political catch phrases in ballot titles, "We have little difficulty concluding that [the challenged wording] could form the basis of a slogan for use by those campaigning in favor of the Initiative." *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to an Initiative Designated "Governmental Business,"* 875 P.2d 761, 876 (Colo. 1994). Clearly, "full-strength beer and wine" is already the "basis of a slogan" to be used by those who are conducting this campaign. A phrase that does not even exist in the initiative itself, "full-strength beer and wine" should not be part of the ballot title because it functions as a political catch phrase for Proponents.

In *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the U.S. Supreme Court addressed whether several phrases – including "full-strength" – could be used for purposes of marketing beer. *Id.* at 481 (citing 27 C.F.R. § 7.29(f) (1994)). The Court struck down federal regulations that allowed the use of "full-strength" in ads but not on the beer bottles themselves, holding that the use of such phrases in

advertising was even "more influential" than its use on product labels at the point of sale. *Id.* at 488.

Rarely is there precedent from the United States Supreme Court that a particular phrase is one used to curry favor in the public opinion realm. In combination with the Proponents' open use of that very phrase on its campaign banners at campaign kick-off events, it is hard to see how "full-strength beer" adds to voter understanding, particularly as it is never used in the measure itself. Instead, it is campaign jargon built into the ballot title. Thus, it violates the prohibition on the inclusion of political catch phrases in ballot titles and should be stricken from the titles.

C. The title fails to state that 1,500 licensees who convert from a 3.2% beer license to a food store license need not establish needs and desires of local inhabitants unless local licensing authorities require it.

For existing fermented malt beverage licensees converting to a food store license, #61 makes the otherwise mandatory showing of neighborhood needs and desires for the new license optional – at the discretion of the local licensing authority. Proposed § 12-47-425(4). Subsection (4) applies to any "licensee under section 12-46-104(1)(c) with a valid fermented malt beverage license in effect on July 1, 2017." Historically, prospective licensees have been required to show that they are filling an unmet need and that their soon-to-be neighbors want a liquor

establishment, selling the types of alcohol that they are selling, in their immediate environment. *See* § C.R.S. 12-47-301(2)(a) ("Before granting any license, all licensing authorities shall consider... , the reasonable requirements of the neighborhood [and] the desires of the adult inhabitants as evidenced by petitions, remonstrances, or otherwise").

Petitioning to determine whether a community wants the licensed premises to offer regulated products is the most commonly understood aspect of the liquor licensing process. To affected neighborhoods, the mandate for petitions or other showings of support for the proposed license allow for significant community input to the governmental authority making the licensing decision. *See, e.g., Kornfeld v. Yost*, 519 P.2d 219, 220 (Colo. App. 1976) (1,300 signatures on petitions in favor of and opposed to license), rev'd on other grounds, 567 P.2d 383 (Colo. 1977); *Bd. of Cty. Com'rs v. Whale*, 154 Colo. 271, 272 (1964) (969 signatures on petitions in favor of and opposed to license); *Schooley v. Steinberg*, 365 P.2d 245, 246 (Colo. 1961) (1,210 signatures on petitions in favor and opposed to license).

Such a showing of the needs and desires of the neighborhood has a notable legal impact. For instance, these showings alone can be sufficient to make a prima facie case for the granting of a liquor license. *Bd. of Cty. Com'rs of Adams Cty. v. Nat'l Tea Co.*, 367 P.2d 909, 910 (Colo. 1961) (granting of license was warranted where 1,230 residents, business owners, and employees of the neighborhood

signed petitions in support of the license, as did 227 non-residents; one competitor opposed the license). That such showings will become optional if #61 is adopted represents a significant departure from current law.

This departure is all the more notable when it is understood that there are about 1,500 current malt beverage licensees who can and will transition over to a food store license, should #61 pass. This point was made by the Proponents before the Title Board. **Exhibit B**, attached hereto, 19:8-12. In hundreds of neighborhoods throughout the state, then, licenses will transition from 3.2% beer to "full-strength beer and wine." This very different product offering would not be the subject of the almost routine showing of neighborhood needs and desires, and this change of course is a central feature of #61 that must be addressed in the title.

Where a ballot initiative deprives citizens of the right to engage in a central democratic right such as the petitioning of government, it is certainly a notable aspect of the measure that requires voter awareness. *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.1993). This conclusion is supported by this Court's decision on a comparable measure. Where the initiative summary established by the Board addressed then-existing law relating to "requirements of the neighborhood and desires of the inhabitants," that reference was appropriate. *Table Wine, supra*, 646 P.2d at 922. The title's explanation of the measure's interaction with then-existing law was warranted. "Since the proposed initiative deals with the sale of an

alcoholic beverage, we see nothing improper in the Board's providing information of a significant effect of existing law on the initiative." *Id.* at 921.

#61 does not incorporate existing law, by reference or otherwise; it changes the guarantee of public involvement in the licensing process. And it does so for more than one thousand food-related enterprises (including convenience stores as well as grocery stores) throughout the state. Yet, the title is silent on the issue. That silence is error that can be corrected by a plain statement that food store licensees, transitioning from a 3.2% beer license, may be exempted from making needs and desires showings as a condition to licensure, based on the discretion of the local licensing authority.

CONCLUSION

Because the Title Board erred, #61 should be returned to the Proponents to allow them to address their single subject violation or its titles should be returned to the Board to allow it to correct the errors cited herein.

RESPECTFULLY SUBMITTED this 16th day of February, 2016.

RECHT KORNFELD, P.C.

s/ Mark Grueskin

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the PETITIONER'S OPENING BRIEF was sent this day, February 16, 2016 via ICCES and first class U.S. mail, postage pre-paid to the proponents and their counsel at:

Thomas Rogers III, Esq.
Hermine Kallman, Esq.
Lewis Roca Rothgerber
1200 Seventeenth Street, Suite 3000
Denver, CO 80202

s/ Erin Holweger
Erin Holweger

DATE FILED: February 16, 2016 6:41 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, WAYNE W. WILLIAMS, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motion for rehearing, and the rulings thereon of the Title Board for Proposed Initiative "2015-2016 #61 'Food Store License'".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 21st day of January, 2016.

SECRETARY OF STATE

Exhibit A

Ballot Title Setting Board

Proposed Initiative 2015-2016 #61[1]

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income, excluding income from fuel products and lottery ticket sales, from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income, excluding income from fuel products and lottery ticket sales, from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption?

Hearing January 6, 2016:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 2:20 p.m.

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[1] Unofficially captioned **"Food Store License"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Rehearing January 20, 2016:
Motion for rehearing denied except to the extent that the Board made changes to the titles.
Hearing adjourned 10:05 a.m.

S.WARD RECEIVED
1:20 P.M. JAN 13 2016

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

Jeanne M. McEvoy, Objector

vs.

Blake Harrison & John Grayson Robinson, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2015-2016 #61

Jeanne M. McEvoy, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2015-16 #61 ("Food Store License").

I. The Title Board set a title for Initiative 2015-16 #61 on January 6, 2016.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

> Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption?

II. Initiative #61 contains multiple subjects, contrary to Colo. Const., art. V, sec. 1(5.5).

#61 adds to #60 the element of eliminating any licenses – ***any*** – that would allow the sale of 3.2% beer for purposes of off-premises consumption. The two statutory changes fail the test for single subject: a "necessary connection exist(s)" between the two provisions, a connection "so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it." *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 # 25*, 974 P.2d 458, 462 (Colo.1999).

No such connection can be found. Proponents did suggest at the December 2 hearing that the two provisions would ensure that customers did not have to be unduly attentive to the alcohol contents of competing beers when making their purchases. It is anomalous that they would think

that customers in a food store are unused to check food labels when they do so routinely – for allergenic food components, caloric and fat content, and even labels indicating that the foodstuff was not made from genetically modified organisms. It is simply not credible to think that label comparison is a task beyond someone shopping for groceries. Or beer. In fact, the United States Supreme Court has invalidated regulations that prohibited the disclosure of alcohol content on beer labels. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-88 (1995) (invalidating federal ban on disclosure of alcohol content on beer labels).

The distinct nature of the two very different elements of #61 is clear. For example, *The Denver Business Journal* ran a story that contained the headline, "Grocery stores submit Colorado ballot language seeking sales of beer and wine – but not spirits," whereas *The Denver Post*'s headline read, "Campaign files ballot initiatives to end Colorado's 3.2 beer law." (*See* Exhibit A-1.) The reports both dealt with the submission of #60 and #61, and the *Journal* even noted that one measure also repealed authority for the lower strength beer. But the topics were clearly distinct. And proponents expressed their own concern in the *Journal* story that #61 might comprise two subjects. "Organizers hope to ask the Legislative Council whether they can repeal the Prohibition-era law at the same time they enact a new statute, or whether that would have to be done in separate actions."

It is certainly conceivable that voters would be forced to weigh a "yes" vote on one aspect of this measure as against a "no" vote on the other. "The single subject requirement eliminates 'the practice of combining several unrelated subjects in a single measure for the purpose of enlisting support from advocates of each subject and thus securing the enactment of measures which might not otherwise be approved by voters on the basis of the merits of those discrete measures.'" *In re Proposed Initiative 1996-4*, 916 P.2d 528, 531 (Colo. 1996). Voters who want to do away with 3.2% beer might not be in favor of the proliferation of liquor licenses, authorized by this measure. And voters who want beer and wine sales in supermarkets and convenience stores might not want to do away with one of their product options for off-premises consumption. Neither voter should have to accept the policy trade-off implicated by this multi-subject initiative.

The title itself establishes that the conclusion that there is a single subject is erroneous. The title reads, "Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption..." But there is not "a change" to the statutes; there are multiple "changes" that affect separate provisions and areas of interest relating to alcohol regulation. The title's misstatement establishes the vulnerability of this measure on single subject grounds.

The Board should thus reverse its decision that #61 contains a single subject.

III. The title set for #61 is misleading and prejudicial.

A. The title should not include the phrase, "full-strength beer and wine."

1. "Full-strength beer and wine" is a contrived phrase.

For the title setting process, the Proponents invented the phrase "full-strength beer and wine." The Board erred in agreeing to use of this phrase anywhere in the titles.

This phrase has no specific meaning. It is not used in the initiative itself. The titles' statement that full-strength beer and wine "commonly refer[]" to malt and vinous liquors is without foundation. As such, it undermines voter understanding and should be excluded from the title.

2. "Full-strength beer and wine" is a political catch phrase.

"Full-strength beer and wine" is a political catch phrase and is thus prohibited from being included in the title. 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 the Matter of the Proposed Initiative on Casino Gaming*, 649 P.2d 303, 308 (Colo.1982). Evaluating whether particular words constitute a slogan or catch phrase must be made "in the context of contemporary public debate." *In the Matter of the Proposed Initiative on Workers Compensation*, 850 P.2d 144, 147 (Colo.1993).

