| | |
|---|---|
| SUPREME COURT OF COLORADO<br>2 East 14th Ave.<br>Denver, CO 80203 | DATE FILED: March 10, 2014 11:41 AM |
| Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #48 ("Labeling Genetically Modified Food")<br><br>**Petitioners: MARC ARNUSCH and MARY LOU CHAPMAN**<br>**v.**<br>**Respondents: LARRY COOPER and CHERYL GRAY**<br><br>**and**<br><br>**Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER** | ▲ COURT USE ONLY ▲ |
| Attorneys for Petitioners:<br>Mark G. Grueskin, #14621<br>RECHT KORNFELD, P.C.<br>1600 Stout Street, Suite 1000<br>Denver, CO 80202<br>Phone: 303-573-1900<br>Facsimile: 303-446-9400<br>Email: mark@rechtkornfeld.com | **Case No.** 13SA335 |
| **PETITIONERS' 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:

**X** It contains 1,704 words.

☐ It does not exceed 30 pages.

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

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 Petitioners*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## INTRODUCTION

This Answer Brief will respond to the Title Board's Opening Brief, given its substantive responses to the specific issues cited in the Petitioners' Notice of Appeal. This Brief will focus on the overarching issues arising out of the Title Board's brief about which there is a difference on the law. The other points are not conceded; they simply were answered in the Opening Brief, and the legal arguments made there do not need to be restated here.

## LEGAL ARGUMENT

### A. "Misbranding" of food needs to be stated in the titles.

The Title Board disagrees that "misbranding" must be referenced in the ballot title and states that the measure is about food labeling, not misbranding. Title Board Opening Brief at 13-14.

The reason misbranding belongs in the title relates both to election-related and post-election processes. In construing an initiative after it has been adopted, this Court treats voters as it does legislators in terms of their understanding of the pertinent legal framework. "The electorate... must be presumed to know the existing law at the time they amend or clarify that law." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo.2000). Yet, this Court recognizes that an initiative's ballot title is the bridge to that presumption. It is the title that must "enable the electorate, whether familiar

familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to Proposed Election Reform Amendment*, 852 P.2d 28, 34-35 (Colo. 2013) (citation omitted) (title deemed insufficient for failure to disclose penalties) (hereafter "*Election Reform*"); *accord* Title Board Opening Brief at 3-4. Thus, voters' imputed knowledge of the law being adopted stems from an accurately stated ballot title, one that reflects a measure's central elements.

Applying these principles to Initiative 2013-2014 #48, the title must state that the measure addresses misbranding. Otherwise, the unfamiliar voter cannot know that he or she is amending the misbranding statute, with all that entails. For instance, the misbranding statute carries with it criminal penalties. *See* Petitioners' Opening Brief at 14-15. Absent an explicit reference to "misbranding" as used in the statute and the initiative, voters could not be presumed to understand that they are criminalizing the failure to label foods that contain a genetically modified ingredient under this statutory rubric. Even Title Board members observed with some chagrin

this statute's seeming disproportion in using criminal penalties to address labeling non-compliance. *Id.* at 16.[1]

Based on the title before the Court, a voter could more likely think he or she is voting to adopt a new, distinct labeling mandate. And if that is the case, the basic presumption used by the courts after the election – that voters comprehend the law they have amended – necessarily evaporates.

Thus, to give effect to the judicial presumption about voters' knowledge of the statute being changed, any title must refer to that statute's central legal concept – here, misbranding. Voters cannot be presumed to know the law they are amending if the title, the primary vehicle used to relate the substance of their vote, does not tell them what law is at issue.

**B. The measure's affirmative defense must be disclosed in the title.**

The measure creates an affirmative defense for unknowing production of genetically modified food, and that affirmative defense is not addressed in the title. The Board justifies this omission as one of several exemptions that did not need to be disclosed. Title Board Opening Brief at 16-17.

---

[1] On this point and as an alternative to referring to the misbranding statute, the Board could have stated in the title that the measure can be enforced with criminal penalties. The Board disagrees this is necessary, citing, as the basis for criminal penalties, the existing misbranding statute rather than the initiative itself. Title Board Opening Brief at 15. But because the title is silent about that very statute, this defense of the title's silence on criminal enforcement falls short.

This initiative lists a number of exemptions. Proposed Section 25-4-411(1)(q) introduces them by saying, "This paragraph (q) of subsection (1) does not apply to" and then lists seven specific types of food product. However, Proposed Section 25-4-411(3) states, "Food will not be considered misbranded under paragraph (q) of subsection (1) of this section if it is produced by a person who" lacks knowledge about any genetic modification and receives sworn written statements on that point from the seller when the seed or food is delivered.

