

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 11, 2016 5:24 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #115 (“Change to the “Colorado Beer Code” Definition of Fermented Malt Beverages to Include All Beer Products”)</p> <p>Petitioners: JOHN GRAYSON ROBINSON AND JOHN BLAKE HARRISON</p> <p>v.</p> <p>Respondents: JEFF JULIN AND CHARLIE BROWN</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; SHARON EUBANK; AND FREDERICK R. YARGER</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>PETITIONERS’ OPENING BRIEF</p>	

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 contains _____ words.
- It does not exceed 30 pages.

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 (R.__P.__), not to an entire document, where the issues was raised on rule on.

For the party responding to the issue:

It contains under a separate heading, a statement of whether each 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/Matthew K. Tieslau

TABLE OF CONTENTS

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW.....1

II. STATEMENT OF THE CASE.....1

III. STATEMENT OF FACTS3

IV. SUMMARY OF THE ARGUMENT.....3

V. ARGUMENT4

 A. Initiative #115 Violates the Clear Title Requirement4

 1. Standard of Review and Preservation of Issue4

 2. Initiative #115’s Title does not Accurately or Fairly Reflect the
 Central Features of the Initiative, and is Incapable of Description
 Due to its Complexity5

 a. Legal Standard5

 b. The Title Board’s Determination Failed to Meet the Legal Standard...7

VI. CONCLUSION.....18

TABLE OF AUTHORITIES

Cases

In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 No. 37
 977 P.2d 845 (Colo.1999)16

In re Title, Ballot Title, Submission Clause, Summary for 1999–2000 No. 29
 972 P.2d 257 (Colo. 1999) 4, 5, 6

In re Title for 1999–2000 No. 258(A)
 4 P.3d 1094 (Colo. 2000)6

In re Title, Ballot Title and Submission Clause for Proposed Initiatives
 2001-2002 Nos. 21 and 2244
 P.3d 213 (Colo. 2002).....16

In re Title, Ballot Title and Submission clause, and Summary for 2005-2006
 No. 73 135, P.3d 736 (Colo. 2006).....5

Title Board’s action.” In re Title, Ballot Title and Submission Clause for
2007-2008 No. 17
 172 P.3d 871(Colo. 2007).16

In re Title, Ballot Title, and Submission Clause for 2009-2010 No. 24
 218 P.3d 350 (Colo. 2009)5, 6

n re Title, Ballot Title, Submission Clause for 2009-2010 No. 45
 234 P.3d 642(Colo.2010)6

In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3
 274 P.3d 562 (Colo. 2012).6

In re Title, Ballot Title, and Submission Clause for 2013-2014 No. 89
 P.3d 172, (Colo. 2014).....4

In re Title, Ballot Title and Submission Clause for 2015-2016 No. 73
 --P.3d--, 2016 CO 24 (Colo. 2016)..... 14, 15

In re Title, Ballot Title, Submission Clause, and Summary by Title Board
Pertaining to a Proposed Initiative on “Obscenity”
 877 P.2d 848 (Colo. 1994) 15, 16