When Proponents announced this measure last year, their speakers appeared before two oversized campaign banners that read:

- "42 States Sell Full-Strength Beer or Wine in Grocery Stores. Why Not Colorado?" (*see* Exhibit A) (emphasis added); and

- "Want to Buy Wine and Full-Strength Beer?" (*see* Exhibit B) (emphasis added).

The two were placed so that they could be displayed in news stories, and they were. (See Exhibit C.) There can be no question that Proponents seek to make "full-strength beer and wine" a prominent part of contemporary political discourse over this issue.

Literally and figuratively, this invented phrase is the backdrop of the Proponents' campaign, and now they seek to intertwine their political rhetoric with the ballot title. As the Supreme Court found in connection with other phrases deemed to be prohibited political catch phrases in ballot titles, "We have little difficulty concluding that [the challenged wording] could form the basis of a slogan for use by those campaigning in favor of the Initiative." *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to an Initiative Designated "Governmental Business,"* 875 P.2d 761, 876 (Colo. 1994). Clearly, "full-strength beer and wine" is ***already*** the "basis of a slogan" to be used by those who are conducting ***this campaign***. A phrase that does not even exist in the initiative itself, "full-strength beer and wine" should not be part of the ballot title because it functions as a political catch phrase for Proponents.

In *Coors Brewing Co. v. Rubin, supra*, the Court addressed whether several phrases – including "full-strength" – could be used for purposes of marketing beer. 514 U.S. at 481 (citing 27 C.F.R. § 7.29(f) (1994)). The use of such phrases in advertising was deemed to be even "more influential" than its use on product labels placed on products at the point of sale. *Id.* at 488. Likewise, the use of this phrase in the ballot title is intended to influence voters without regard for its contribution to substantive understanding of the initiative. Thus, it violates the prohibition on the inclusion of political catch phrases in ballot titles.

3. The Board is inconsistent in using non-textual references in the titles.

The Board approved the use of the phrase "full-strength beer and wine" but does not provide the clarity needed to explain "food stores," other than to state the minimum percentage of food sales for such an entity to qualify for this status. If it was consistent in using non-textual descriptors, the Board would include in the 25% food sales clause, "which includes but is not limited to all grocery stores and most convenience stores." Both types of stores qualify for a food store license, based on the express statements of the Proponents' counsel during Title Board hearings on Initiatives #51 and #52. If the Board is, in fact, going to substantively deviate from the text of the measure, it should at least be consistent in doing so, as long as such non-textual references reflect the announced intent of the Proponents.

B. The phrase "allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses" is confusing and misleading.

A variety of licenses granted under the Colorado Liquor Code are referred to as "retail" establishments. For instance, brew pubs, distillery pubs, gaming taverns, liquor stores, and vintner's restaurants are all "retail" operations as a matter of law. C.R.S. §§ 12-47-103(4) ("'brew pub' means a retail establishment...."), (7.3)("'distillery pub' means a retail establishment...."), (31)("'Retail liquor store' means an establishment...."), (39.5)("'vintner's restaurant' means a retail establishment...."); -414("A retail gaming tavern license shall be issued to persons who are licensed pursuant to section 12-47.1-501(1)(c)...."). Yet, none of these "retail" licenses is covered by the provisions in this initiative.

Instead, this measure applies solely to multiple ownership interests in "retail businesses licensed pursuant to this section." Proposed C.R.S. § 12-47-425(3). The vagueness of the title's terminology by referring to "certain retail liquor licenses" does not communicate the specific exception for multiple ownership interests only by commonly owned operations such as Walmart, Costco, King Soopers, Safeway, 7-11, or any of a variety of oil company owned or other multi-outlet convenience stores.

C. The title fails to state that food store licensees must establish needs and desires of local inhabitants only if local licensing authorities require it.

Petitioning to determine whether a community wants the licensed premises to offer regulated products is the most commonly understood aspect of the liquor licensing process. To affected neighborhoods often sign petitions to indicate their support of or opposition to the proposed license. *See, e.g., Kornfeld v. Yost,* 519 P.2d 219, 220 (Colo. App. 1976) (1,300 signatures on petitions in favor of and opposed to license), rev'd on other grounds, 567 P.2d 383 (Colo. 1977); *Bd. of Cty. Com'rs v. Whale*, 154 Colo. 271, 272 (1964) (969 signatures on petitions in favor of and opposed to license); *Schooley v. Steinberg*, 365 P.2d 245, 246 (Colo. 1961) (1,210 signatures on petitions in favor and opposed to license).

Such a showing of the needs and desires of the neighborhood can be sufficient to make a *prima facie* case for the granting of a liquor license. *Bd. of Cty. Com'rs of Adams Cty. v. Nat'l Tea Co.*, 367 P.2d 909, 910 (Colo. 1961) (granting of license was warranted where 1,230 residents, business owners, and employees of the neighborhood signed petitions in support of the

license, as did 227 non-residents; one competitor opposed the license). Thus, the recognized legal impact of such a demonstration establishes that the ability of a local licensing authority to bypass such requirement is a central feature that must be addressed in the title.

Voters would likely be surprised to discover that a routine requirement for new licenses, applicable across the various categories of licenses to be granted, will become optional for this new class of license. Given the wide breadth of licensing activity (all grocery stores and all convenience stores are eligible licensees, as stated by proponents at the December 2, 2015 hearing), the significance of this change is statewide, affecting every neighborhood that has such a retail outlet in its midst. As a result, the citizens' voice in the licensing process could be silenced if permitted at the local level. Where a ballot initiative deprives citizens of the right to engage in a central democratic right such as the petitioning of government, it is certainly a notable aspect of the measure that requires voter awareness. *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.1993).

This conclusion is supported by the Supreme Court's decision on a comparable measure. There, where grocery stores were to operate under the same requirement for a demonstration of needs and wants of the neighborhood as applied to other liquor licensees, the ballot title stated that the new class of license was subject to those requirements. *Table Wine in Grocery Stores, supra*, 646 P.2d at 922. However, here, there is a deviation from those requirements, and the title is silent on the issue. That silence is error that can be corrected by a plain statement that food store licensees may not be required to make such showings, based on the decision of the local licensing authority.

D. The title fails to state that the measure sets a presumptive and conclusive test for a licensee's reputation/character/record if the applicant has an unexpired fermented malt beverage retailer license.

For the reasons stated above, the initiative creates a new – and lesser – standard for establishing a licensee's reputation, character, and record, namely by referring only to its existing fermented malt beverage retailer license and the absence of an administrative or criminal prosecution against the applicant. This change in the law deserves mention in the ballot title.

Currently, there is no such limitation in the law. C.R.S. § 12-47-307(1(a)(II)-(V). The law requires that an applicant be "of good character and reputation satisfactory to the respective licensing authorities." *Id.* The ability of local officials to exercise discretion in determining whether to license persons who acquire and resell alcoholic beverages is an important element of current law. That discretion is eliminated by the provision in question. A title that informs voters that their licensing officials will be unable to make character and reputation assessments themselves is a central feature of the measure and should be disclosed in the titles.

For instance, the failure to be truthful in an application is sufficient reason for a licensing authority to deny a license on this ground. *See Fueston v. City of Colo. Springs*, 713 P.2d 1323, 1326 (Colo. App. 1985) (misstatements made to licensing officials in other states were adequate grounds for license denial); *see also MacLarty v. Whiteford*, 496 P.2d 1071, 1072-73 (Colo. App. 1972) (police chief made inquiries for licensing authority about applicant's character and reputation). The local authority's total inability to consider the veracity and licensing record of

companies that seek licenses in various jurisdictions is central to this measure. The Board should correct the title to reflect this aspect of the measure.

E. The title should reflect the imposition of a fee for this license.

Where a new license is created, it is appropriate to inform voters of the fee associated with such license. Where the Supreme Court has rewritten ballot titles regarding licensed activities, it included specific reference to such fees and did so of its own accord. *Dye v. Baker*, 354 P.2d 498, 460-61 (Colo. 1960) (to titles for measure legalizing certain gambling activities and licensing in connection therewith, adding language about "fees for the licenses provided for and disposition of the fees realized from licensed operations"). The Board should follow the Court's lead on this issue and add language to reflect the imposition of the fee on food store licensees.

F. The title's reference to "annual gross income" in the definition of "food store" is incomplete and incorrect.

The title states that a food store is defined "as an establishment that earns at least 25% of its annual gross income from the sale of food." The measure states that an establishment is a "food store" if it derives "a minimum of 25% of the gross annual income from its total sales, **excluding fuel products as defined at section 8-20-201(2) and lottery ticket sales from such total.**" Proposed C.R.S. § 12-47-103(8.5) (emphasis added). These statements are inconsistent and misleading.

The most recent industry statistics indicate that fuel sales account for 69.2% of convenience store income. Of the remaining 30.8% of sales, tobacco accounted for 35.9% and various forms of "food" accounted for 45.4%.[1]

Thus, once fuel sales are excluded, food sales are about 14% of convenience store gross revenue (30.8% x 45.4% = 13.98%). However, the relatively minor nature of food sales to a convenience store (i.e., a potential food store licensee) is hidden from voters, due to the existing inaccurate wording of the title, which therefore must be corrected.

WHEREFORE, the titles set January 6, 2016 should be reversed or modified to account for the legal insufficiencies highlighted in this Motion for Rehearing.

[1] http://tinyurl.com/2014cstore (last viewed Jan. 13, 2016).

