SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 5, 2014 11:35 AM
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 MARC ARNUSCH AND MARY LOU CHAPMAN, Petitioners, v. LARRY COOPER AND CHERYL GRAY AND SUZANNE STAIERT, DANIEL DOMENICO AND JASON GELENDER, TITLE BOARD Respondents.	▲**COURT USE ONLY**▲ Case No. 2013SA335
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OPENING BRIEF OF TITLE BOARD

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).

It does not exceed 30 pages.

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

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 (R. , p.), not to an entire document, where the issue was raise and ruled on.

/s/*Maurice G. Knaizer*

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

Other Authorities

RULES

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

I. STATEMENT OF THE ISSUES

Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 #48 correctly and fairly express the true intent and meaning of the proposed initiative?

II. STATEMENT OF THE CASE

This case is an appeal of a ballot title setting by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013)

On November 22, 2013, proponents Larry Cooper and Cheryl Gray filed Proposed Initiative 2013-2014 #48("#48") with the Colorado Secretary of State. The Title Board conducted a hearing on December 4, 2013 and set titles for the measure. On December 11, 2013, the Petitioners Marc Arnusch and Mary Lou Chapman ("Petitioners") submitted a motion for rehearing. The Title Board considered the

motion on December 18, 2013. It granted the motion in part and set the titles. The Petitioners then filed this appeal on December 24, 2013.

III. STATEMENT OF THE FACTS

#48 amends the Colorado Food and Drug Act, §§ 25-5-401, et seq., C.R.S. (2013) by adding provisions concerning the labeling of genetically modified food. #48 includes a legislative declaration that states, "Consumers have a right to know if the food they are consuming has been genetically modified or has been produced with genetic engineering." It includes definitions of key terms and states that genetically modified food must be labeled. Genetically modified food that is not properly labeled is denominated "misbranded." #48 also includes exceptions to the labeling requirements; prohibits a private right of action against a distributor, manufacturer, or retailer that sells or advertises food for failure to meet the new labeling requirements; and requires the Colorado Department of Public Health and Environment (CDPHE) to implement the new labeling standards.

The titles set by the Title Board mirror the text and structure of #48. The titles start with the subject, "labeling of genetically modified food." They then inform voters of #48's major tenet: "requiring food that has been genetically modified or treated with genetically modified material to be labeled, 'Produced With Genetic Engineering' starting on July 1, 2016". The titles then lay out most of the exceptions, and inform voters that CDPHE must promulgate regulations and that the measure prohibits private actions alleging failure to conform to the labeling requirements.

IV. ARGUMENT

A. Summary Of The Argument

The titles and submission clause meet the clear title standards established by this Court. They fairly and accurately set forth the major elements of the measure.

B. Standard Of Review

The titles must clearly express the single subject of the proposal. The language of the titles cannot obscure the meaning of the measure. The titles must enable all citizens, whether familiar or unfamiliar with

the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45,* 234 P.3d 642, 648 (Colo. 2010) (*#45*). The Title Board must "consider the confusion that might be caused by misleading titles" and "avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." § 1-40-106(3) (a), C.R.S. (2013). Ballot titles shall be brief. *Id.* The Board is not required to discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance,* 877 P.2d 311, 314, 315 (Colo. 1994) ("*Political Finance*").

The Court has set forth the following directive for ballot titles:

> We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of

> the proposal but need not include every detail.

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 4 P.3d 213, 222 (2002*)* (*#21and #22*).

When the Court reviews a challenge to the clear title requirement of a ballot title setting, it employs all legitimate presumptions in favor of the propriety of the Board's decision. *#45*, 234 P.3d at 645. The Court will examine the text to determine whether the titles and submission clause are consistent with the standards established in statute. The Court will not determine the efficacy, construction or future application of the proposal, if passed. *Id.*

The Court has recognized that the Title Board has the difficult task of balancing the competing interests of the proponents against concerns raised by opponents and other members of the public. *In re Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives Nos. 67, 68 and 69*, 2013 CO 1, 293 P.3d 551, 554 (Colo. 2013). The Title Board's decisions are presumptively valid. The Title Board has considerable discretion in setting ballot titles. The Court does

not demand that the Title Board set the best possible titles. It will reverse the Title Board's action only if the titles are insufficient, unfair or misleading. *In re Ballot Title 2011-2012 No. 45,* 2012 Co 26, 274 P.3d 576, 582 (2012).