Statutes

C.R.S. § 1-40-105(1)..... 1

C.R.S. § 1-40-106(3)(b)6

C.R.S. § 1-40-106.52

C.R.S. § 1-40-107(1)(a)2

C.R.S. § 1-40-107(2)..... 1, 2, 5

C.R.S. § 1-41-103 9

C.R.S. § 12-46-101	9
C.R.S. § 12-46-102	3
C.R.S. § 12-46-103	3
C.R.S. § 12-46-104	9, 10
C.R.S. § 12-46-104(b).....	17
C.R.S. § 12-47-101	9
C.R.S. § 12-47-103	9, 12, 17
C.R.S. § 12-47-106	17
C.R.S. § 12-47-202	17
C.R.S. § 12-47-301	9, 17
C.R.S. § 12-47-311	17
C.R.S. § 12-47-312	17
C.R.S. § 12-47-313	17
C.R.S. § 12-47-401	17
C.R.S. § 12-47-402	17
C.R.S. § 12-47-405	17
C.R.S. § 12-47-406	17
C.R.S. § 12-47-406.3	17
C.R.S. § 12-47-407	9, 10, 13, 17
C.R.S. § 12-47-408	10, 17
C.R.S. § 12-47-409	9, 10
C.R.S. § 12-47-410	10
C.R.S. § 12-47-411	11, 17
C.R.S. § 12-47-412	17
C.R.S. § 12-47-413	17
C.R.S. § 12-47-414	17
C.R.S. § 12-47-415	17
C.R.S. § 12-47-416	17
C.R.S. § 12-47-417	17
C.R.S. § 12-47-418	17
C.R.S. § 12-47-409	17
C.R.S. § 12-47-424	17
C.R.S. § 12-47-503	17
C.R.S. § 12-47-505	17
C.R.S. § 12-47-901	3
C.R.S. § 12-47-901(8).....	10

Constitutional Provisions

Colo. Const. art. V, § 1(5.5)..... 2, 5, 6

Other Authorities

SUMMIT ECONOMICS, LLC, ECONOMIC IMPACT OF REPLACING 3.2 BEER SALES WITH FULL STRENGTH BEER SALES, p. 26. *available at* http://myclba.com/news/wp-content/uploads/2011/10/Economic_Impact_Report_Final-1.pdf12

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in setting a title that violates the clear title requirement by being so vague and misleading that it does not clearly or fairly reflect the Initiative.

II. STATEMENT OF THE CASE

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

Jeff Julin and Charlie Brown (hereinafter “Proponents”) are the designated proponents of Proposed Initiative 2015–2016 #115 (“Change to the “Colorado Beer Code” Definition of Fermented Malt Beverages to Include all Beer Products”) (hereinafter “Initiative”). Proponents submitted a final version of the Initiative to the Secretary of State on March 25, 2016 for purposes of having the Title Board set title. *See* Final 2015-2016 #115, attached as Exhibit A. The Secretary of State or his designee is a member of the Title Board. The review and comment hearing required by C.R.S. § 1-40-105(1) was conducted by the Offices of Legislative Council and Legislative Legal Services on April 6, 2016.

The Title Board considered the Initiative at its April 6, 2016 meeting and set the following title:

A change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that

contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer.

See Ballot Title Setting Board, Proposed Initiative 2015 –2016 #115 (April 6, 2016), attached hereto as Exhibit B.

On April 7, 2016 the Proponents filed a corrected final version of the Initiative to the Secretary of State, attached hereto as Exhibit C. On April 13, 2016, John Grayson Robinson and John Black Harrison (“Petitioners”) timely filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1)(a), alleging that the proposed Initiative violated the single subject requirement contained within the Colo. Const. art. V., § 1(5.5) and C.R.S. § 1-40-106.5; that the Initiative’s title impermissibly included a catch phrase; and that the Initiative’s title violated the clear title requirement by failing to adequately describe the purpose and import of the initiative which rendered the title misleading. *See* Motion for Rehearing, attached hereto as Exhibit D. The Title Board considered Petitioners’ Motion at its April 20, 2016 meeting. The Motion for Rehearing was denied in all respects. *See* Ballot Title Setting Board, Proposed Initiative 2015–2016 #115 (April 6, 2016), attached hereto as Exhibit E (hereinafter “Title”).

As the Title continues to be misleading in violation of the clear title requirement, Petitioners timely submitted this matter to the Colorado Supreme Court for review pursuant to C.R.S. § 1-40-107(2).