RESPECTFULLY SUBMITTED this 13th day of January, 2016.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2015-2016 #61** was sent this day, January 13, 2016 via first class U.S. mail, postage pre-paid to the proponents and their counsel at:

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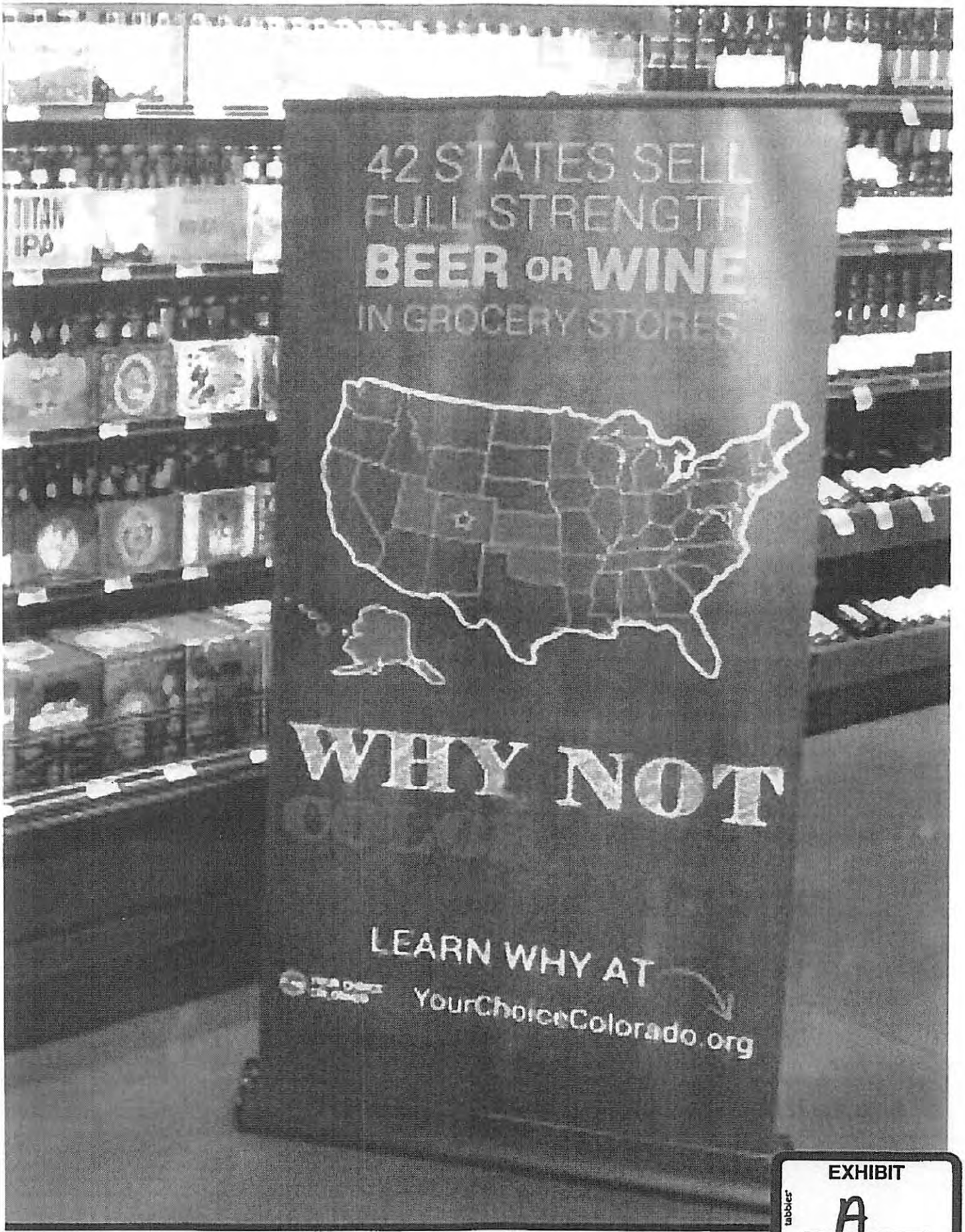

EXHIBIT
tabbies
A

Ballot Title Setting Board

Proposed Initiative 2015-2016 #61[1]

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least 25% of its annual gross income from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee; allowing the ownership of multiple food store licenses, including by the owners of certain retail liquor licenses; prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age; and as of January 1, 2019, eliminating licenses to sell 3.2% beer for off-premises consumption?

Hearing January 6, 2016:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 2:20 p.m.

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[1] Unofficially captioned **"Food Store License"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Proposed Initiative 2015-16 #61 (final)

Change to Colorado Revised Statutes Permitting Sale of Beer and Wine by Food Stores

Text of Measure:

Be it Enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 12-47-425 as follows:

12-47-425. FOOD STORE LICENSE. (1) NOTWITHSTANDING ANY PROVISIONS TO THE CONTRARY IN THIS ARTICLE, A FOOD STORE LICENSE MAY BE ISSUED TO FOOD STORES SELLING ONLY MALT AND VINOUS LIQUORS IN SEALED CONTAINERS NOT TO BE CONSUMED AT THE PLACE WHERE THE MALT AND VINOUS LIQUORS ARE SOLD.

(2) EVERY FOOD STORE LICENSED UNDER THIS SECTION TO SELL MALT AND VINOUS LIQUORS SHALL PURCHASE SUCH MALT AND VINOUS LIQUORS ONLY FROM A WHOLESALER LICENSED PURSUANT TO THIS ARTICLE.

(3) NOTWITHSTANDING ANY PROVISIONS OF THIS ARTICLE TO THE CONTRARY, NO OWNER, PART OWNER, SHAREHOLDER, OR PERSON INTERESTED DIRECTLY OR INDIRECTLY IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS ARTICLE, SHALL BE PROHIBITED FROM CONDUCTING, OWNING EITHER IN WHOLE OR IN PART, OR FROM BEING DIRECTLY OR INDIRECTLY INTERESTED IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS SECTION.

(4) A LICENSEE UNDER SECTION 12-46-104(1)(c) WITH A VALID FERMENTED MALT BEVERAGE LICENSE IN EFFECT ON JULY 1, 2017, MAY APPLY TO A LOCAL LICENSING AUTHORITY FOR A FOOD STORE LICENSE ISSUED UNDER THE PROVISIONS OF THIS SECTION IF IT OTHERWISE COMPLIES WITH THE REQUIREMENTS OF THIS SECTION. IN MAKING A DETERMINATION ON THE APPLICATION UNDER THIS SUBSECTION (4) FOR A FOOD STORE LICENSE, THE LOCAL LICENSING AUTHORITY MAY CONSIDER AS PROVEN THE SATISFACTORY NATURE OF THE CHARACTER, RECORD, OR REPUTATION OF THE APPLICANT IF, AT THE TIME OF THE FILING OF THE APPLICATION, THE APPLICANT MAINTAINS A VALID UNEXPIRED FERMENTED MALT BEVERAGE RETAILER LICENSE, AND NO ADMINISTRATIVE OR CRIMINAL PROSECUTION IS PENDING AGAINST THE APPLICANT. IN CONSIDERING ANY APPLICATION UNDER THIS SUBSECTION (4), THE LOCAL LICENSING AUTHORITY MAY CONSIDER THE REASONABLE REQUIREMENTS OF THE NEIGHBORHOOD AND THE DESIRES OF ITS ADULT INHABITANTS PURSUANT TO SECTION 12-47-312 IN MAKING A DETERMINATION ON THE ISSUANCE OF A FOOD STORE LICENSE.

(5) THE STATE LICENSING AUTHORITY SHALL MAKE GENERAL RULES AND REGULATIONS AND SPECIAL RULINGS AND FINDINGS AS NECESSARY FOR THE PROPER REGULATION AND IMPLEMENTATION OF THE PROVISIONS OF THIS SECTION.

SECTION 2. In Colorado Revised Statutes, 12-47-103, **add** (8.5) as follows:

(8.5) "FOOD STORE" MEANS AN ESTABLISHMENT, OTHER THAN A RESTAURANT AS DEFINED IN SUBSECTION (30) OF THIS SECTION, THAT OFFERS FOR SALE FOOD ITEMS AT A RETAIL PREMISES, PROVIDED THAT A MINIMUM OF 25% OF THE GROSS ANNUAL INCOME FROM ITS TOTAL SALES, EXCLUDING FUEL PRODUCTS AS DEFINED AT SECTION 8-20-201(2) AND LOTTERY TICKET SALES

FROM SUCH TOTAL, IS DERIVED FROM THE SALE OF FOOD ITEMS. "FOOD ITEMS", AS USED IN THIS SUBSECTION (8.5), MEANS ANY RAW, COOKED, OR PROCESSED EDIBLE SUBSTANCE, ICE AND BEVERAGE, OTHER THAN ANY BEVERAGE CONTAINING ALCOHOL, INTENDED FOR USE OR FOR SALE IN WHOLE OR IN PART FOR HUMAN CONSUMPTION.

SECTION 3. In Colorado Revised Statutes, 12-47-309, **add** (1) (n) as follows:

12-47-309. Local licensing authority--applications--optional premises licenses. (1) A local licensing authority may issue only the following alcohol beverage licenses upon payment of the fee specified in section 12-47-505:

(n) FOOD STORE LICENSE.

SECTION 4. In Colorado Revised Statutes, 12-47-401, **add** (1) (w) as follows:

12-47-401. Classes of licenses. (1) For the purpose of regulating the manufacture, sale, and distribution of alcohol beverages, the state licensing authority in its discretion, upon application in the prescribed form made to it, may issue and grant to the applicant a license or permit from any of the following classes, subject to the provisions and restrictions provided by this article:

(w) FOOD STORE LICENSE.

SECTION 5. In Colorado Revised Statutes, 12-47-501, **add** (1) (f.5) as follows:

12-47-501. State fees. (1) The following license and permit fees shall be paid to the department of revenue annually in advance:

(f.5) FOR EACH FOOD STORE LICENSE, ONE HUNDRED DOLLARS.

SECTION 6. In Colorado Revised Statutes, 12-47-505, **add** (1) (b.5) as follows:

12-47-505. Local license fees. The following license fees shall be paid to the treasurer of the municipality, city and county, or county where the licensed premises is located annually in advance:

(b.5)(I) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED WITHIN ANY MUNICIPALITY OR CITY AND COUNTY, ONE HUNDRED FIFTY DOLLARS;

(II) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED OUTSIDE THE MUNICIPAL LIMITS OF ANY MUNICIPALITY OR CITY AND COUNTY, TWO HUNDRED FIFTY DOLLARS.

SECTION 7. In Colorado Revised Statutes, 12-47-901, **amend** (1) (f) and (5) (a) (I) as follows:

12-47-901. Unlawful acts – exceptions. (1) Except as provided in section 18-13-122, C.R.S., it is unlawful for any person:

(f) To sell at retail any malt, vinous, or spirituous liquors in sealed containers without holding a retail liquor store or liquor-licensed drugstore license, OR TO SELL MALT AND VINOUS LIQUORS IN SEALED CONTAINERS WITHOUT HOLDING A FOOD STORE LICENSE, except as permitted by section 12-47-301(6)(b) or any other provision of this article:

(5) It is unlawful for any person licensed to sell at retail pursuant to this article:

(a)(I) To sell an alcohol beverage to any person under the age of twenty-one years, to a habitual drunkard, or to a visibly intoxicated person, or to permit any alcohol beverage to be sold or dispensed by a person under eighteen years of age, or to permit any such person to participate in the sale or dispensing thereof. If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article or article 46 of this title. Notwithstanding any provision in this subparagraph (I) to the contrary, no person under twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained twenty-one years of age. No employee of a tavern licensed pursuant to section 12-47-412, that does not regularly serve meals as defined in section 12-47-103(20), or a retail liquor store shall sell malt, vinous, or spirituous liquors unless such person is at least twenty-one years of age. AN EMPLOYEE OF A FOOD STORE LICENSED PURSUANT TO SECTION 12-47-425 SHALL NOT SELL MALT OR VINOUS LIQUORS UNLESS THE EMPLOYEE IS AT LEAST TWENTY-ONE YEARS OF AGE.