C. THE TITLE BOARD SET CLEAR TITLES

i. Summary of #48

#48 declares that "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." #48, § 25-5-401.5(1) (1). It then declares, "Consumers have a right to know if the food they are consuming has been genetically modified or has been produced with genetic engineering." #48, § 25-5-401.5(1) (5). It defines "distributor", "enzyme", "genetically engineered", "genetically modified", "manufacturer", "organism", "processed food", "processing aid", and "retailer". #48, § 25-5-402.

#48 states that a food is deemed misbranded if it has been genetically modified or has been produced with genetic engineering

unless the words "produced with genetic engineering" appear in designated places. #48, § 24-5-411(1) (q). There are seven exceptions to the labeling requirement: (1) food or drink for animals; (2) chewing gum; (3) alcoholic beverages; (4) processed food in which the processing aids or enzymes were produced or derived with genetic engineering; (5) certain foods not packaged for retail sale; (6) certain foods from an animal that has not been genetically engineered even if the animal has received food or drugs that may have been produced through genetic engineering; and, (7) medically prescribed food.

#48 establishes an exception for food that is produced by a person who meets certain requirements. #48, § 25-5-411(3). It also prohibits private rights of action against distributors, manufacturers and retailers that sell or advertise food for failure to conform to the labeling requirements and requires CDPHE to promulgate regulations. #48, § 24-45-411(4), (5).

ii. The Titles Mirror the Major Elements of #48.

The titles set by the Title Board follow the format required in in *#21 and #22*. The titles begin with a clear summary of the measure. The measure seeks to inform consumers that certain foods have been genetically modified. The opening clause of the titles informs the voters that the measure concerns the labeling of genetically modified foods. The titles then state that food that has been genetically modified or treated with genetically modified material must be labeled, "Produced with Genetic Engineering." The titles note that "some foods" are exempt and list five of the seven exemptions. The titles do not mention chewing gum and foods processed with aids or enzymes produced or derived with genetic engineering are exempt. The titles then inform the voters that CDPHE must promulgate regulations and that the measure prohibits private actions alleging failure to conform to the labeling requirements.

D. PETITIONERS' CHALLENGES ARE WITHOUT MERIT

The Petitioners raise nine challenges to the titles in their Petition for Review. These challenges will be addressed in order.

i. The titles correctly describe the food to be labeled.

Petitioners first argue that the titles are incorrect because they state that labeling is required for "food that has been… treated with genetically modified material." Petitioners contend that the titles improperly conflate two separate concepts: food that has been genetically modified and food treated with organisms that have been genetically modified. This contention ignores the plain language of #48.

#48 states:

> "Genetically engineered' or 'genetically modified' means *food produced from or with an organism or organisms* with its genetics altered through the application of:…(a) in vitro and in vivo nucleic acid techniques…or (b)methods of fusing cells beyond the taxonomic family….(c) *A food* shall otherwise be considered to be genetically engineered if : (I) *the organism from which the food is derived has been treated with a genetically engineered material*…or (II) the food contains an

> ingredient, component or other article that is genetically engineered.

#48, section 25-4-402 (12.5) (emphasis added)

#48 itself defines genetically engineered food to include (1) food produced "from or with" an organism with altered genetics and (2) food produced from an organism that has been treated with a genetically engineered material. #48 treats both types as food as genetically modified or genetically engineered.

The Title Board must do more than repeat the language of the measure. If the language of the measure obfuscates or does not clearly convey the measure's major tenets, then the Title Board must use language that will adequately convey the measure's intent and purpose to the voters. *In re Title, Ballot Title and Submission Clause, and Summary by the Title Board Pertaining to a Proposed Initiative on "Obscenity",* 877 P.2d 848, 850 (Colo. 1994) In this case, the definitions are long and technical. The Title Board simplified the language in a manner that is both clear and accurate. The titles properly convey the scope of the definition of genetically engineered food when they refer to

"food that has been genetically modified or treated with genetically modified material."