III. STATEMENT OF FACTS

If adopted, the Initiative would amend the Colorado Revised Statutes Sections 12-46-102, 12-46-103, and 12-47-901 to change the regulation of “fermented malt beverages” such that the definition of the same no longer includes an upwards alcohol by weight limit of 3.2%. Ex. B, p.1. The Initiative would further add the term “malt liquors,” which is currently regulated under separate statutory authority, to the definition of “fermented malt beverage.” *Id.* The Initiative would also remove restrictions prohibiting manufacturers and wholesalers licensed to sell fermented malt beverages from selling beverages containing alcohol in excess of 3.2% alcohol by weight, as well as lift restrictions for those licensed as fermented malt beverage retailers from selling beer in excess of 3.2% alcohol by weight. *Id.* at p.2. Thus the Initiative attempts to allow the type of businesses specifically licensed to sell only beer below 3.2% alcohol by volume to now sell beer over 3.2% alcohol by volume.

IV. SUMMARY OF THE ARGUMENT

The Title Board erred when it set title for Initiative 115 because, when read as a whole, the Initiative violates the clear title requirement. While the title of the Initiative reflects the Initiative’s overarching intent to remove 3.2% beer restrictions for manufacturers, wholesalers, and retailers currently licensed to sell beer less than 3.2% alcohol by weight, the Initiative does not reflect the far

reaching affects it will also have on licenses to sell different types of alcoholic beverages. For example, the title does not reflect the regulatory shift from a two-tiered licensing system for fermented malt beverages, nor does it explain how the modifications to the definition of “fermented malt beverage” will affect the composition of businesses currently licensed to sell beer over 3.2% alcohol by weight. Additionally, the title does not reflect or quantify the full import of the Initiative to the extent that the Initiative alters the existing beer and liquor statutes, as the changes the Initiative makes are so complex that a clear and accurate description of the changes is beyond quantification.

As such, the Court should remand this matter to the Board with directions to amend the title consistent with the concerns set forth herein.

V. ARGUMENT

A. Initiative #115 Violates the Clear Title Requirement

1. Standard of Review and Preservation of Issue

The Court will reverse the board’s action in a setting title and submission clause if the title misleads voters through a material omission or misrepresentation. *In re Title, Ballot Title, and Submission Clause for 2013-2014 No. 89*, 328 P.3d 172, 179 (Colo. 2014). In determining whether a material omission or misrepresentation has occurred, the Court will first “engage all legitimate presumptions in favor of the propriety of the Title Board’s action.” *In re Title, Ballot Title, Submission*

Clause, Summary for 1999–2000 No. 29, 972 P.2d 257, 266 (Colo. 1999) It has also been said that the Court “will only reverse the Board’s decision if the titles are insufficient, unfair, or misleading.” *In re Title, Ballot Title and Submission clause, and Summary for 2005-2006 No. 73*, 135 P.3d 736, 740 (Colo. 2006)). The Court will not consider the initiatives efficacy, construction, or future application, but necessarily must examine the initiative’s text in order to review the Title Board’s action. *In re Title, Ballot Title, and Submission Clause for 2009-2010, No. 24*, 218 P.3d 350, 353 (Colo. 2009).

Petitioners’ raised the clear title requirement in Petitioners’ Motion for Rehearing on April 13, 2016. *See Ex. D*, p.2-5. Petitioners’ further presented this issue to the Court pursuant to C.R.S. § 1-40-107(2). *See Petition for Review of Final Action* (January 13, 2016), attached hereto as Exhibit F, at p. 3-4.

2. Initiative #115’s Title does not Accurately or Fairly Reflect the Central Features of the Initiative, and is Incapable of Description Due to its Complexity.

a. Legal Standard

Article V, section 1(5.5) of the Colorado Constitution requires that:

No measure shall be proposed by petition containing more than one subject, *which shall be clearly expressed in its title*; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

Colo. Const. art. V, § 1(5.5) (emphasis added).