SECTION 8. In Colorado Revised Statutes, 12-46-107, **amend** (1) (a) and (1) (c) as follows:

12-46-107. Local licensing authority – application – fees. (1) The local licensing authority shall issue only the following classes of fermented malt beverage licenses:

(a)(I) Sales for consumption off the premises of the licensee;

(II) THIS PARAGRAPH (a) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

(c)(I) Sales for consumption both on and off the premises of the licensee. A person licensed pursuant to this paragraph (c) may deliver at retail fermented malt beverages in factory-sealed containers in conjunction with the delivery of food products if such person has obtained a permit for the delivery of fermented malt beverages from the state licensing authority. The state licensing authority shall promulgate rules as are necessary for the proper delivery of fermented malt beverages pursuant to this paragraph (c) and shall have the authority to issue a permit to any person who is licensed pursuant to and delivers fermented malt beverages under this paragraph (c).

(II) THIS PARAGRAPH (c) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

SECTION 9. Effective date. July 1, 2017.

Proposed Initiative 2015-16 #61 (amended)

Change to Colorado Revised Statutes Permitting Sale of Beer and Wine by Food Stores

Text of Measure:

Be it Enacted by the People of the State of Colorado:

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12-47-425. FOOD STORE LICENSE. (1) NOTWITHSTANDING ANY PROVISIONS TO THE CONTRARY IN THIS ARTICLE, A FOOD STORE LICENSE MAY BE ISSUED TO FOOD STORES SELLING ONLY MALT AND VINOUS LIQUORS IN SEALED CONTAINERS NOT TO BE CONSUMED AT THE PLACE WHERE THE MALT AND VINOUS LIQUORS ARE SOLD.

(2) EVERY FOOD STORE LICENSED UNDER THIS SECTION TO SELL ~~SELLING~~ MALT AND VINOUS LIQUORS SHALL PURCHASE SUCH MALT AND VINOUS LIQUORS ONLY FROM A WHOLESALER LICENSED PURSUANT TO THIS ARTICLE.

(3) NOTWITHSTANDING ANY PROVISIONS OF THIS ARTICLE TO THE CONTRARY, NO OWNER, PART OWNER, SHAREHOLDER, OR PERSON INTERESTED DIRECTLY OR INDIRECTLY IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS ARTICLE, SHALL BE PROHIBITED FROM CONDUCTING, OWNING EITHER IN WHOLE OR IN PART, OR FROM BEING DIRECTLY OR INDIRECTLY INTERESTED IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS SECTION.

(4) A LICENSEE UNDER SECTION 12-46-104(1)(c) WITH A VALID FERMENTED MALT BEVERAGE LICENSE IN EFFECT ON JULY 1, 2017, MAY APPLY TO A LOCAL LICENSING AUTHORITY FOR A FOOD STORE LICENSE ISSUED UNDER THE PROVISIONS OF THIS SECTION IF IT OTHERWISE COMPLIES WITH THE REQUIREMENTS OF THIS SECTION. IN MAKING A DETERMINATION ON THE APPLICATION UNDER THIS SUBSECTION (4) FOR A FOOD STORE LICENSE, THE LOCAL LICENSING AUTHORITY MAY CONSIDER AS PROVEN THE SATISFACTORY NATURE OF THE CHARACTER, RECORD, OR REPUTATION OF THE APPLICANT IF, AT THE TIME OF THE FILING OF THE APPLICATION, THE APPLICANT MAINTAINS A VALID UNEXPIRED FERMENTED MALT BEVERAGE RETAILER LICENSE, AND NO ADMINISTRATIVE OR CRIMINAL PROSECUTION IS PENDING AGAINST THE APPLICANT. IN CONSIDERING ANY APPLICATION UNDER THIS SUBSECTION (4), THE LOCAL LICENSING AUTHORITY MAY CONSIDER THE REASONABLE REQUIREMENTS OF THE NEIGHBORHOOD AND THE DESIRES OF ITS ADULT INHABITANTS PURSUANT TO SECTION 12-47-312 IN MAKING A DETERMINATION ON THE ISSUANCE OF A FOOD STORE LICENSE.

(5) THE STATE LICENSING AUTHORITY SHALL MAKE GENERAL RULES AND REGULATIONS AND SPECIAL RULINGS AND FINDINGS AS NECESSARY FOR THE PROPER REGULATION AND IMPLEMENTATION OF THE PROVISIONS OF THIS SECTION.

SECTION 2. In Colorado Revised Statutes, 12-47-103, **add** (8.5) as follows:

(8.5) "FOOD STORE" MEANS AN ESTABLISHMENT, OTHER THAN A RESTAURANT AS DEFINED ~~AT~~ IN SUBSECTION ~~SECTION 12-47-103~~(30) OF THIS SECTION, THAT OFFERS FOR SALE FOOD ITEMS AT A RETAIL PREMISES, PROVIDED THAT A MINIMUM OF 25% OF THE GROSS ANNUAL INCOME FROM ITS TOTAL SALES, EXCLUDING FUEL PRODUCTS AS DEFINED AT SECTION 8-20-201(2) AND LOTTERY

TICKET SALES FROM SUCH TOTAL, IS DERIVED FROM THE SALE OF FOOD ITEMS. "FOOD ITEMS", AS USED IN THIS SUBSECTION (8.5), MEANS ANY RAW, COOKED, OR PROCESSED EDIBLE SUBSTANCE, ICE AND BEVERAGE, OTHER THAN ANY BEVERAGE CONTAINING ALCOHOL, INTENDED FOR USE OR FOR SALE IN WHOLE OR IN PART FOR HUMAN CONSUMPTION.

SECTION 3. In Colorado Revised Statutes, 12-47-309, **add** (1) (n) as follows:

12-47-309. Local licensing authority--applications--optional premises licenses. (1) A local licensing authority may issue only the following alcohol beverage licenses upon payment of the fee specified in section 12-47-505:

(n) FOOD STORE LICENSE.

SECTION 4. In Colorado Revised Statutes, 12-47-401, **add** (1) (w) as follows:

12-47-401. Classes of licenses. (1) For the purpose of regulating the manufacture, sale, and distribution of alcohol beverages, the state licensing authority in its discretion, upon application in the prescribed form made to it, may issue and grant to the applicant a license or permit from any of the following classes, subject to the provisions and restrictions provided by this article:

(w) FOOD STORE LICENSE.

SECTION 5. In Colorado Revised Statutes, 12-47-501, **add** (1) (f.5) as follows:

12-47-501. State fees. (1) The following license and permit fees shall be paid to the department of revenue annually in advance:

(f.5) FOR EACH FOOD STORE LICENSE, ONE HUNDRED DOLLARS.

SECTION 6. In Colorado Revised Statutes, 12-47-505, **add** (1) (b.5) as follows:

12-47-505. Local license fees. The following license fees shall be paid to the treasurer of the municipality, city and county, or county where the licensed premises is located annually in advance:

(b.5)(I) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED WITHIN ANY MUNICIPALITY OR CITY AND COUNTY, ONE HUNDRED FIFTY DOLLARS;

(II) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED OUTSIDE THE MUNICIPAL LIMITS OF ANY MUNICIPALITY OR CITY AND COUNTY, TWO HUNDRED FIFTY DOLLARS.

SECTION 7. In Colorado Revised Statutes, 12-47-901, **amend** (1) (f) and (5) (a) (I) as follows:

12-47-901. Unlawful acts – exceptions. (1) Except as provided in section 18-13-122, C.R.S., it is unlawful for any person:

(f) To sell at retail any malt, vinous, or spirituous liquors in sealed containers without holding a retail liquor store or liquor-licensed drugstore license, OR TO SELL MALT AND VINOUS LIQUORS IN SEALED CONTAINERS WITHOUT HOLDING A FOOD STORE LICENSE, except as permitted by section 12-47-301(6)(b) or any other provision of this article;

(5) It is unlawful for any person licensed to sell at retail pursuant to this article:

(a)(I) To sell an alcohol beverage to any person under the age of twenty-one years, to a habitual drunkard, or to a visibly intoxicated person, or to permit any alcohol beverage to be sold or dispensed by a person under eighteen years of age, or to permit any such person to participate in the sale or dispensing thereof. If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article or article 46 of this title. Notwithstanding any provision in this subparagraph (I) to the contrary, no person under twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained twenty-one years of age. No employee of a tavern licensed pursuant to section 12-47-412, that does not regularly serve meals as defined in section 12-47-103(20), or a retail liquor store shall sell malt, vinous, or spirituous liquors unless such person is at least twenty-one years of age. AN EMPLOYEE OF A FOOD STORE LICENSED PURSUANT TO SECTION 12-47-425 SHALL NOT SELL MALT OR VINOUS LIQUORS UNLESS THE EMPLOYEE IS AT LEAST TWENTY-ONE YEARS OF AGE.

SECTION 8. In Colorado Revised Statutes, 12-46-107, **amend** (1) (a) and (1) (c) as follows:

12-46-107. Local licensing authority – application – fees. (1) The local licensing authority shall issue only the following classes of fermented malt beverage licenses:

(a)(I) Sales for consumption off the premises of the licensee;

(II) THIS PARAGRAPH (a) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

(c)(I) Sales for consumption both on and off the premises of the licensee. A person licensed pursuant to this paragraph (c) may deliver at retail fermented malt beverages in factory-sealed containers in conjunction with the delivery of food products if such person has obtained a permit for the delivery of fermented malt beverages from the state licensing authority. The state licensing authority shall promulgate rules as are necessary for the proper delivery of fermented malt beverages pursuant to this paragraph (c) and shall have the authority to issue a permit to any person who is licensed pursuant to and delivers fermented malt beverages under this paragraph (c).

(II) THIS PARAGRAPH (c) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

SECTION 9. Effective date. July 1, 2017.

Proposed Initiative 2015-16 #61 (original)

Change to Colorado Revised Statutes Permitting Sale of Beer and Wine by Food Stores

Text of Measure:

Be it Enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** 12-47-425 as follows:

12-47-425. FOOD STORE LICENSE. (1) NOTWITHSTANDING ANY PROVISIONS TO THE CONTRARY IN THIS ARTICLE, A FOOD STORE LICENSE MAY BE ISSUED TO FOOD STORES SELLING ONLY MALT AND VINOUS LIQUORS IN SEALED CONTAINERS NOT TO BE CONSUMED AT THE PLACE WHERE THE MALT AND VINOUS LIQUORS ARE SOLD.

(2) EVERY FOOD STORE SELLING MALT AND VINOUS LIQUORS SHALL PURCHASE SUCH MALT AND VINOUS LIQUORS ONLY FROM A WHOLESALER LICENSED PURSUANT TO THIS ARTICLE.

(3) NOTWITHSTANDING ANY PROVISIONS OF THIS ARTICLE TO THE CONTRARY, NO OWNER, PART OWNER, SHAREHOLDER, OR PERSON INTERESTED DIRECTLY OR INDIRECTLY IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS ARTICLE, SHALL BE PROHIBITED FROM CONDUCTING, OWNING EITHER IN WHOLE OR IN PART, OR FROM BEING DIRECTLY OR INDIRECTLY INTERESTED IN ONE OR MORE RETAIL BUSINESSES LICENSED PURSUANT TO THIS SECTION.