The titles set by the Title Board are consistent with titles approved by this Court in a prior food labeling measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #265*, 3 P.3d 1210 (Colo. 2000) (*#265*). The petitioners challenged statements in the titles and summary that appeared to limit the labeling requirements to foods that contain genetically engineered materials even though the measure also applied to foods that were produced using such material. *Id.* at 1214. The Court concluded that language in the titles and summary, when read in their entirety, adequately conveyed the intent and meaning of the measure. *Id.* at 1215.

ii. The titles clearly state exceptions to the labeling requirement.

Petitioners next contend that the single subject statement is misleading because it does not state that 48 exempts certain genetically modified foods. They argue that the initial clause in the titles must

include the word "some". According to Petitioners, the reference to exceptions later in the title is insufficient.

The clear title requirement does not mandate that details of the single subject must be expressed in the initial clause. Rather, the Title Board meets its obligations if the initiative's single subject is "clearly expressed in its titles." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 647 (Colo. 2010) Thus, the Court will review the language used throughout the titles. If the language of the titles, read as a whole, adequately conveys the meaning of a measure, the Court will affirm the decision of the Title Board. *Id.* at 648. Titles are sufficient if they provide voters with a "reasonably ascertainable expression of the initiative's purpose." *Id.*

The titles in this case include a clear, general statement of the subject. The subject is labeling of genetically modified foods. The language after the statement of the single subject notifies the voter that the measure exempts certain genetically modified foods.

The titles are structured in a manner similar to titles approved for a previous measure requiring labeling of genetically engineered food. *#265,* 3 P.3d at 1216. There, the single subject was "labeling of genetically engineered food." After the statement of the subject, the titles stated that the measure defined "which foods and drinks shall be labeled." Although the statement of the subject mentioned food and drink for humans and animals, thereby implying that all food and drink were subject to labeling, the titles later narrowed the food and drink to those defined in the measure. The Court concluded that the titles were adequate.

iii. The essence of the measure is labeling, not misbranding.

Petitioners' third challenge is that the titles do not state "the essence of the Proposed Initiative is that the failure to label genetically modified food is treated as "'misbranding' of food." This contention is incorrect.

#48's legislative declaration states, "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." #48, § 25-5-401.5(1). It also declares that "Consumers have a right to know if the food they are consuming has been genetically modified or has been produced with genetic engineering." #48, § 25-5-401.5(5). #48 contains specific language that must be included in labels. #48, § 25-5-411(1) (q). Food packaging to which the measure applies must contain the words "produced with genetic engineering." Food packaging that does not contain the language is deemed "misbranded". #48, section 25-4-111(1).

The measure is intended to require genetically engineered food to include a label with the words "produced with genetic engineering". The underlying purpose of the measure is to inform consumers about food that is genetically modified. The designation of "misbranded" will occur only if the food does not have the required language on the label. Because the designation is contingent, it cannot be essential.

iv. Criminal penalties are not part of #48

Petitioners' fourth challenge is that the "titles do not inform voters that the misbranding of food can be punished by various means including criminal prosecution." The measure itself does not impose or alter any civil or criminal penalties. Rather, it expands the definition of "misbranding" to include foods that are genetically modified or engineered and that are not appropriately labeled.

Misbranded foods are already subject to both civil and criminal penalties. §§ 25-5-404 and -405, C.R.S. (2013) Petitioners contend that the titles must explain the relationship of the amendment to existing penalties that are not part of the measure. The Court has rejected this argument. The Title Board is not required to explain the relationship of the proposed measure to existing laws that are not in the text of the measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255,* 4 P.3d 485, 498 (Colo. 2000) (titles are not "misleading because they do not refer to the Initiative's possible

interplay with existing state and federal laws"); see also, *Political Finance,* 877 P.2d at 315.

v. The exemption for persons who unknowingly produce genetically modified food is not a crucial element of the measure.

Petitioners' fifth challenge states that the titles do not inform the voters that #48 exempts genetically modified food from being deemed mislabeled if the producer can prove that he did not knowingly produce the food from seed or other food that was derived through genetic engineering and obtains a sworn statement from the party that sold the seed or food that that the party had not acted knowingly.