The Board is charged with setting a title that fully, fairly, and accurately informs voters of the central elements of the measure so as to enable them to make a thoughtful decision about its merits. C.R.S. § 1-40-106(3)(b); *see also In re Title for 1999–2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). Titles and submission clauses should enable voters “whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Title, Ballot Title, Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010) (quoting *In re No. 24*, 218 P.3d at 356). The requirement of a fair and accurate title is intended to prevent “surreptitious measures” and imposes on the Title Board the duty to “apprise the people of the subject of each measure by the title” in order to prevent “surprise and fraud from being practiced upon voters.” *In re No. 29*, 972 P.2d at 261. The title need not be perfect, but should be rejected if voters could construe the title in a way incorrectly representing the text of the initiative, or if the title does not sufficiently inform the voters of “important aspects of the initiative.” *In re Title, Ballot Title, Submission Clause for 2011–2012 No. 3*, 274 P.3d 562, 570 (Colo. 2012).

b. The Title Board's Determination Failed to Meet the Legal Standard.

The Title as set by the Title Board violates the clear title requirement as it does not fairly and accurately reflect the Initiative to the extent that voters would be able to make an informed vote. As described in Petitioners' Motion for Rehearing and in their Petition for Review of Final Action, the Title is so general that it leaves out important elements and central features of the Initiative. More specifically, the clear title requirement is violated in that the Initiative:

- (1) does not alert voters to the fact that there are currently multiple licenses governing the sale of alcoholic beverages, many of which will be affected by the Initiative;
- (2) does not reflect central features of the Initiative such as shifting the regulatory structure from a two-tiered beer licensing system, altering current licensing procedures, and altering the types of businesses that will be allowed to sell what is known as full-strength beer;
- (3) does not adequately explain the definition changes to fermented malt beverages and malt liquors such that a voter, whether or not familiar with the subject matter of the Initiative, could determine intelligently whether to support or oppose the proposal; and
- (4) is unable to quantify the import of the Initiative as the provisions of the Initiative alter the existing statutory code for beer and liquor in such a

complex manner as to make full description of the Initiative's changes to existing law unquantifiable.

The final ballot title and submission clause as designated and fixed by the Board is:

Shall there be a change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer?

Ex. E, p. 1.

First, the Title generally states that the Initiative will “repeal the alcohol content limitation in the definition of fermented malt beverage,” thus allowing “businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages” in excess of the alcohol content limitation. However, at the outset it does not alert voters that there are already businesses licensed under Colorado law that can sell malt beverages in excess of the content limitation. For example, this can be seen by the Title's failure to make any mention that there are businesses licensed under Colorado law capable of selling “full strength beer.” While this may seem obvious to the imbibing voter, a voter unfamiliar with the alcoholic beverage licensing system may very well be unaware of such facts.

Second, the Title does not alert voters that it will significantly rework how licenses and fees for selling full strength beer (and for that matter, liquor) are

handled in the state, nor that the composition and types of businesses that are able to sell full strength beer will be significantly altered.

For example, licenses to sell malt beverages (commonly known as beer) in Colorado are currently governed under two separate Articles in Title 12 of the Colorado Revised Statutes. *See* §§ 12-46-101, C.R.S. (2015) *et seq.* (“Colorado Beer Code”); §§ 12-47-101, C.R.S. (2015) *et seq.* (“Colorado Liquor Code”). Businesses licensed under Article 46 may sell fermented malt beverages between .2% and 3.2% alcohol by weight, whereas those licensed under Article 47 may sell fermented malt beverages between 2.% and 3.2% alcohol by volume, malt liquors containing alcohol by volume in excess of 3.2%, spirituous liquors, vinous liquors, or some combination of the above beverages, depending on the type and class of license issued. *Id.*; *See e.g.* § 12-41-103, C.R.S. (2015) (defining fermented malt beverage);§ 12-46-104, C.R.S. (2015) (defining licenses issued for the manufacture, importation, and sale of fermented malt beverages only); § 12-47-103, C.R.S. (2015) (defining types of alcoholic beverages at issue); § 12-47-301, C.R.S. (2015) (licensing requirements in general); § 12-47-407, C.R.S. (2015) (discussing retail liquor store licenses that may only sell malt, vinous, and spirituous liquors); § 12-47-409, C.R.S. (2015) (discussing beer and wine licenses which allow sale of malt liquors vinous liquors, *and* fermented malt beverages).