(4) A LICENSEE UNDER SECTION 12-46-104(1)(c) WITH A VALID FERMENTED MALT BEVERAGE LICENSE IN EFFECT ON JULY 1, 2017 MAY APPLY TO A LOCAL LICENSING AUTHORITY FOR A FOOD STORE LICENSE ISSUED UNDER THE PROVISIONS OF THIS SECTION IF IT OTHERWISE COMPLIES WITH THE REQUIREMENTS OF THIS SECTION. IN MAKING A DETERMINATION ON THE APPLICATION UNDER THIS SUBSECTION (4) FOR A FOOD STORE LICENSE, THE LOCAL LICENSING AUTHORITY MAY CONSIDER AS PROVEN THE SATISFACTORY NATURE OF THE CHARACTER, RECORD, OR REPUTATION OF THE APPLICANT IF, AT THE TIME OF THE FILING OF THE APPLICATION, THE APPLICANT MAINTAINS A VALID UNEXPIRED FERMENTED MALT BEVERAGE RETAILER LICENSE, AND NO ADMINISTRATIVE OR CRIMINAL PROSECUTION IS PENDING AGAINST THE APPLICANT. IN CONSIDERING ANY APPLICATION UNDER THIS SUBSECTION (4), THE LOCAL LICENSING AUTHORITY MAY CONSIDER THE REASONABLE REQUIREMENTS OF THE NEIGHBORHOOD AND THE DESIRES OF ITS ADULT INHABITANTS PURSUANT TO SECTION 12-47-312 IN MAKING A DETERMINATION ON THE ISSUANCE OF A FOOD STORE LICENSE.

(5) THE STATE LICENSING AUTHORITY SHALL MAKE GENERAL RULES AND REGULATIONS AND SPECIAL RULINGS AND FINDINGS AS NECESSARY FOR THE PROPER REGULATION AND IMPLEMENTATION OF THE PROVISIONS OF THIS SECTION.

SECTION 2. In Colorado Revised Statutes, 12-47-103, **add** (8.5) as follows:

(8.5) "FOOD STORE" MEANS AN ESTABLISHMENT, OTHER THAN A RESTAURANT AS DEFINED AT SECTION 12-47-103(30), THAT OFFERS FOR SALE FOOD ITEMS AT A RETAIL PREMISES, PROVIDED THAT A MINIMUM OF 25% OF THE GROSS ANNUAL INCOME FROM ITS TOTAL SALES, EXCLUDING FUEL PRODUCTS AS DEFINED AT SECTION 8-20-201(2) AND LOTTERY TICKET SALES FROM SUCH TOTAL, IS DERIVED FROM THE SALE OF FOOD ITEMS. "FOOD ITEMS", AS USED IN THIS SUBSECTION

(8.5), MEANS ANY RAW, COOKED, OR PROCESSED EDIBLE SUBSTANCE, ICE AND BEVERAGE, OTHER THAN ANY BEVERAGE CONTAINING ALCOHOL, INTENDED FOR USE OR FOR SALE IN WHOLE OR IN PART FOR HUMAN CONSUMPTION.

SECTION 3. In Colorado Revised Statutes, 12-47-309, **add** (1) (n) as follows:

12-47-309. Local licensing authority--applications--optional premises licenses. (1) A local licensing authority may issue only the following alcohol beverage licenses upon payment of the fee specified in section 12-47-505:

(n) FOOD STORE LICENSE.

SECTION 4. In Colorado Revised Statutes, 12-47-401, **add** (1) (w) as follows:

12-47-401. Classes of licenses. (1) For the purpose of regulating the manufacture, sale, and distribution of alcohol beverages, the state licensing authority in its discretion, upon application in the prescribed form made to it, may issue and grant to the applicant a license or permit from any of the following classes, subject to the provisions and restrictions provided by this article:

(w) FOOD STORE LICENSE.

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(b.5)(I) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED WITHIN ANY MUNICIPALITY OR CITY AND COUNTY, ONE HUNDRED FIFTY DOLLARS;

(II) FOR EACH FOOD STORE LICENSE FOR PREMISES LOCATED OUTSIDE THE MUNICIPAL LIMITS OF ANY MUNICIPALITY OR CITY AND COUNTY, TWO HUNDRED FIFTY DOLLARS.

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(f) To sell at retail any malt, vinous, or spirituous liquors in sealed containers without holding a retail liquor store or liquor-licensed drugstore license, OR TO SELL MALT AND VINOUS LIQUORS IN SEALED CONTAINERS WITHOUT HOLDING A FOOD STORE LICENSE, except as permitted by section 12-47-301(6)(b) or any other provision of this article;

(5) It is unlawful for any person licensed to sell at retail pursuant to this article:

(a)(I) To sell an alcohol beverage to any person under the age of twenty-one years, to a habitual drunkard, or to a visibly intoxicated person, or to permit any alcohol beverage to be sold or dispensed by a person under eighteen years of age, or to permit any such person to participate in the sale or dispensing thereof. If a person who, in fact, is not twenty-one years of age exhibits a fraudulent proof of age, any action relying on such fraudulent proof of age shall not constitute grounds for the revocation or suspension of any license issued under this article or article 46 of this title. Notwithstanding any provision in this subparagraph (I) to the contrary, no person under twenty-one years of age shall be employed to sell or dispense malt, vinous, or spirituous liquors unless he or she is supervised by another person who is on premise and has attained twenty-one years of age. No employee of a tavern licensed pursuant to section 12-47-412, that does not regularly serve meals as defined in section 12-47-103(20), or a retail liquor store shall sell malt, vinous, or spirituous liquors unless such person is at least twenty-one years of age. AN EMPLOYEE OF A FOOD STORE LICENSED PURSUANT TO SECTION 12-47-425 SHALL NOT SELL MALT OR VINOUS LIQUORS UNLESS THE EMPLOYEE IS AT LEAST TWENTY-ONE YEARS OF AGE.

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(a)(I) Sales for consumption off the premises of the licensee;

(II) THIS PARAGRAPH (a) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

(c)(I) Sales for consumption both on and off the premises of the licensee. A person licensed pursuant to this paragraph (c) may deliver at retail fermented malt beverages in factory-sealed containers in conjunction with the delivery of food products if such person has obtained a permit for the delivery of fermented malt beverages from the state licensing authority. The state licensing authority shall promulgate rules as are necessary for the proper delivery of fermented malt beverages pursuant to this paragraph (c) and shall have the authority to issue a permit to any person who is licensed pursuant to and delivers fermented malt beverages under this paragraph (c).

(II) THIS PARAGRAPH (c) IS REPEALED, EFFECTIVE JANUARY 1, 2019.

SECTION 9. Effective date. July 1, 2017.

TITLE SETTING BOARD

January 20, 2016

DATE FILED: February 16, 2016 6:41 PM

Rehearing of Proposed Initiatives

2015-2016 #60 "Food Store License"

2015-2016 #61 "Food Store License"

THE BOARD

Suzanne Staiert, Chair, Deputy Secretary of State
Sharon Eubanks, Office of Legislative Legal Services
David Blake, Deputy Attorney General

Exhibit B

P R O C E E D I N G S

MS. STAIERT: Good morning. This is a meeting of the Title Setting Board pursuant to Article 40 of Title 1 C.R.S. The time is 9:07. The date is Wednesday, January 20, 2016. We are meeting in the Secretary of State's Aspen Room, 1700 Broadway, Denver, Colorado.

The title setting board today consists of myself, Suzanne Staiert, Deputy Secretary of State on behalf of Wayne Williams; David Blake, Deputy Attorney General on behalf of Attorney General Cynthia Coffman; and Sharon Eubanks -- I have all the wrong names here that's why -- the designee of Director of Office of Legislative Legal Services, Dan Cartin.

Today we are meeting to consider title settings and rehearings. There are two titles for each measure. One is a statement and the other is a statement in the form of a question. Changes adopted by the Title Board to the first title in the staff draft will be considered adopted for the other title.

For anyone who wishes to testify, there is a sign-up sheet on the back table. This hearing is broadcast over the Internet from the Secretary of State's website. And public restrooms are located on

the floor.

When the Title Board considers a proposed initiative for the first time, the Board will follow three steps. First, Board members may ask -- may wish to ask questions of the proponents. This is to ensure the Board understands the proposal.

Second, the Board will determine if it has jurisdiction to set a title. In particular the Board must determine if the measure complies with the single subject rule proscribed in Article V, Section 1 5.5 of the Colorado Constitution, and Section 1-40-1065 Colorado Revised Statutes. This is because the Board is prohibited for setting a title for a measure that contains more than one subject.

Third, if the Board determines that it has jurisdiction to set title, then the Board will use a staff prepared draft for discussion purposes. A copy of the staff draft is on the table.

Generally we will take all testimony first, and then the Board will discuss and vote after all testimony has been completed. A decision is reached by two of the three members of the Board.

Please take note we are not concerned with the merits of any proposal here. We are only concerned with the setting of titles. Furthermore,

we are not concerned with any legal or constitutional objections to the measures except to the extent that such objections relate to the jurisdiction of the Board to set titles or to the correctness of the titles and summaries themselves. Anyone who is dissatisfied with the decision of the Title Board may file a motion for rehearing with the Secretary of State within seven calendar days.

In the interest of brevity, speakers may incorporate remarks made on the record in prior hearings on similar measures.

The first item on the agenda today is 2015-2016 #60, Food Store License, and this is a rehearing. If the proponents could come forward and just state names for the record.

MR. ROGERS: Trey Rogers on behalf of the proponents Blake Harrison and Grayson Robinson, both of whom are here and have previously completed their affidavits. They did that at the time of the initial hearing.

MS. STAIERT: Okay. Thank you. And the motion for rehearing was filed by Mr. Grueskin.

You want to come forward and just identify yourself for the record and then we'll...

MR. GRUESKIN: Thank you, Madam Chair.

My name is Mark Grueskin, counsel for the objector Jeanne McEvoy, registered elector of the State of Colorado.

MS. STAIERT: And is there anything you want to add to your motion or any argument you want to make?

MR. GRUESKIN: There is. If I could just turn to the (inaudible).

Let me just first say that I may be a little bit more exhaustive because I know that Mr. Blake was not able to be part of the earlier proceedings. And so I might -- I might just go through what this measure does and what our motion addresses.

This measure creates a new category of liquor license for grocery stores and convenience stores, in essence, and any other entity that sells at least 45 percent of its -- has 25 percent of its gross sales from -- excluding fuel sales and lottery tickets -- from food.

The title that's been set -- and I know that it is largely based on the title that was set for 51 and 52 -- is still flawed even though the Board made certain changes last time.

First of all, it uses twice the phrase

full strength beer and wine. That's a phrase that simply doesn't exist, not in the initiative. It exists in the promotional materials of the proponents as indicated on the exhibits attached to our motion. It's even a phrase that the United States Supreme Court has looked at as an extremely persuasive -- excuse me -- highly influential advertising phrase. But it doesn't exist in the initiative. It's contrived. It's invented. It's created. And, honestly, I would -- I would be hard-pressed, and I would guess the Board would be hard-pressed to define what full strength beer and wine means. And to the extent that that's true, it is a phrase that has been created for purposes of voter appeal as opposed to voter understanding and that is contrary to the Board's direction and the statutes in terms of reflecting the measure in the title.

