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SUPREME COURT, STATE OF COLORADO
101 West Colfax Avenue, Suite 800
Denver, CO 80202

ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

In the Matter of the Title and Ballot Title and Submission Clause and Summary for 2009-2010 #91

Petitioner:
Christopher Howes, Objector,
v.
Respondents:
Richard G. Brown and Gerald L. Barber, Proponents,

and
Title Board:
William A. Hobbs, Sharon Eubanks, and Geoff Blue

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Case No. 2010SA135

PETITIONER'S ANSWER BRIEF

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I. SUMMARY OF THE ARGUMENT

Approving proponents' wholesale strike-out effort will encourage obfuscation and illogically shift the burden of identifying changes to the public instead of proponents, who have first-hand knowledge of any changes. Allowing the statute's flexibility in indicating changes to permit a technique that obscures changes fails to enforce the statute's plain meaning and undermines transparency.

A beverage tax, round-table transformation moratorium, and new borrowing authority lack the necessary connection with the broad purpose of water preservation to be a single subject. The initiative's title is insufficient and misleading because it omits of four of the initiative's central features (the roundtable transformation moratorium, excluding alcoholic beverages, new borrowing authority, and new constitutional Treasurer's duties).

II. ARGUMENT

A. Proponents admit that they replaced their initial draft with a new draft, and did not indicate specific changes.

Proponents either admit or do not dispute the facts that show that the Title Board lacks jurisdiction because Proponents' amended draft failed to indicate any specific changes. Proponents:

- Admit "that they made organizational, technical, and substantive changes to the draft initiative."[1]
- Do not dispute that their revised draft showed essentially all of the initial draft's text as having been deleted, as indicated by a strikethrough or redline.
- Do not dispute that the entire text of their reorganized and technically and substantively changed draft immediately follows this wholesale redline.
- Do not dispute that their new text does not indicate any of the organizational, technical, and substantive changes made to the initial draft.

These facts are dispositive. The wholesale strike-through that Proponents submitted falsely indicates that every word of the initiative's initial draft was deleted and replaced with all new words. This is not what Proponents did, though. They admittedly made major changes. They admittedly did not show these changes. They admitted receiving "statutory guidance" (actually a command) to identify these changes.[2] They did not. As a result, the Title Board lacks jurisdiction.

1. Proponents must indicate specific changes, but they flexibly can use many reasonable techniques to do so.

Proponents suggest that enforcing the change-identification requirement would

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[1]Respondents' [Proponents'] Op. Br., 2, 1st full ¶ ("the amended draft was reorganized as a direct result of comments and recommendations made by Legislative Council . . . .") and ¶ 3 ("The changes that we made to the original draft were the result of the technical and substantive issues raised by the professional staff.")

subject initiatives to 'hypertechnical challenges' without any definitive guidance on how to indicate changes.[3] Both the statute's language and this Court's substantial-compliance enforcement standard show that this fear is ungrounded.

To decide this case, this Court does not need to provide detailed guidance to proponents or to revise its long-standing substantial-compliance enforcement standard. It need only take a small and routine step and formally recognize that the mandatory change-identification requirement, like other mandatory jurisdictional and procedural requirements, cannot be ignored. Substantial compliance does not include "compliance" that is absent or ineffective.

Proponents do not need more detailed guidance to comply with the change-disclosure requirement. The statute's command is unambiguous and objective: an amended draft must either "highlight" changes or "otherwise indicate" them. Somehow.

This requirement is not hypertechnical. It is flexible. "[O]therwise indicate" does not constrain proponents to a particular method. It facially allows many flexible techniques.[4] A proponent might highlight, red-line, or explain and use its own method that is appropriate to its particular circumstances, as long as this method readily

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[2] *Id.* at 2, ¶ 1.

[3] *Id.* at 2, 3d full ¶.

identifies changes to a reasonable reader. To denote organizational changes, a proponent could redline the section numbers, or add a marginal comment for each section that identified its prior section number. This flexibility virtually eliminates the kind of hypertechnical challenges that proponents fear.

The statute's flexibility is not a proponent's only protection against 'hypertechnical' challenges. This Court's substantial-compliance standard already protects proponents from inadvertent or minor technical omissions.[5]

The flexibility that the statute and this Court already provide in indicating changes, though, must be used for the purpose for which the statute commands: indicating changes. Using a technique that obscures changes does not comply with the statute's command to indicate them. Techniques may be flexible; the statute's objective is not. Whatever technique a proponent uses, it must readily identify all substantive and organizations changes, and the vast majority of technical changes. If a reasonable or typical reader cannot readily discern what the legislature has commanded proponents to identify (changes), then (as here) a proponent has not substantially complied with the statute.

2. Proponents are in the best position to efficiently identify and disclose changes.

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[4] C.R.S. § 1-40-105(4).

[5] *In re Title, Ballot Title and Submission Clause, and Summary for Proposed Initiated Constitutional Amendment "1996-3,"* 917 P.2d 1274, 1286 (Colo. 1996).