In fact, the businesses licensed under Article 46 to sell the lesser alcohol by weight beers are expressly forbidden from obtaining a license under Article 47 to sell beers in excess of the 3.2% alcohol by weight limit. § 12-47-901(8), C.R.S. (2015) (“It is unlawful for . . . any fermented malt beverage retail license licensed pursuant to article 46 of this title to hold or operate under any license for the sale of any beverage containing alcohol in excess of three and two-tenths percent by weight or four percent by volume for the same premises”). Importantly, there is currently *no limitation* on the number of retail licenses a business can obtain to sell fermented malt beverages under Article 46. *See generally*, § 12-46-104, C.R.S. (2015). Contrastingly, Article 47 prohibits businesses from obtaining more than one retail license of any type. § 12-47-407, C.R.S. (2015) (“Retail liquor store license”) (“It is unlawful . . . to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article”); § 12-47-408, C.R.S. (2015) (Liquor-licensed drugstore license”) (“It is unlawful . . . to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article”); § 12-47-409 (“Beer and wine license”) (“It is unlawful . . . to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article”); § 12-47-410 (“Bed and breakfast permit”) (“It is unlawful . . . to conduct, own either in whole or in part, or be directly or indirectly interested in any

other business licensed pursuant to this article”); § 12-47-411(“Hotel and restaurant license”) (“It is unlawful . . . to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article”).

Practically, this Initiative attempts to fundamentally change the types of businesses licensed to sell what the Title refers to as “full-strength beer.” By way of example, imagine a chain convenience store or supermarket which, under current law, is eligible to apply for *one* retail license to sell beer, wine, and liquor under Article 47. However, any additional store in the chain outside of the *one* store licensed pursuant to Article 47 will be ineligible to receive the same license which includes full strength beer. Thus, additional locations in the same chain are often licensed to sell only beer less than 3.2% alcohol by weight under Article 46, which contains no numerical limitations on licenses for each entity.

Under the Initiative, a convenience store with an Article 46 fermented malt beverage retail license, by virtue of the definition change, would be able to sell “full strength beer” in all of its Article 46 licensed locations, which change the Title undoubtedly reflects. However, businesses licensed under Article 47 would still be unable to obtain more than one license per entity. Furthermore, Article 47 businesses will have different requirements and fees as they are a part of a different statutory code, which could change incentives for the certain types of license.

Thus the local, singularly owned liquor stores which currently make up a majority of the full strength beer retailers in Colorado could soon be outnumbered by larger, chain owned stores, or at the very least their market share would be diminished.¹ The Title as set by the Title Board in no way reflects these changes.

Third, that these changes will disproportionately affect businesses licensed under Article 47 is further exemplified by a look at the definition of “fermented malt beverages.” A review of the Final Corrected Text of the Initiative shows that the term “malt liquors” was added to the definition of “fermented malt beverage.” Ex. C., p.1. As the Initiative stands, “fermented malt beverages” would include any beer-like beverage over .5% alcohol by volume, whereas “malt liquors” are separately defined in Article 47 as containing more than 3.2% alcohol by weight. *See* Ex. D, p.3; § 12-47-103, C.R.S. (2015). Thus malt liquors will actually encompass a lower range of beer products than fermented malt beverages under the Initiative. As most business in Article 47 are regulated to sell only malt liquors (or

¹ There were approximately 1600 retail liquor stores licenses in Colorado in 2008, whereas each major chain (Target, King Soopers) only represented one of those licenses each. *See* SUMMIT ECONOMICS, LLC, ECONOMIC IMPACT OF REPLACING 3.2 BEER SALES WITH FULL STRENGTH BEER SALES, p. 26. *available at* http://myclba.com/news/wp-content/uploads/2011/10/Economic_Impact_Report_Final-1.pdf

vinous/spirituous liquors), businesses licensed under Article 46 will be able to sell a wider range of beer products than those under Article 47.²

