SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: March 7, 2014 1:56 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 INITIATIVE 2013-2014 #48 ("LABELING GENETICALLY MODIFIED FOOD") MARC ARNUSCH and MARY LOU CHAPMAN, Petitioners, v. LARRY COOPER and CHERYL GRAY, Objectors; and SUZANNE STAIERT, DANIEL DOMENICO, AND JASON GELENDER, Title Board, Respondents.	▲COURT USE ONLY▲ Case No. 13SA335
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Special Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720)508-6000 FAX: (720)508-6041 E-Mail: maurice.knaizer@state.co.us Registration Number: 05264 *Counsel of Record	

ANSWER BRIEF OF TITLE BOARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 57, C.A.R. 32, and C.A.R. 28, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and C.A.R. 32.

It contains 2064 words.

/s/ Maurice G. Knaizer
Original signature on file at the Colorado Attorney General's Office

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Suzanne Staiert, Daniel Domenico and Jason Gelender, as members of the Ballot Title Setting Board, (hereinafter "Title Board"), hereby submit their Answer Brief.

ARGUMENT

A. Summary of the argument.

The titles clearly and succinctly set forth the subject of the measure. The titles reflect the central elements of the measure in a simple and straightforward manner.

B. Standard of review.

The standard of review set forth in Petitioners' Opening Brief is adequate. A fuller explanation of the standard of review is at pages 4-6 of the Title Board's Opening Brief.

C. The titles are fair, clear and accurate.

Petitioners assert that the primary focus of the measure is "misbranding" of food. (Petitioners' Opening Brief, p. 11). Petitioners' Opening Brief acknowledges that proponents do not seek to expand the

definition of misbranding, but "to impose a labeling requirement." (Petitioners' Opening Brief, p. 15).

Petitioners' argument ignores the language of the declaration in the measure. The declaration states that the measure is "intended to provide consumers with the opportunity to make an informed choice of the products that they consume." The declaration further states that "Consumers have a right to know if the food they are consuming has been genetically modified or has been produced with genetic engineering."

Petitioners' argument also is inconsistent with relevant case law. The purpose of the Colorado Pure Food and Drug Act, which this measure seeks to amend, is not to define certain foods as misbranded. In discussing the purpose of the Act, the Tenth Circuit noted that it is intended to "impose a broad and far-reaching duty upon manufacturers ...for the benefit of those who use the product and who are the real sufferers if the statute is violated." *White v. Rose,* 241 F.2d 94, 97 (10th Cir. 1957). The measure seeks to amend the Act by adding new disclosure requirements. The language of the titles is consistent with

the underlying purpose and intent of the Act: provide information to consumers.

In support of their argument, Petitioners offer quotes from disparate portions of the record. The quotes are taken out of context. When read in context, the language does not support Petitioners' argument.

Petitioners provide a partial quote from Mr. Gelender. (Petitioners' Opening Brief, p. 9). The full statement, which was made at the initial hearing, reads as follows:

> At the risk of expanding the conversation should *this* be described in terms of defining food as misbranded—that's what we're really doing. And this whole paragraph, too, following the intro about who shall—be branded, inserted anywhere in the, you know, existing labeling requirements.
>
> (Emphasis added).

Ms. Staiert then responded, "I don't know if anybody is going to understand what—I wouldn't want to use the word misbranded." Mr. Gelender responded, "Should it say something like requiring labeling of genetically modified food as produced with genetic engineering starting on July 1, 2016?" Mr. Domenico concurred, "That's fine, I would just use the language in the measure." (Ex. D at 21:5-20).

Petitioners then stated that the proponents "thereafter agreed that expanding the statutory coverage of 'misbranding' was their primary objective." The statement was not made in response to Mr. Gelender's statement, as implied by the Petitioners. Instead, it was made at the rehearing in response to inquiries about enforcement responsibilities. Proponents' full statement provides (Ex. A at 25:7-18):

> So this a statute that is clearly set up to be administered and enforced by the Department of Public Health and Environment. There is no private right of action. So this is really a red herring.
>
> Now, why, when we wrote the initiative, did we limit—did we say that this creates no private right of actions against distributors, manufacturers or retailers? The reason for that is that if you look at (q), which is really the meat of the initiative, it creates new duties. Who does it create new duties for? For producers—sorry, for distributors, manufacturers and retailers.