Proponents over-wrought fear of inadvertent exclusion from the initiative process is based on a very one-sided view of this process. Although the right to propose an initiative is worthy of protection, proponents are not the only participants in the initiative process. Other interested parties and the general public also participate in this process. They can do so effectively only if proponents timely and reasonably disclose information that only the proponents have, such as what they have changed between drafts.

Proponents play a unique role in the initiative process. Only proponents have intimate, immediate, first-hand knowledge of any changes in an initiative because they decide whether to change an initiative's draft, decide what to change, and make any changes. Their unique knowledge puts proponents in the best position to identify and disclose changes to others at the least cost. If proponents fail to identify changes, the public must expend time and energy and incur the frustration of hunting and pecking through detailed and often complex texts to individually identify changes. This wastes time, and illogically places the burden of identifying changes on the public, which has no knowledge of proponent's changes. The collective costs of these many separate efforts far surpass the singular cost that an already informed proponent incurs to disclose what it already knows: what changed.

3. Failing to enforce the change-identification requirement invites future proponents to replace transparency with obfuscation.

Failing to comply with or failing to enforce the statutory command to identify changes has real consequences. Non-compliance imposes real costs on others. These costs are likely to be substantial, both individually and collectively. The legislature wisely decided that to participate in the initiative process proponents cannot impose these costs on others. The public should not have to hunt and peck to discover what the proponents already know. Proponents must be transparent.

Approving the Proponents' wholesale strike-out technique would effectively read the change-identification requirement out of the statute. It would invite countless (98 initiatives were proposed for this cycle alone)[6] future proponents to leave others clueless by striking through an entire initial draft, instead of identifying individual alterations. However well-intended, this Court should not sanction any change-identification effort that undermines the disclosure and transparency that the legislature required. Just as this Court routinely enforces compliance with other procedural and jurisdictional provisions of the initiative statute, such as deadlines,[7] this

[6] Colorado Secretary of State, 2009-2010 Initiatives, http://www.elections.colorado.gov/Content/Documents/Initiatives/Title%20Board%20Filings/2009-2010_Filings/2009-2010_initiative_spreadsheet051410.pdf (last visited June 4, 2010).

Court should also enforce the change-identification requirement to protect the public's interest in effective disclosure that is necessary for the initiative process to be transparent.

B. The initiative's overly broad purpose does not adequately connect its disparate subjects.

Recognizing that neither the roundtable transformation/moratorium nor new borrowing authority have a natural, intuitive, or intimate relationship (i.e. a "necessary connection")[8] to either a beverage tax or to the initiative's broad purpose of preserving Colorado waters does not require artifice or illusion or even "deconstruction." It just requires logic and an appreciation of this Court's precedents.

Labeling the roundtable transformation/moratorium and borrowing authority as integral and comprehensive cannot shrink them into mere implementing details or logical incidents that have a natural or intimate connection to a beverage tax. Simply put, these topics are separate subjects because, standing alone, they would be substantive constitutional changes that could qualify as separate initiatives.[9] A subject

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[7] *In re Title, Ballot Title and Submission Clause and Summary for #25A Concerning Housing Unit Construction Limits v. Hayes*, 954 P.2d 1063, 1064 (Colo. 1998) (excluding initiative filed post-deadline from ballot).

[8] *In re Title, Ballot Title, Submission Clause & Summary for a Proposed Initiative "Pub. Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995).

or topic that can stand alone cannot be an incidental administrative or implementing detail because stand-alone subjects are not dependent upon each other, necessarily connected to each other, or interrelated.[10]

Explaining that what the initiative calls "borrowing" is merely an accounting transfer only shows that borrowing authority is not intrinsically, administratively, or intimately connected to a beverage tax. An "advance" must be repaid. Whether an advance or a transfer or something else, the initiative constitutionally requires the legislature to enact a repayment plan in order to obtain monies from the new reserve fund. Regardless of the source or intent, a receipt of funds that a party is obliged to repay is borrowing. Unless the relationship between the revenue that the beverage tax generates and the borrowing that the initiative authorizes is intimate, such as if the tax proceeds are designated to repay the borrowing, borrowing and tax increases are separate subjects. [11]

For similar reasons, the purpose of providing temporary stability to the reserve fund does not prevent the initiative's moratorium on altering its transformation of the

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[9] *In re Ballot Title & Submission Clause for 2007-2008, No.17*, 172 P.3d 871, 873 (Colo. 2007) (initiative that "(1) relates to more than one subject and (2) has at least two distinct and separate purposes violates single-subject requirement.").

[10] *Id.* at 873 (Colo. 2007); *In re Title and Ballot Title & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273 (Colo. 2006).

[11] *No.17*, 172 P.3d at 875-76.

basin roundtables from being a separate subject. A statutory moratorium has no intuitive or natural connection to a beverage tax or to transforming the basin roundtables. One could conceivably enact one without the others.

C. Minimizing the title's substantive omissions does not make it sufficient and non-misleading.

To avoid having the title stricken because it contains misleading or material omissions, proponents deny that two of the title's omissions are material. These denials are factually flawed.