The titles inform the voter that the measure exempts "some foods" and then provide a representative list of the exemptions. The titles do not mention exempting genetically modified food produced by persons who do so unknowingly. The Court has long recognized that the Title Board must balance completeness with brevity. The titles must convey the essence of the measure without burying the voter in unnecessary detail. The titles achieve this goal.

This Court rejected a similar argument in *#265*. There, the challengers contended that the titles were misleading because they did not define what foods would be labeled. The titles stated that the measure "concerns the labeling of genetically engineered food and drink for humans and animals and, in connection therewith, defines which foods and drinks shall be labeled." The Court concluded that "the failure to define the foods that must be labeled in the titles does not render the titles misleading to the voters." *Id.,* 1215.

vi. The definitions of genetically modified or genetically engineered food do not alter an existing legal standard in a new or controversial manner.

Petitioners' sixth challenge argues that the titles do not include "a unique definition of 'genetically modified' and 'genetically engineered,'" to include foods that "contain any genetically engineered ingredient, component, or other article, whether or not the ultimate food product itself has gone through the process of having been genetically modified."

This Court has required the Board to include a definition in the titles when the definition alters a legal standard in a manner that is both new and controversial. *In re Title, Ballot Title and Submission Clause Adopted April 4, 1990, Pertaining to the Proposed Initiative on Parental Notification of Abortions for Minors,* 794 P.2d 238, 242 (Colo.1990); *see also*, *In re Title, Ballot Title and Submission Clause for 2009-2010 #24,* 218 P.3d 350, 355 (Colo. 2009).

In this case, the concept of genetic modification and genetic engineering is not new in Colorado law. Genetic engineering is addressed in another state statute. The state board of stock inspection commissioners requires each alternative livestock farm to provide proof that "the farm has maintained the purity of alternative livestock herds by preventing the introduction of red deer or hybrid nonnative species either by the importation of untested live animals, gametes, eggs, sperm or other genetic material into alternative livestock herds in Colorado." § 35-41.5-111(6) (a), C.R.S. (2013).

The concept that foods containing genetically engineered material may be deemed genetically engineered is not new. The measure at issue in *#265* required a label that stated, "NOTICE: this product contains a genetically engineered material, or was produced with a genetically engineered material." *#265*, at 1218.

Moreover, federal regulations include a definition that is similar to the one included in the proposed measure. 7 C.F.R. 340(2013) governs the introduction of organisms and products altered or produced through genetic engineering which are plant pests. The term "regulated article" within this regulation is defined, in part, as "any organism which has been altered or produced through genetic engineering…or *any product which contains such an organism*." 7 C.F.R. 340.1(2013)(emphasis added) The federal government's regulation, like the definitions in #48, equates organisms altered or produced through genetic engineering with articles that contain materials that are altered or produced through genetic engineering.

vii. The Title Board reasonably excluded references to processed food that is genetically engineered with enzymes or additives and to the time when raw products must be labeled.

Petitioners' seventh and eighth challenges address exemptions that the Title Board did not include in the titles. The titles inform the public that the titles do not include all exemptions. The Title Board included the exemptions it believed were most pertinent to the public.

In their seventh challenge, Petitioners contend that the titles do not inform the voters that the proposed measure exempts from the labeling requirement processed food that is produced with genetically engineered enzymes or additives. Petitioners' eighth contention is that the titles do not inform the voters that the informational requirements apply to raw agricultural commodities only at the point of retail sale but not at the point of consumption.

The Title Board, in the interest of brevity, could reasonably conclude that these exemptions were not crucial to the public's understanding of the measure.

viii. The wording of the label is an important feature of #48.

Finally, Petitioners contend that the mandated wording of the labels is included even though it is not a central feature of the measure. This contention is wrong. The crux of the measure is providing information to consumers about the food products they consume. The wording on the label is perhaps the most important part of the measure from the perspective of the food consumer because it is the portion of the law that each consumer will see if the measure passes.

CONCLUSION

The Title Board requests that the Court approve the titles.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Opening 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 5th day of February, 2014 addressed as follows:

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