The "meat" of the initiative is not misbranding. Instead, it is the creation of new labeling responsibilities designed to inform consumers.

Petitioners cite to a recent Oregon Supreme Court decision that affirmed a title for a labeling measure. The court's decision is not particularly helpful for three reasons. First, it is a summary affirmation. In general, summary affirmances by an appellate court of another state are not persuasive. *See, People v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348, 364, n. 20 (Colo. 1985).

Second, the Oregon Supreme Court's review is limited to a determination whether, in the face of the challenges raised by the parties, the ballot title is in substantial compliance with the requirements of Oregon's initiative law. ORS 250.085(6). The Oregon court's review is limited to the issues raised by the challengers in the court proceeding. *Carson v. Myers,* 951 P.2d 700, 702 (Or. 1998). In this instance, the Court does not have any information regarding the challenges made by the protestors in the Oregon labeling initiative. Without knowledge of the challenges raised and of the Oregon court's rationale, the parties in this case and this Court cannot know whether the challenges and the affirmance are relevant.

Third, the Oregon Supreme Court held, "Petitioner's argument that the Attorney General's certified ballot title for Initiative Petition No. 27 (2014) does not comply substantially with ORS 250.035(2) to (6) is not well taken." It did not state that other formulations would not substantially comply with Oregon law.

The Petitioners next argue that the titles misstate the scope of the proposal. According to Petitioners, the measure addresses only "foods that are derived from *organisms* that have been treated with genetically modified material." (Emphasis in original). (Petitioners' Opening Brief, pp. 12-14). As noted at pages 9-11 of the Title Board's Opening Brief, Petitioners' argument ignores significant portions of the definition. Moreover, the argument ignores the substantive provision of the measure. Food must be properly labeled "if it has been genetically modified or has been produced with genetic engineering." #48, section 25-5-411(1)(q).

The Petitioners next contend that the Title Board erred by failing to include a reference to criminal penalties. (Petitioners' Opening Brief,

pp. 14-17). This contention is based upon two false assumptions: (1) #48 includes a criminal penalty (Petitioners' Opening Brief, p. 16), and (2) the Title Board must discuss the effect of the text of the measure even though the measure does not include a penalty (Petitioners' Opening Brief, pp. 15-16).

Petitioners' brief is unclear. It can be interpreted to argue that #48 includes penalties. (Petitioners' Opening Brief, p. 16, "A ballot measure's penalties are notable enough to deserve mention in the ballot title"). #48 does not include a criminal penalty. Thus, if Petitioners make this argument, the argument must be rejected.

It is true that existing sections of the law not amended by #48 contain criminal penalties that will be applicable to foods that are not labeled if #48 passes. Petitioners contend that the Title Board erred by not including a reference to the criminal penalty. The Court must reject this argument.

The Title Board must fairly summarize the central points of a proposed measure. However, it need not refer to every effect that the

measure may have on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for Petition on Campaign Finance and Political Reform,* 877 P.2d 311, 315 (Colo. 1994). While the Title Board is not necessarily precluded from mentioning existing criminal penalties, it is not obligated to do so. Rather, the decision to refer to such penalties rests within the Title Board's discretion. *In re Title Pertaining to Sale of Table Wine in Grocery Stores,* 646 P.2d 916, 921 (Colo. 1982).