Proponents first assert that the initiative only requires the Treasurer to perform routine administrative tasks that are inherent to the nature of the office. The Legislative Staff Council and the Office of Legislative Services disagreed. Their analysis of the Proponents' initial draft noted that the Treasurer typically receives, rather than administers, state funds and that the initiative imposes new constitutional requirements on the Treasurer:

> [F]unds are typically not 'administered by the state Treasurer'. Rather the principal function of the treasury department is the receipt of state moneys. This type of program is typically administered by the Department of Revenue, which has more experience in the field. [. . .] In addition, specifically naming a state agency in the Colorado constitution creates a constitutional requirement for the agency.[12]

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[12] Ex. A, Memorandum, Legislative Council Staff and Office of Legislative Legal Services to Richard Brown and Gerald Barber [Proponents] dated April 7, 2010, 13, ¶ 4.

Similarly, proponents argue that the legislature's new borrowing authority is really an "emergency reserve." Yet, the initiative authorizes the General Assembly "to *borrow* up to two-thirds of the moneys in the reserve account. . . ."[13] The unambiguous word "borrow" should be given its natural meaning.[14]

Mentioning the initiative's exclusion of non-alcoholic beverage will clarify, rather than mislead. America's failed experiment with constitutional temperance gives alcoholic beverages a singularly unique status.[15] In accordance with this history, as Petitioner's Opening Brief notes, a "beverage," particularly a beverage that is subject to taxation, would typically be thought to include alcohol.[16] Failing to expressly note that the initiative excludes alcoholic beverages would likely mislead voters into wrongly believing that the initiative taxes beverage containers that it actually excludes. Eliminating this basic confusion far outweighs any hypothetical complexity that mentioning other exclusions for dairy products and medicines might introduce.

Proponent's Opening Brief succinctly captures what beverages the initiative excludes: "The measure specifically exempts dairy products, medicines, and fountain

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[13] *Initiative*, 2, ¶ 6(a) (emphasis added).

[14] *Dunlap v. Colorado Springs Cablevision, Inc.*, 855 P.2d 6 (Colo. 1993).

[15] U.S. Const., Amend. XVIII and XXI.

[16] Petitioner's Op. Br., 22-23.

beverages."[17] The initiative's current title does not. This omission makes the title misleading and incomplete because it omits one of the initiative's central features.[18]

V. CONCLUSION

For these reasons, this Court should deny the title and submission clause set by the Title Board.

Respectfully submitted this 4th day of June 2010.

HACKSTAFF GESSLER LLC

By: _____
Steven A. Klenda, Reg. No. 29196

Attorneys for Christopher Howes

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[17] *Id.* at 7, numbered ¶ 3.

[18] *Blake v. King*, 185 P.2d 142,147 (Colo. 2008) (upholding title that included initiative's "central features")

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of June 2010, a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** was placed in the United States mail, postage prepaid, to the following:

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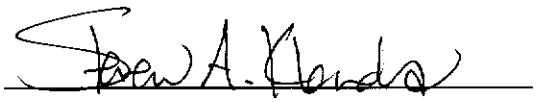

EXHIBIT A

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MEMORANDUM

April 7, 2010

TO: Richard Brown and Gerald Barber

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2009-2010 #91, concerning a container fee to fund water preservation and protection

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be:

1. To create a fee upon beverage containers that meet certain criteria of one cent for every six fluid ounces, or part thereof, not to exceed fifty cents for each container;

2. To exempt certain beverages, including dairy products and medicines, from the fee;

3. To allow the general assembly by bill to exempt other containers from the fee, and require

b. In the third sentence, the phrase "to include repeal" is unnecessary and can be deleted.

35. In subsection (10), change "these sections" to "THIS SECTION" for the correct reference.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?

2. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. This may make it difficult to address any unforseen consequences of the provisions. Is this your intention?

3. Although the proposed initiative refers to a "fee" on containers, the charge seems to operate more like a tax because it does not appear that the primary purpose of the charge is to finance a particular service used by those required to pay the charge. Would the proponents consider changing the word "fee" to "tax" where applicable?

4. With regard to subsection (2) of the proposed initiative, funds are not typically "administered by the state treasurer". Rather, the principal function of the treasury department is the receipt of state moneys. This type of program is typically administered by the Department of Revenue, which has more experience in the field. Would the proponents consider changing the agency to the Department of Revenue? In addition, specifically naming a state agency in the Colorado constitution creates a constitutional requirement for the agency. Would the proponents consider using a phrase such as "the state agency charged with the collection of sales tax under Colorado law"? Alternately, would the proponents consider a provision that authorizes or requires the general assembly to designate the appropriate agency to collect and distribute the funds?

5. Is it the intention of the proponents that the state treasurer have the authority to invest the moneys in the fund as provided by law? If so, would any income derived from investing or depositing the moneys in the fund be credited to the fund, or would such income be credited to the general fund?

6. Subsection (3) contains the following provision: "The container fee imposed by this section shall be the exclusive fee imposed upon containers..."
   a. The word "shall" is a command that imposes a legal duty. This sentence appears to impose a legal duty on a container fee. A better practice is to identify the actor and impose the duty on the actor, which is what the next sentence appears to accomplish.