And so we would suggest to you not only is it an invented phrase that doesn't even exist and is beyond definition; it is beyond legal definition. It is a catchphrase because of its demonstrated use in the political campaign.

Of course, if the Board decides that nontextual references are appropriate, well, honestly, I think you've opened the proverbial

Pandora's box, and you will have every proponent telling you what their measure -- the technical parts and even the nontechnical parts of their measure mean and how best to phrase them. And I think that is a path you do not want to go down. If you do want to go down that, well, then, it seems to me you probably want to make sure that people know that all convenience, virtually all convenience stores and all grocery stores are going to be eligible for these kinds of licenses.

That is an expanded form of the argument that we made on 51 and 52. That one wasn't as compelling as it needed to be, but I still believe that the use of this phrase is -- is error on the part of the Board.

Second --

MS. STAIERT: What would your suggestion be? To go back to the malt and vinous liquors or...

MR. GRUESKIN: It's the text. It's the text of the statute, and it's the text of the amendment and, therefore, it is the -- it is the measure. So, yes, that -- that would be my proposal.

Secondly, the change made by the Board on 51 and 52 relating to the provision allowing the ownership of multiple food store licenses, including

by the owners of certain retail liquor licenses, is misleading. There are so many forms of retail liquor licenses as we point out in the motion. This measure is very clear that the multiple ownership is a function of this type of license, the food store license. The measure itself talks about the retail businesses licensed pursuant to this section. And so to be vague when you can be clear seems to me to be a concession that you do not need to make, and I would suggest it is error not to -- to hold out to voters that their types of retail licenses may be affected, when, in fact, they're not.

MS. EUBANKS: Mr. Grueskin, if I could ask a question regarding this argument. I guess I'm a little confused because the -- the terminology in the measure talks about the license pursuant to this section versus licenses pursuant to the article, and -- and I think that the reference to the owners of certain retail liquor licenses was supposed to be trying to encompass under the article in terms of those -- those folks could also have now multiple ownership of licenses under the article. I mean, that's my understanding. It's not just that you have one company that has a food store license that then has another food store license for another location.

It was my understanding that also that current licensees under the liquor code could also have an interest in a food store license. Am I misunderstanding?

MR. GRUESKIN: Well, I guess Mr. Rogers will probably clear this up. I did not read the language that way. I read it simply to allow for the Section 425 which relates to food store licenses. So that was my understanding. But I -- but maybe we ought to wait and see what the proponents have to say but -- but it was my understanding that the section --

MS. EUBANKS: This food store license.

MR. GRUESKIN: Exactly. Food store license section.

MS. EUBANKS: And I don't know whether Mr. Rogers wants to come up now or address it.

MR. ROGERS: Thank you, Ms. Eubanks.

There is -- anyone can own as many food store licenses as they wish to own under this measure. The provision that we're talking about is simply intended to provide that even the owner of a liquor license drug store license or a retail liquor license may also own as many food store licenses as they would like.

Article 47, and in particular those two subparts of Article 47 provide that currently owners of liquor licenses, drug store licenses, and owners of retail liquor licenses may only own that single license and may own no other license within Article 47.

So the title is correct and is not misleading. It simply points out that it allows multiple ownership, including for certain retail license holders. In fact, the only two retail license holders that would under current law be prohibited from owning food store licenses are those two. So this listing in Mr. Grueskin's motion of all the other types of retail licenses that exist is really a red herring. Those licensees can own as many food store licenses as they like, whether or not we have the not-withstanding-any-other-provision-of-Article 47 language. Does that answer your question?

MS. EUBANKS: And so, for example, you have a retail liquor store licensee could under the measure now also own a food store license?

MR. ROGERS: Correct. As the title -- as the title points out.

MS. EUBANKS: Okay.

MR. ROGERS: Yeah.

MS. EUBANKS: Thank you.

MR. ROGERS: Yeah.

MR. GRUESKIN: Then to Mr. Rogers' point, if it is clear that there are only two forms of licensees that -- in addition to food store licensees that can have this multiple ownership, the title ought to be specific about those kinds of licenses rather than leaving the language vague as to certain retail licensees.

Third, this measure takes out of the current licensing mandate that there be an establishment of the needs and desires of local inhabitants before the license is granted and makes it optional. That is a major change. As most people perceive the licensing process, that is a major change. Typically neighbors get to say via petitions and hearing whether or not they support a particular license, to omit this category of license, which frankly will be the most pervasive type of licensee, licensees because there will be convenience -- thousands of convenience stores and -- and grocery stores, seems to me to be to underserve the voters who are going to rely on this ballot title and, therefore, it seems to be a -- it is an error on the

part of the Board not to include a reference to the fact that it is optional at the local level as to whether or not needs and desires have to be established.

Likewise in our -- our motion addresses it, this measure treats as a presumptive and conclusive test, the lack of an administrative or criminal proceeding as evidence of character and reputation. That is a new, dramatically new standard, and it is certainly not one, no matter what other civil litigation may exist, for instance, the establishment of that standard is noteworthy and ought to be part of the title.

We've indicated a fifth, that the Supreme Court has formally written titles that require disclosure of a fee. We believe that is also required here.

And, lastly, an argument that was not raised in terms of 51 or 52, this issue of how the Board did change the 51 and 52 title to include the reference to 25 percent of annual income to help make it clear what a food store is. However, food sales are a minimal, relatively minimal part of what happens at a convenience store and all of what this definition says is if you take most of the revenue

out of a convenience store revenue assessment, 25 percent of what's left is the minimum amount that has to be met. And as we indicated based upon current statistics, that really means that in the overall context it's -- and I think my wording was not fully accurate in the next to last paragraph, but in the overall context it's about 14 percent of sales. It's not 25 percent of sales. Because you have to exclude all those other dollars from the other revenue sources, and we think that in order to make that phrase clear you have to include the phrase that comes from the initiative itself, so that it's clear that it's not just 25 percent of the overall sales, but it's 25 percent of maybe 40 percent of -- excuse me -- 30 percent of the overall sales of one of these entities.

I don't have anything further, and hopefully my motion for rehearing was thorough enough that you don't have questions. But if I'm wrong and you do, I'm happy to answer them.

MS. STAIERT: Do you have any questions? Okay.

Mr. Rogers, if you want to respond.

MR. ROGERS: I do. Thank you.

So first and primarily for the record

and for Mr. Blake's benefit, 60 and 61 differ from proposed Initiatives 51 and 52, that the Board previously considered and for which the Board also considered a re -- a motion for rehearing filed by the same objector, represented by the same counsel. The Board listened to most, if not all, of the arguments presented in the motion for rehearing and dealt with those, either rejected them or made changes to the title as the Board saw appropriate.

Now, to be sure, 60 and 61 are new measures, and the objectors have the right to come and argue the points made in the motion.

Again, I simply point out that we're largely doing this exercise again for a couple of reasons. First, I'm going to try to, as Mr. Grueskin did, keep my remarks fairly short.

You've heard again -- Mr. Blake, with the exception of you, you've heard most of these arguments before. The second reason I mention it is that I would ask the Board, the Chair to incorporate the argument on 50 and -- sorry -- 51 and 52 and the rehearing on those proposed initiatives in the record for these measures.

Let me address, then, quickly, if I could, the arguments Mr. Grueskin has made this

morning.

With regard to the phrase full strength beer and wine, I'd like to note first that this is not something that was concocted by the proponents. In the staff draft on 60 and 61 and in fact on 51 and 52, the phrase full strength beer and wine was used. So it's not our invention. And, in fact, it's not really even the staff's invention. It is common parlance. The alternative, as you heard Mr. Grueskin suggest, is that we use the terms exclusively vinous liquor and malt liquor. The problem there is the public is -- is certainly going to be confused by the use of those terms if they are used exclusively. They are arcane, technical terms that are beyond the -- the understanding of the voter.

A little case law on this. The -- the task of the Title Board according to the Supreme Court is to enable the electorate, who is familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently to support or oppose. How? The Supreme Court goes on to say "by setting a title that correctly and fairly expresses the true intent and meaning of the initiative."

You know these standards well. That

particular quote, those quotes are from In Re Title for 2009-10 #45, that's Colorado Supreme Court 2010.

In another case the Court expressly said, quote, that the Board -- sorry -- that the Board may, quote, use terms in the common understanding of most voters, close quote. That was In Re Title on Taxation 3, Colorado Supreme Court 1992.

That's exactly what you've done here in setting the titles for 60 and 61. You've used terms, full strength beer and wine, that are within the common parlance, as opposed to words like vinous liquor and malt liquor which simply are not.

A second point on this, it is true that vinous liquor and malt liquor are the terms used -- in the statute. The reason those are the terms used or used in the statute and the initiative. The reason those are used in the initiative is that the proponents chose to amend the existing statute. They chose to drop this new license into the existing Article 47, which deals with liquor licenses in Colorado. We did that because that's good drafting because it enables us to have a holistic -- one article that holistically addresses liquor licenses in the state of Colorado.

If you accept Mr. Grueskin's argument, you would create a perverse incentive. You create an incentive for proponents to define their own terms. We certainly could have done that. We could have drafted this measure to regulate the sale of full strength beer and wine in food stores, and we could have defined those terms, and we could have done it -- could have done it outside of Article 46 and 47. We chose not to do so.

We shouldn't be penalized for making good drafting decisions and -- and drafting our measure in a way that makes sense and works within the existing statutory framework.

Now, finally, on 60 -- sorry -- finally, on full strength beer and wine, to use the terms vinous and malt liquor would instead be confusing to the voter. Both of those terms include the phrase liquor, and they would tend to lead the voter to conclude that this measure allows the sale of what in common parlance is known as liquor, that is spiritus liquor, that's your whiskeys and your gins and your vodkas. That is the impression that the use of only the terms vinous and malt liquors would create in the minds of the voters.

So the title you have set is --

complies with the Supreme Court case law, and it accurately communicates to the voters what this measure would do.

Let me go on to Mr. Grueskin's next point, which is that the changes made at the initial hearing regarding ownership by certain retail liquor licensees is misleading. I think I addressed this in -- for the most part in my comments earlier, but, again, I think -- I think you got it right at the initial hearing. There are only two retail liquor licenses that are affected. We don't need to list them out. To list them out would get down to a level of detail that is simply not required. This -- this -- the fact that the initiative would allow the owners of liquor license drug stores and retail liquor license -- retail liquor stores to own food stores is simply not a central feature of the measure, and it need not be further described in the title, certainly no further than it is already described in the title that's been set.

Let me go on to the exclusion of the provision of the measure that requires a needs and desires hearing.

