Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 10, 2014 4:05 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2013) Appeal from the Ballot Title Board	**▲COURT USE ONLY▲**
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #48 **Petitioners:** Marc Arnusch and Mary Lou Chapman; **v.** **Respondents:** Larry Cooper and Cheryl Gray; **and** **Title Board:** Suzanne Staiert, Dan Domenico, and Jason Gelender.	Supreme Court Case No.: 2013SA335
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RESPONDENTS' ANSWER 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.

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

☐ 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/ Thomas M. Rogers III

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RESPONSE TO PETITIONERS' STATEMENT OF APPLICABLE STANDARD OF REVIEW

Respondents disagree with Petitioners' statement that the Court reviews *de novo* the Title Board's actions in setting the title. While a *de novo* standard applies when the Court reviews whether a proposed measure violates the single-subject requirement of the Colorado Constitution, *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219*, 999 P.2d 819, 820-22 (Colo. 2000), Petitioners have not challenged the Title Board's actions on single-subject grounds. The challenge here involves the title set by the Title Board, and the Court grants "great deference to the board's broad discretion in the exercise of its drafting authority." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 # 256*, 12 P.3d 246, 255 (Colo. 2000) (internal quotations omitted).

Accordingly, all legitimate presumptions must be resolved in favor of the Title Board, and "a board-prepared title should only be invalidated in a clear case." *Matter of Title, Ballot Title, Submission Clause, & Summary, Adopted Aug. 26, 1991, Pertaining to Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). Unless clearly misleading, the Court should not interfere with the board's choice of language. *Id.*; *In re Ballot Title for 1999-00 # 256*, 12 P.3d at 255.

SUMMARY OF THE ARGUMENT

The title for Initiative 48 accurately and succinctly reflects the central features of the Initiative. Petitioners erroneously argue that every single detail of the proposed initiative must be included in the title. In support of their contentions, Petitioners cite to several cases for the proposition that various components of the Initiative should have been included in the title. But Petitioners' cases demonstrate, once again, that this Court defers to the Title Board and does not interfere with the Title Board's language except in extremely narrow circumstances.

Petitioners' repeated reliance on the Oregon Supreme Court's decision regarding the title of a similar labeling initiative in Oregon is equally unavailing. The title language and format requirements in Oregon substantially differ from the Colorado requirements, and thus have no bearing on the issues before this Court.[1]

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[1] *See* Or. Rev. Stat. Ann. § 250.035(2):
The ballot title of any state measure to be initiated or referred shall consist of:
(a) A caption of not more than 15 words that reasonably identifies the subject matter of the state measure. The caption of an initiative or referendum amendment to the Constitution shall begin with the phrase, "Amends Constitution," which shall not be counted for purposes of the 15-word caption limit;
(b) A simple and understandable statement of not more than 25 words that describes the result if the state measure is approved. The statement required by this paragraph shall include either the phrase, "I vote" or "vote yes," or a substantially similar phrase, which may be placed at any point within the statement;
(c) A simple and understandable statement of not more than 25 words that describes the result if the state measure is rejected . . .; and

The Title Board, in the exercise of its drafting expertise and after careful consideration, chose to omit certain minor details and definitions from the title, at the same time ensuring that the title clearly sets forth the true intent and meaning of the Initiative: the requirement that genetically modified food offered for sale in Colorado be labeled. The Title Board's action is entitled to great deference and should be upheld.

ARGUMENT

Petitioners argue that all of the following should have been included in the title: (1) the fact that Initiative 48 amends Colorado's misbranding statute; (2) every detail and every narrow exception to the labeling requirement; (3) the technical definition of genetically modified food; (4) the narrow exemption for unknowing failure to label, which Petitioners call an affirmative defense; (5) the precise way the labels should be displayed; and finally (6) the possibility of criminal penalties under Colorado's Food and Drug Act, even though those penalties are not included in the text of the Initiative. These arguments, individually, but certainly taken together, directly contradict C.R.S. § 1-40-106 and this Court's precedents, which require that titles contain a brief and plain statement

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(d) A concise and impartial statement of not more than 125 words summarizing the state measure and its major effect.

setting forth the central features of the Initiative for the voters, not an item-by-item paraphrase of the proposed initiative. *See Matter of Title, Ballot Title and Submission Clause and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1083 (Colo. 1998). If this Court were to adopt Petitioners' arguments, the title of Initiative 48 would span more than a page paraphrasing or repeating every detail and nuance of Initiative 48. As this Court has repeatedly held, such result would be contrary to the General Assembly's purpose in promulgating C.R.S. § 1-40-106.

I. The true intent and meaning of Initiative 48 is to require labeling of genetically modified food sold in Colorado, not expand the definition of misbranded foods.