Contrary to the Petitioners' argument, it is not likely that voters would be surprised. Existing law imposes criminal penalties for mislabeling of food in many similar circumstances, including not stating that it is an imitation of another food, § 25-5-411(1)(e), C.R.S. (2013), or that it contains artificial flavoring, § 25-5-411(1)(h), C.R.S. (2013).[1]

Petitioners next contend that the titles are inadequate because they do not inform the voters that the measure contains an important affirmative defense. (Petitioners' Opening Brief, pp. 17-19). The

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[1] *In re Title, Ballot Title and Submission Clause for Election Reform,* 852 P.2d 28, 33 (Colo. 1993) is inapposite because the measure included a new criminal penalty.

measure states that food will not be considered misbranded if the person who produces food is unaware that the food was created with seed or otherwise derived through a process of genetic engineering and obtains a sworn statement from the person who sold the seed or food. "The sworn statement must be obtained at the time that the seed or food is delivered from the seller." Proposed measure, 25-5-411(3).

This provision is not an affirmative defense. In the criminal context, an affirmative defense is one in which the defendant admits the criminal act but seeks to justify, mitigate or excuse it. It is not available to a defendant who denies it. *People v. Grizzle,* 140 P.3d 224, 225-26 (Colo. App. 2006). In the civil context, an affirmative defense is defendant's assertion of facts and argument that will defeat plaintiff's claim, even if plaintiff's claims are true. *Dinosaur Park Investments v. Tello,* 192 P.3d 513, 516 (Colo. App. 2008).

In this case, the sworn statement does not provide an affirmative defense. Because the affidavit must be obtained at the time the seed or food is delivered, this provision creates an exemption to the labeling

requirement. If the affidavit is not obtained at the time that the purchase is made, then the food must be labeled.

The titles are accurate. They refer to exemptions, including obtaining affidavits. ("A change to the Colorado Revised Statutes concerning labeling of genetically modified foods, and in connection therewith ... exempting some foods"). This reference includes subsection (3). [2]

Petitioners next argue that the titles are defective because they do not include a reference to the definitions of "genetically modified" and "genetically engineered". (Petitioners' Opening Brief, pp. 19-20). Providing a statement that the terms are defined in the measure would not necessarily assist the voters. Voters understand that the terms "genetically modified" and "genetically engineered" mean that the item does not occur naturally. Where a measure contains a definition of a term that is commonly understood and does not create a new and controversial legal standard, the Title Board is not required to include a

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[2] The Petitioners did not raise this issue in their Motion for Rehearing or at the hearing on the motion. Ex. B, at 81:24-82:6

definition or a reference to the definition. *In re Title, Ballot Title and Submission Clause 2009-2010 #24,* 218 P.3d 350, 356 (Colo. 2009) (definition and reference to definition of "political subdivision" not included in titles).

Petitioners next contend that the Title Board erred by failing to include a reference to the exemption of processed foods made with a processing aid. (Petitioners' Opening Brief, pp.21-22). According to Petitioners, voters would likely be surprised that the measure includes this exemption. The Title Board included with the titles those exemptions that it concluded were most relevant to voters. Petitioners do not explain why this particular exemption is as important as those included within the titles.

Petitioners also argue that the titles do not inform the voters that the measure does not require labeling of raw agricultural commodities at the point of consumption. (Petitioners' Opening Brief, pp. 22-23). #48 provides that genetically engineered foods must have a label with the words "produced with genetic engineering" in the case of packaged

foods. However, in the case of raw commodities, such as fresh fruits or vegetables, that are not separately packaged, the labels must be placed on the shelf or bin where the commodity is placed for sale.

The titles do not disclose the labeling requirements for raw agricultural commodities. This exception is not material. There is no evidence that the typical consumer expects to see a label on an apple or a carrot when the consumer eats the apple or carrot.

Petitioners next assert that the titles are defective because they include the mandated wording of the labels. As noted in the Title Board's Opening Brief at p. 21, the words on the label are important. Moreover, even if the wording is not important, Petitioners have not argued that the statement within the titles is misleading, inaccurate, or confusing.

CONCLUSION

The Court must affirm the action of the Title Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Answer Brief of the Title Board upon all parties herein by Integrated Colorado Courts E-filing System (ICCES) or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 7th day of March, 2014 addressed as follows:

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