So, first, the -- it is not an exclusion, it is not a removal of the needs and

desires hearing, first. It leaves that decision to local authorities.

Second, that provision only applies to existing 3.2 license holders. Those existing 3.2 license holders have already been through a local needs and desires hearing at the time that they obtained their Article 46, 3.2 liquor license. So all that the measure is saying here is that for this 1500 or so license holders in the State of Colorado who have already been through a needs and desires hearing, if the local authorities choose to not make them go through that a second time, that's okay. And I think that you will see when you consider the provision in that context, this is, again, merely a detail and does not need to be included in the title, lengthening it, adding to voter confusion, and really moving away from the central features of the measure to a detail.

Same arguments apply to the -- the permitted presumption -- again, the permitted presumption that an existing 3.2 license holders meets other requirements for a liquor license. Again, it only applies to the existing 3.2 license holders. Those 3.2 license holders have already met the requirements that we're discussing today. And so

the measure simply says if the local authority wishes to not make those 3.2 license holders go through the process a second time, they can do that. So, again, this is a detail. This is not a central feature of the measure and need not be included in the title.

MS. STAIERT: So I guess I haven't done a lot of 3.2 licenses. I just don't remember those going through the needs and desires, but that's part of the statutory structure now? That's what you're saying?

MR. ROGERS: Yes.

MS. STAIERT: Okay. So a convenience store that has a 3.2 license is required under current code to do a needs and desires?

MR. ROGERS: I certainly believe that's the case. I can --

MS. STAIERT: Maybe when we take a break, you could just -- you could get me a cite because I just don't personally remember that happening, and it may be when I did licensing authorities those were handled administratively or something, but I just don't recall that. So I'd just like it for the record.

MR. ROGERS: We'll take a look at that and -- and get you a cite.

MS. STAIERT: Thanks.

MR. ROGERS: Mr. Grueskin next mentioned that we should include the fact that we're imposing a fee. The case law is pretty clear on this, that the creation of a fee need not -- it's not a central feature. It need not be included in the title. Every type of retail license under -- every type of license, wholesale, retail, importer, manufacturer, includes a fee. That there would certainly be no voter surprise to learn that in addition to the dozens of other types of licenses granted under Article 47 this one also includes a nominal fee. I think 100 to $150 fee. It is a detail. I'm sure the proponents would like to see, you know, every measure of this title included so that instead of having a nine-line title we have a 20-line title, thus confusing and -- confusing the voters. It's just not necessary under the -- under the case law, under the standards that this Board applies when setting title.

Finally, objectors suggested that the change to the language around food stores remains misleading. Well, you know, the request in the first -- in the motion for rehearing on 51 and 52 was that the percentage of food sales should be included.

And the Board did that. And now the objectors have come back to say, well, despite the fact that that's what we asked for it didn't go far enough. You need to now include more details about what a food store is.

I would submit that you've done enough. You've told the voter in the title that a food store is one that gets 25 percent of its annual revenue -- annual gross revenue from the sale of food. Are there exclusions? Yes, there are exclusions. Those are in the measure. If the voter isn't satisfied with the language in the title, with the information provided in the title, the voter can certainly go and parse -- parse it out a little more finely by reading the measure itself. But with regard to the title you've set, it is sufficient. You did what the objectors asked you to do on 50 and 51. No further kind of language around what a food store is is necessary.

Unless you've got questions, that's all.

MS. STAIERT: Any questions?

Do you want to add anything, Mr. Grueskin?

MR. GRUESKIN: Mark Grueskin.

First, as a general matter, I take umbrage at the suggestion that the goal of this motion or that the goal of the motion on 51 and 52 was to confuse voters. Obviously the Board found merit in a number of the things that were suggested. As the Board knows, I wasn't able to attend the last hearing, and I would have asked for additional clarity had I been here, but nonetheless the purpose here and I think it was very particularly as to the imposition of the fee is to create a 20-line title. Well, let's see, if you inserted a phrase imposes a fee upon food store licensees, I don't know that you get to 20 lines. And I -- and I raise that in a somewhat sarcastic manner because I think that the point isn't of this motion to do anything other than to contribute to voter understanding.

Two quick -- two quick points. First, full strength beer and wine, I'm not sure I -- I can add a lot to what we have said except for the fact that the -- the use of full strength beer and wine was raised as a phrase in the legislative review and comment hearing. If that's where staff got it from, that's very possible.

But at no point have the proponents of this initiative actually tried to define what "full

strength" means. And it is a term that is left open to public interpretation. We are not trying to penalize them for their drafting processes. That was then. This is now. We simply want the title to be reflective of the initiative.

The only other issue that I would raise for you at this point relates to the very last issue addressed. We do -- we do believe that the added detail about what -- how the annual gross income is calculated is helpful. There's no suggestion on the part of the proponents that our numbers are wrong or that the industry studies cited are incorrect. The point is these are called food stores again for, I guess, drafting convenience. But they're really not -- if you sell 14 percent of everything that you put out for sale and you call yourself a food store, it -- it is at least something that ought to be known to voters so that they don't believe that this is simply a super market sweeps kind of measure.

Thank you very much.

MS. STAIERT: Thank you.

Mr. Grueskin, I just wanted to clarify. I think at the last rehearing you had raised single subject, but you didn't this time. And I just wanted to make sure that you're not intending to.

MR. GRUESKIN: We did as to #52.
MS. STAIERT: Okay.
MR. GRUESKIN: And we are as to #61.
MS. STAIERT: Okay.
MR. GRUESKIN: But we're not raising it here.
MS. STAIERT: But not in this one.
MR. GRUESKIN: Correct.
MS. STAIERT: All right. Thank you.
MR. ROGERS: If I could, Madam Chair, you asked for information about whether needs and desires is required for 3.2. Let me give you a couple of cites on that.
MS. STAIERT: Okay.
MR. ROGERS: So 12-46-104(1)(c) provides that a retail -- "retailers license shall be granted and issued to any person, partnership, association, organization or corporation qualifying under Section 12-47-301," and then goes on. 301 is the then the provision of -- 12-47-301 is the provision that requires a wants and desires or needs and desires hearing for an Article 47 liquor license. So, yes, the same needs and desires process required for a liquor license is also required for a 3.2 license.

MS. STAIERT: Okay. And just so I can clarify it. I think my -- my position. So I guess that on the ones that exist, but theoretically there could also be new food stores that come in, didn't go through needs and desires because it's new construction or whatever, and they could obtain one without doing needs and desires?

MR. ROGERS: No. The -- the exclusion from needs and desires and the presumption that they've met the other requirements is only available to existing 3.2 licensees.

MS. STAIERT: Okay. All right. Perfect. Thank you.

MS. MADSEN: And if the Board would allow me, this is Shayne Madsen. I'm the attorney for Coloradans for Convenience. First time that we've appeared before this Board. But we are -- my clients are a coalition of convenience store owners which are primarily individual business owners integral to their communities.

I wanted to make two quick points. First, we are -- we have been part of the drafting process since the beginning. We do support all of Mr. Rogers' arguments before the Board.

I would just point out two things.

First, the insistence of Mr. Grueskin on using malt and vinous liquor is really an attempt to use prohibition-era terminology in what is hopefully a modern-day proposal.

And, secondly, my clients are quite troubled by what we see as invented numbers in the motion for rehearing. We're in the business of being convenience stores, and all of a sudden Mr. Grueskin is citing what he purports to represent as industry figures. I think those are fairly in dispute here and should not be considered by the Title Board unless you want to turn your consideration into an evidentiary hearing, in which case we're happy to bring forth the actual facts.

And just to underscore Mr. Trey -- Mr. Rogers' last statement, Article 46 which is the 3.2 licensing article does require a needs and desires hearing for a new 3.2 licensee and a second needs and desires hearing in the context of this initiative when converting to the new food store license doesn't need to be mandatory. It needs to be permissive on -- on the side of the local licensing authority.

So if you have any questions, we'd be happy to answer them here. But we stand in support

of Initiative 60.

MS. STAIERT: Okay. Thank you. Any questions for the... All right.

Is there discussion by the Board? Do you want to incorporate your comments from last time or do you want to make them anew?

MS. EUBANKS: I think I can just do it sort of anew.

MS. STAIERT: Okay.

MS. EUBANKS: Very briefly. I don't think my position is a surprise to anyone.

I do agree with Mr. Grueskin's first argument about the terminology used. I think that the terminology should follow the statutes. I still think that it can be -- the title can be drafted in a way that it still explains to the voters in terms of the type of beer and wine that is at issue with the measure. But I do think that the terminology should track the statutory terminology. I'm afraid that the full strength beer and wine terminology is a catchphrase in terms of trying to elicit a favorable response, full strength being something better than less than full strength and also in terms of potentially being used as an advertising slogan in a campaign. So that's my position on -- on that

argument.

The only other argument that I would agree with in Mr. Grueskin's motion for rehearing is the argument, the last argument under F in terms of the description of the income that's used in the calculation of whether someone qualifies as a food store licensee. I do think regardless of the numbers that's really not important to me. For whatever reason, the measure itself excludes the income from fuel products and lottery ticket sales, and I think that that should be indicated in the title.

MS. STAIERT: Okay. While we had a lot of discussion at the last couple of hearings about the term full strength beer and wine, and I guess I'm -- I'm pretty much with Mr. Rogers on the notion that if our goal is to track the initiative rather than to use terms of -- of common meaning, then what we essentially force proponents into is rewriting, you know, the liquor code into a new title. And so, you know, if Mr. Rogers could have solved that problem by just, you know, pulling all of his stuff out and putting it in a different article and calling it beer and wine, would we be having this discussion?

And that's kind of what resonates with me is that we're trying to use terms of common

meaning. And I think I agree that if we track the language that's in the statute, it's going to be confusing to the voters who don't know what malt and vinous means. They don't distinguish it from spirits, and so I don't know how else to describe it in a -- in a common way. I think at some point we have to refer to beer and wine.

So even if we said concerning the sale of full strength malt and vinous liquors, then in the next line we'd still have to say commonly referred to as beer and wine or we'd be confusing the voters.

So I don't really have a problem keeping it the way that it is because I think they're terms of common meaning. I don't think they're catchphases because I don't think they elicit necessarily a reaction one way or another. They're just things. It's not like we're saying they're good things or bad things. People have different feelings about full strength alcohol. So I'm -- I'm comfortable with that.

On the -- on the issue of allowing the multiple food store licenses, I think that we adequately covered that.

The needs and desires, I don't see that as a major issue given that, one, it's not -- it's

not something that they removed. It's a consequence of what exists now and what will exist later, but I don't think it's this Board's duty to describe every change that occurs from current law, and I think it was adequately explained by the proponents that, in fact, this isn't even a major procedural change as all those groups will have already gone through that.

The reputation, character record, I don't think that's central to the measure.

And the imposition of a license fee, I also don't think that that's central. I think imposition of license fees become central to measures when the license fee is then going to be dedicated to a certain fund or it's really part of the purpose, and this is just a fee that is not central. Just everything has a fee attached to it.