According to the Title Board's earlier work in this arena, this latter provision is an affirmative defense and is properly reflected in the title. In *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 265*, 3 P.3d 1210 (Colo. 2000) (hereafter "*#265*"), a ballot title for a measure imposing labeling requirements on genetically modified foods stated the measure "provid[es] an affirmative defense for persons who do not knowingly violate such labeling requirements and have completed a reasonable investigation." *Id.* at 1216. While the 2000 initiative required a reasonable investigation rather than a sworn statement from the producer, the effect of the defense is the same – to eliminate liability despite non-compliance with the labeling mandate. Like #48, the text of the 2000 measure did not use the phrase, "affirmative defense." *Id* at 1219. The

Board simply differentiated between exclusions (listed in the section 25-5-1205 of the measure as "exclusions from labeling requirements") and an affirmative defense (listed in section 25-5-1207 of the measure under the heading, "person not liable for non-compliance"). *Id.*

The sufficiency of the title's encapsulation of the affirmative defense was not challenged in 2000 and for good reason. It was clear to voters what they would accomplish with a "yes" vote, and this Court found the titles were "not misleading." *Id.* at 1212. Consistent with its previous work on related measures, the Title Board needed to include a reference to this affirmative defense in the title set for #48.

**C. The titles fail to adequately convey the breadth of foods subject to the labeling mandate.**

There are a number of categories of foods that the Title Board failed to accurately address to convey the actual scope of #48.

First, processed foods are exempt if the processing aids or enzymes used were genetically engineered. In contrast, in *#265, supra*, the regulated foods included those that were prepared using "genetically engineered enzymes or other genetically engineered processing agents." *Id.* at 1218. The title there did not reflect this provision or the fact that the genetically engineered material did not need to be in the final food product. *Id.* at 1214. However, the discussion of food additives was addressed in the *summary* of

the initiative (which then appeared on initiative petitions and is no longer required by statute). Read as a whole, the summary accurately reflected the way in which food with processing aids or enzymes would fare under the proposed measure. *Id.* at 1214-15. Only by addressing the food additive issue did the Board "adequately convey[] the breadth of the Initiative's conception of foods subject to the labeling requirement." *Id.* at 1215.

Second, the titles for #48 do not correctly state the manner of determining which foods are affected by this initiative. #48 addresses the organism from which foods are produced; the title speaks to "food that has been genetically modified." *See* Petitioners' Opening Brief at 12-13. The definition of "genetically engineered" and "genetically modified" does not solely regulate the final food product itself, even though the title indicates otherwise. The Board's recitation of language from the initiative underscores this point. *See* Title Board Opening Brief at 9-10. The "breadth of the Initiative's conception of foods" is thus incorrectly described.

Finally, raw agricultural commodities are only given signage at the point of retail sale, not labeling that accompanies the purchased product. The Board omitted this very different labeling requirement from the title in the name of brevity. Title Board Opening Brief at 20. In doing so, the Board again failed to adequately convey to voters that the otherwise

substantial breadth of the measure did not extend to raw agricultural commodities purchased at retail. The Board went to great lengths to ensure that it was accurately describing when labels were and were not required for one grocer's potato salad or a specialty market's quinoa salad. Exhibit D to Petitioners' Opening Brief, Dec. 4 Tr. at 14:21-15:22; 16:3-17:9. Yet, it did not describe at all the very limited labeling – merely retail posting, really – that will apply to fresh produce. The banner of brevity cannot be used to justify omitting key details from the title. "[I]f a choice must be made between brevity and a fair description of essential features of a proposal, the decision must be made in favor of full disclosure to the registered electors." *Election Reform, supra*, 852 P.2d at 32.

This title fails reflect these foods as exempt from the measure's reach and should be returned to the Title Board for correction.

**D. The titles do not need to include the wording of the label.**

Notwithstanding its advocacy of a brief title, the Board contends that it did need to include the actual text of the label ("Produced with Genetic Engineering") in the ballot title as "the most important part" of the measure to consumers. Title Board Opening Brief at 21. Yet, the title in *#265* only said, "setting forth the contents and placement of such labels." 3 P.3d at 1216. As noted above, that title was "not misleading." *Id.* at 1212.

There is a role for stare decisis in the Title Board process. *See In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No.29*, 972 P.2d 257, 262-63 (Colo. 1999). The exact wording of the product label was not necessary when the labeling requirement for genetically modified foods was considered in *#265*. There is no basis for determining that the label's text has become critical since that time. Therefore, the Title Board should change the title to reflect its previous titling on a comparable measure.

## CONCLUSION

The Title Board erred, and it should be directed to revise the titles set for Initiative #48 to correct the errors described in Petitioners' Briefs.

Respectfully submitted this 10th day of March, 2014.

s/ Mark G. Grueskin
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@rechtkornfeld.com

**ATTORNEYS FOR PETITIONERS**

## CERTIFICATE OF SERVICE

I, Lauren Miller, hereby affirm that a true and accurate copy of the **PETITIONERS ANSWER BRIEF** was transmitted this day, March 10, 2014, via hand delivery to:

Thomas Rogers
Lewis Roca Rothgerber
1200 Seventeenth Street, Suite 3000
Denver, CO 80202

Maurice Knaizer
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Lauren Miller