The title and submission clause of a proposed measure must fairly express the true intent and meaning of the initiative. *Matter of Title, Ballot Title & Submission Clause, & Summary Adopted November 1, 1995, By Title Bd. Pertaining to a Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 24 (Colo. 1996). Contrary to Petitioners' argument, it is clear from the very first words of Initiative 48 that its central purpose is labeling genetically modified food, not misbranding. Initiative 48's legislative declaration states:

> (1) *LABELING* OF GENETICALLY MODIFIED FOOD IS INTENDED TO PROVIDE CONSUMERS WITH THE OPPORTUNITY TO MAKE AN INFORMED CHOICE OF THE PRODUCTS THEY CONSUME AND TO PROTECT THE PUBLIC'S HEALTH, SAFETY AND WELFARE;
>
> . . .

(3) U.S. U.S. FEDERAL LAW DOES NOT PROVIDE FOR THE REGULATION OF THE SAFETY AND *LABELING* OF GENETICALLY MODIFIED FOOD[.] [2]

Initiative 48 proposes an amendment to Colorado's Food and Drug Act. The fact that the Colorado legislature has chosen to set food labeling requirements in the statute which defines failure to label as misbranding is irrelevant and does not create confusion for the potential voter who would be voting on requiring that genetically modified foods be labeled as such. It is hardly reasonable that consumers care more about the fact that failure to label is considered misbranding, as opposed to what labeling requirements are in place to protect them. In any event, Petitioners offer no authority to support their argument that the title of the statutory section amended by the Initiative must be included in the title. *In re Title, Ballot Title, & Submission Clause for Initiative 2009-2010 #24,* 218 P.3d 350, 353 (Colo. 2009), on which Petitioners rely is inapposite. In that case, the Court held that the heading used in the text of the proposed initiative provided helpful guidance in determining the single subject of the initiative; it does not stand for the proposition that headings of the statutory provision being amended must be included in the title.

[2] Pet'rs' Exh. A, at 1 (emphasis added).

II. Details of the single subject need not be expressed in the initial clause of the title.

The title as a whole must convey the true intent and meaning of the proposed measure. *See In re Flowing Water*, 910 P.2d at 26 (all parts of the title must be read as a whole to determine if any part is misleading). The initial clause here provides that the measure is concerned with labeling genetically modified food. It goes on to list the key exemptions, at the same time alerting the voters that there are additional exemptions from the labeling requirement. Thus the title as a whole expresses the central features of the Initiative. Petitioners fail to show how the fact that the title's initial clause does not express every detail of Initiative 48 renders it deficient.

III. Petitioners' challenge based on the definition of what is considered genetically modified food is without merit.

The definition provided in the Initiative explains that food is considered genetically modified if it contains or is derived from organisms which have been genetically modified through certain biological engineering techniques or which have been treated with genetically modified material, as well as if the food contains an ingredient, component, or other article that is genetically engineered.[3]

[3] Pet'rs' Ex. A, at 1-2.

The title accurately explains that food that has been genetically modified or has been treated with genetically modified material must be labeled.

Petitioners appear to argue that food produced from or with an organism which has been genetically modified is somehow different or distinguishable from genetically modified food. That distinction, they suggest, should be included in the ballot title. But the average voter will appreciate that "genetic modification" involves the genes of a particular organism, and not, the "genes" of a final food product. It is hardly conceivable that an ordinary voter, by reading the title that refers to "food that has been genetically modified" would expect that the final food product, sometimes comprised of many ingredients, is what is actually genetically modified. Petitioners' challenge defies logic.

IV. Petitioners fail to cite to any authority which requires that information which is not in the text of the initiative be reflected in the title.

Contrary to Petitioners' arguments, *In re Title, Ballot Title & Submission Clause, & Summary Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 919, 921 (Colo. 1982), does not stand for the proposition that the Title Board is required to include a reference to how the proposed measure fits within the overall statutory scheme; especially with regard to provisions of the statute not included in the measure. In fact, the Court has repeatedly held that title need not reflect all possible future effects of the measure, or how the proposed law affects other

statutory and constitutional provisions. *See, e.g.*, *Matter of Title, Ballot Title & Submission Clause, & Summary for a Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994). While, in *In re Table Wine*, this Court, deferring to the Title Board, held that the Title Board's inclusion of certain effects of the measure was appropriate; it does not mean that inclusion is mandatory. *See In re Table Wine*, 646 P.2d at 921.

Likewise, *Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 34 (Colo. 1993), does not support Petitioners' arguments. In that case, the fines at issue were specifically included in the measure and were integral to the election reform the initiative sought to institute. *Id*. That case is inapplicable and does not support Petitioners' position that criminal penalties not included in the text of Initiative 48 must be reflected in the title.

Here, the Title Board considered—and unanimously rejected—Petitioners' argument that criminal penalties imposed by Colorado Food and Drug Act should be reflected in the title of Initiative 48. Possible effects, including future implications of passing a particular measure, are properly left to public debate. *See Matter of Branch Banking Initiative Adopted on March 19, 1980, & Amended on April 8, 1980*, 612 P.2d 96, 99 (Colo. 1980). Furthermore, the Court does not consider possible applications of the proposed measure when reviewing the Title

Board's actions in setting title. *See In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010) ("We are not permitted in our review to determine the legal meaning or application of the initiative when reviewing its title for defects.")