Annual gross income, I mean, I'm fine adding those, you know, couple of things in there. I mean, as to any argument that, you know, we may or may not be trying to avoid a 20-line measure, I don't think lines have ever mattered much or Amendment 66 would have never looked the way it did. I think the Board is trying to capture everything that's central. And so, you know, I don't really consider the line one way or the other, but I am fine with this other

inclusion in F so...

MR. BLAKE: So I'll make the record since I wasn't here before. I think I agree with most of what the Chair has discussed.

The most sympathetic argument or the argument that I'm most sympathetic to is regarding the catchphrase, but I think I disagree. But for the record let me explain why.

The argument in the rehearing, by the way, just also for the record, I'm up here looking at case law. And I'm not up here playing -- playing games or something.

That there's no specific meaning. I mean, I think, of course, there is a specific meaning that comes along with it. It conveys generally the purpose or I don't think we'd be having this discussion if it was really that amorphous.

As to the second argument -- or let me jump to the third argument. The Board is inconsistent in using nontextual references to the title. I don't think it has to come out of the proposal. I think as a general matter we do try to adhere to that because it's the safest route, but I don't think we've ever held ourselves to that absolute standard. I certainly had not. So, again,

I think that's a good best practice, I don't think it's a requirement.

As to the second argument that it's political catchphrase, again, this is the one where I'm most sympathetic, but as to the arguments here relating to whether or not this is a campaign slogan, it doesn't have to be exclusive. I think you can certainly use words out of the title for a campaign. The question about whether or not it's a catchphrase is really whether or not it's prejudicial or it invokes some kind of reaction or it generates some kind of favoritism to one side or the other. I simply don't think that it does.

At least one of the cases that I was most familiar with, and I'm going to quote In Re Ballot Title 2013-14, Nos. 85, 86, 87 where it says it checks the language of the text of the proposed initiative -- I've already discussed why I don't think that's a requirement -- it is merely descriptive, and it neither evokes emotion nor engenders voter confusion. And I think that's the standard that I want to apply to this. So I think it satisfies the fact that it is not a catchphrase. So I think I made the record on the one argument that I was most persuaded by. But I can't agree.

MS. STAIERT: Do you have any opinion on the adding in the excluding lottery and gas?

MR. BLAKE: I don't -- I don't think that it's necessary. Clarity is always helpful, but I don't think it's necessary.

MS. STAIERT: You want to put it in?

MS. EUBANKS: Sure.

MS. STAIERT: At least in terms of what it would look like.

MS. EUBANKS: Sure. So I believe on line 5 after "income" you want to insert a comma and say something along the lines of excluding fuel product and lottery ticket sales, comma. I mean, we can put it in terms of excluding income from if you think that's helpful, but that pretty much, I think, tracks the way it's described in the measure.

So I would move this language as adopting the motion for rehearing in regard to the argument set forth in F, 2F.

MS. STAIERT: I'll second it.

All those in favor?

(The Board voted.)

MS. STAIERT: It passes unanimously.

So you're going to need to make the motion on the rehearing because or -- you're fine

adopting this.

MS. EUBANKS: I don't...

MS. STAIERT: It's not enough for you to vote no.

MS. EUBANKS: No.

MS. STAIERT: I figured that.

MS. EUBANKS: I don't think I'm going to win over either of you --

MS. STAIERT: Okay.

MS. EUBANKS: -- on the argument in A. And so if you're ready to -- unless there's any other changes that you wish to make, then make a motion (inaudible).

I would move that we deny the motion for rehearing on Initiative 15-16 #60 in all regards except for the argument F that we already took action on, and in that regard we grant the motion for rehearing.

MR. BLAKE: I'll second.

MS. STAIERT: All those in favor?

(The Board voted.)

MS. STAIERT: That takes us to the rehearing on Initiative 2015-2016 #61 Food Store License.

MR. ROGERS: Madam Chair, Trey Rogers

representing the proponents Grayson Robinson and Blake Harrison, both of whom are here and have previously executed their affidavits.

MS. STAIERT: All right. Thank you.

Mr. Grueskin.

MR. GRUESKIN: Mark Grueskin on behalf of the objector.

Madam Chair and Members, the motion for rehearing on 61 is the same as the motion for rehearing on 60 with the exception of the single subject argument produced on pages 1 and 2. Basically -- sorry.

MS. STAIERT: So for the record, we'll go ahead and incorporate the arguments made in the prior on 60, and then if you want to just talk about single subject, that will save your voice.

MR. GRUESKIN: You anticipated my next comment, which is probably frightening for you.

But the -- the concern on 61 is that it seeks -- it doesn't seek a change to the Colorado Revised Statutes. It seeks multiple changes. Number one, to create this grocery store, convenience store liquor license category and, secondly, basically to do away with the 3.2 off-premises license altogether, which is the line that you see on -- or the verbiage

that you see on line 10 that states and I quote, eliminating licenses to sell 3.2 percent beer for off-premises consumption.

Those are different changes, and they achieve different things, and you could do them separately, and you could find, I think, constituencies for doing each of them, but that doesn't mean that those constituencies are the same.

We think that there is -- without running you through our motion -- no necessary and direct connection between them and, therefore, we think that -- again, without running you through our motion, just that the press has even treated it -- these two issues differently. In announcing the measure, one major outlet talked about grocery stores, and one major outlet talked about 3.2 beer.

To the extent that the popular perception generated, at least by the media so far, is that they are two different issues, we think that that is correct. And we think that you should allow the proponents to do this in two separate measures and would ask that you find that there are multiple subjects. Thank you.

MS. STAIERT: Thank you. Any questions?

MS. EUBANKS: Mr. Grueskin, I just -- clarification. My understanding of the measure, it just gets rid of the license for 3.2 beer for off-premises consumption.

MR. GRUESKIN: Right.

MS. EUBANKS: So other types of establishments that maybe served 3.2 beer on premises --

MR. GRUESKIN: A bar, a restaurant.

MS. EUBANKS: Right. That they -- that those still exist.

MR. GRUESKIN: That's correct. I think your line 10 is an accurate statement of what it -- of what this measure does.

MS. EUBANKS: Okay. Thank you.

MR. GRUESKIN: Thank you very much, ma'am.

MS. STAIERT: Mr. Rogers, do you want to respond?

MR. ROGERS: Madam Chair, you've already, I believe, incorporated the previous arguments from 52 here, and so with that I'll just add a few comments.

Of course the single subject requirement that the Supreme Court tells us must be

liberally construed to provide access to the ballot, also we have to look at what the Supreme Court is -- has told us are the purposes behind the single subject requirement, to avoid voter surprise and fraud; that that's not a problem here. The title very clearly tells the voter that there would be this 3.2 repeal as part of the measure.

The Supreme Court has also told us that a purpose for the single subject requirement is to avoid piggybacking. This is not piggybacking. The repeal of the 3.2 off-premises licenses is properly and necessarily connected to the goal of selling full strength beer and wine in food stores. You can't have two licenses at one premise. So you could not sell under current law or the under the measure. You couldn't have two licenses. So if a store is going to avail itself of the opportunity to sell full strength beer and wine, it necessarily has to give up the 3.2 -- the 3.2 license.

So for those reasons we think, again, that you got it right the first time. There is only a single subject for initiative -- proposed Initiative 61. Thanks.

MS. EUBANKS: Ask one question. I think I asked you this back on 51 or --

MR. ROGERS: 52.

MS. EUBANKS: 52.

MR. ROGERS: Yeah.

MS. EUBANKS: Yeah. That while many or some 3.2 licensees now would -- could roll over as food store, there could potentially be 3.2 licensees that don't qualify as a food store that this measure would eliminate their ability to sell 3.2 beer for off-premises consumption? Is that correct?

MR. ROGERS: That is possible. I think the number would be vanishingly small, you know, out of a universe of 1500. Again, I think my answer last time was maybe single digit number of stores which is -- which is we think just not enough to create an entirely new subject. It's -- it's simply not the intent of this measure to -- to take away the opportunity to sell 3.2 from those handful of stores. This is part of the larger scheme that the initiative is undertaking and that is to authorize the sale of full strength beer and wine in food stores.

MS. STAIERT: Do you have something, Mr. Grueskin?

MR. GRUESKIN: I do.

You know, it's ironic in the conversation over #60 that Mr. Rogers correctly

pointed out that the exceptions, the licensing exceptions for entities currently with 3.2 licenses are liberalized. If you currently have a 3.2 license, you don't have to -- unless the local licensing authority requires it -- go through another needs and desires test even though they're different products. I mean -- and that's the point. And to the extent that the suggestion is is that, well, you wouldn't want -- you wouldn't want to have two licenses, well, that's -- of course that's true. They're going to give up one license for the other license. That doesn't mean that you have to abolish that license for any other entity that would seek to have it. But they are both using the 3.2 license conundrum of -- of having some sort of blessing for liquor sales. And then on the other hand saying it is an irrelevant license, let's abolish it.

And I would just suggest to you that when it comes to community decision making, I think Mr. Rogers' number when he talked about the number of entities with 3.2 licenses, about 1500 right now, one thousand five hundred. Those 1500 neighborhoods have a right to know that the nature of the product being sold is different and, therefore, the point that we raise about what needs to be in the title is

underscored by the discussion of Mr. Rogers as to both 60 and 61, and we think as is the point about multiple subjects. Thank you.

MS. STAIERT: All right. Any discussion?

MS. EUBANKS: I don't think so.

In terms of incorporating our comments from #60, that I think that the reports previously talked about single subject and found it to be a single subject. I'm still comfortable with that determination, and so the only change would be in regard to the argument set forth in F of the motion.

MS. STAIERT: All right.

MS. EUBANKS: And whether we could make the same change on 61 as we did on 60 which was after income and --

MS. STAIERT: And I think we dealt with this in terms of the single subject at a rehearing on 50 --

MS. EUBANKS: 52.

MS. STAIERT: -- 52, so that argument will be incorporated and clearly the Board believed it was a central feature, but I'm not sure that that makes it a separate subject, which is why this question raised much differently than the other one.

And I think that we described that feature in the measure, and there would be no surprise to the voters.

MS. EUBANKS: So I would move the language that appears on lines 5 and 6.

MR. BLAKE: Second.

MS. STAIERT: All those in favor?

(The Board voted.)

MS. EUBANKS: Then I would move that we deny the motion for rehearing on Initiative 15-16 #61 to all arguments except for that in F which we made the change, and for that reason we would grant the motion in that regard only.

MR. BLAKE: Second.

MS. STAIERT: All those in favor?

(The Board voted.)

(End of requested transcription.)

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Jennifer W. Hulac, Registered Professional Reporter and Notary Public within and for the State of Colorado, do hereby certify that the foregoing constitutes a true and correct transcript of the disc provided by the Secretary of State's Office.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 2nd day of February, 2016.

JENNIFER W. HULAC
Registered Professional Reporter

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