V. A narrow exemption for unknowingly failing to label genetically modified food is not a central feature of Initiative 48.

Every detail and nuance of a proposed initiative cannot and should not be included in the title. *In re No. 62*, 961 P.2d at 1083. Petitioners describe the proposed subsection (3) to C.R.S. § 25-5-411 as an "affirmative defense," and argue that this alleged "affirmative defense" must be included in the title.[4] Even assuming subsection (3) creates an affirmative defense, as Petitioners contend, as opposed to an exemption from the labeling requirement, it is a detail which need not be included in the title. The case which Petitioners cite for support involved an amendment to criminal statutes, which created a new offense and specified an affirmative defense. *See Blake v. King*, 185 P.3d 142, 147-48 (Colo. 2008). But *Blake* did not involve the issue of whether the affirmative defense must be included in the title. As Petitioners concede, the portion of the title reflecting the affirmative defense was not challenged. The fact that this Court affirmed the title, which happened to include the affirmative defense established by the initiative,

[4] Pet'rs' Opening Br., at 17; Pet'rs' Ex. A, at 3.

does not stand for the proposition that the affirmative defense must be included in the title. Likewise, the reference to the medical marijuana initiative[5] is inapplicable, as the essence of the measure was to create an affirmative defense against prosecution under the state's controlled substances law for marijuana used for medicinal purposes.

Initiative 48 is about labeling, not creating a very narrow exemptions or affirmative defenses to an enforcement action for failure to label. The proposed § 25-5-411(3) is not a central feature of the initiative, but a detail which need not be reflected in the title.

VI. The precise definition of genetically modified food does not involve new or controversial terms that would be of significance to the voters.

Contrary to Petitioners' arguments, the definition of genetically modified food does not set forth new or controversial terms that would be of significance to all concerned with the issues surrounding the labeling of such food. *See Election Reform Amendment*, 852 P.2d at 34. The relevant inquiry under C.R.S. § 1-40-106 is whether the title "correctly and fairly express[es] the true intent and meaning thereof," so that "petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *Election Reform Amendment*, 852 P.2d at 32. Petitioners do not even attempt to explain

[5] *See* Pet'rs' Opening Br. at 18, n.5.

how the technical definition of genetically modified food[6] is of significance to the voter. The common usage of the words "genetic" and "modified" clearly conveys the idea that the proposed measure refers to food which contains or is derived from ingredients with altered or modified genes.

In fact, recognizing that including the lengthy definition in the title is neither required nor necessary, Petitioners instead argue that the title must include a reference to the fact that "genetically modified" is defined in the measure. The Title Board chose to not include that redundant language—voters to whom the precise definition of genetically modified food is of significance will be able to look to the text of the measure without a prompt from the title. Once again, the case on which Petitioners rely does not support their position, as it is but another example of this Court affording the Title Board the deference to which it is entitled under the law. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 Nos. 245(f) & 245(g)*, 1 P.3d 739, 744 (Colo. 2000) (affirming the title which included partial definition of "judge").

[6] Pet'rs' Ex. A, at 1 (". . . food produced from or with an organism or organisms with its genetics altered through application of: (a) In vitro and in vivo nucleic acid techniques, including recombitant deoxyribonucleic acid (DNA) techniques and the direct injection of nucleic acid into cells or organelles . . . .").

VII. Petitioners' remaining arguments similarly lack merit.

In parts H and I of their Opening Brief, Petitioners challenge the Title Board's decision not to include the remaining details and features of Initiative 48.[7] Petitioners fail to explain why these details are central features of the Initiative, or how their absence renders the title clearly misleading. As set forth in Respondents' Opening Brief, the title set by the Title Board accurately reflects key exemptions from the labeling requirement and alerts the voters that there are additional exemptions not reflected in the title. The title also alerts the voters that food must be labeled using particular language. The title properly omits the details of how exactly the label should be printed, or where it needs to be affixed. These are details which the Title Board, in the exercise of its drafting discretion and expertise, decided to leave out. *See In re No. 62*, 961 P.2d at 1083 ("The Board need not and often cannot describe every feature of a proposed initiative in a title . . . and simultaneously heed the mandate that such document[] be concise.").

In Part J of their Opening Brief, Petitioners reverse course and argue that the wording of the label required by Initiative 48 should not have been included in the title as the title "need not include every detail."[8] Petitioners do not cite to a single authority which supports their argument that the Title Board's action setting title

[7] Pet'rs' Opening Br., at 21-23.
[8] Pet'rs' Opening Br., at 24 (citing *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002 No. 21 and 22*, 44 P.3d 213, 222 (Colo. 2002)).

must be reversed based on language that the Title Board chose to include in the title, as opposed to omit. The Board properly exercised its discretion in including the wording of the label, and absent a showing that the inclusion makes the title clearly misleading, the title should be affirmed.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Court affirm the Title Board's action and approve the title set for Initiative 48.

DATED: March 10, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on March 10th, 2014, I filed a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** using the ICCES electronic filing system and served electronic copies to the following:

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