This represents a materially significant change in the way retail malt beverage licenses are regulated in Colorado. Instead of the current makeup of small, independently owned stores that can sell full strength beer, wine, and liquors (with, admittedly, one chain owned location per entity allowed in the state), the Initiative would suddenly increase the proportion of chain and cooperatively owned businesses that could sell full strength beer under Article 46. Not only would the composition of businesses selling full strength beer change, but additionally traditional sellers of beer licensed pursuant to Article 47 would have a more truncated range of beer products than those licensed under Article 46 pursuant to the changes contemplated by this initiative.

Thus the Initiative does not seek just to repeal the “alcohol content limitation in the definition of fermented malt beverage . . . to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverage,” (Ex. E, p.1.) but rather seeks to change both the requirements, licensing scheme, types of businesses allowed to sell malt beverages in excess of 3.2% alcohol by weight, and

² For example, a business licensed as a Retail Liquor Store under § 12-47-407, C.R.S. 2015 may sell “malt, vinous, and spirituous liquors” but not fermented malt beverages. Thus under the definition change a business license pursuant to Article 46 could sell beer ranging from .2% alcohol by volume and up, while one licensed under Article 47 could only sell beer ranging from 3.2% alcohol by volume and up.

restrictions for business licensed to only sell one or the other class of alcoholic beverages. While a Title need not reflect all of the implementation details of an initiative, these fundamental and central features of this Initiative should have been included in the Title.

To this extent, this Court's recent decision in *In re Title, Ballot Title and Submission Clause for 2015-2016 No. 73*, --P.3d--, 2016 CO 24 (Colo. 2016), is instructive. That case involved an initiative that reworked procedures leading to, and the conduct of, recall elections for state and local elected officials. *Id.* at ¶4. While the title at issue generally stated the overall focus of the initiative, which was geared towards recalling elected officials and the subsequent successor election procedures, this Court found that it did not alert voters to "some of the proposed changes [which] would significantly alter how recall elections are currently conducted." *Id.* at ¶28. Changes the Title omitted that this Court considered significant included: a change in the number of signatures required to trigger a recall election from 25% to 5% of active registered electors; a reduction in the number of valid successor petition entries by approximately half (in the example used); and failing to mention that officials who resign from office during a recall are also barred from holding office for six years. *Id.* at ¶¶ 28-31. Ultimately, this court noted that:

generally stating in a title that the initiative specifies recall and successor election procedures without in any way describing those procedures does not

provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal.

Id. at ¶32.

In deciding in *In re Title, Ballot Title and Submission Clause for 2015-2016 No. 73*, this Court relied on *In re Title, Ballot Title, Submission Clause, and Summary by Title Board Pertaining to a Proposed Initiative on “Obscenity”*, 877 P.2d 848 (Colo. 1994). There, this Court noted that even when the title and submission clause “read, virtually word for word, the same as the Initiative, this fact does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative.” *Id.* at 850. After analyzing the Initiative, this Court concluded that the title did not fully alert voters to the Initiatives underlying intent. *Id.* at 851. Thus, the initiative’s central focus could not be gleaned solely by tracking the Initiative’s language, but rather required additional explanation beyond the Initiative’s text. *Id.* at 851.

In this case the Title, while accurately describing the general nature of the Initiative of repealing the alcohol content limitation of fermented malt beverages, fails to give enough description to provide adequate information for voters to determine intelligently whether to support or oppose the proposal, or to understand what a yes or no vote will mean. From the Title, voters will not be alerted to the fact that there are currently businesses selling full strength beer in Colorado, that there are multiple tiers of licenses governing the sale of alcoholic beverages that

will be affected by the Initiative, or that the fundamental licensing system separating beer less than 3.2% alcohol by weight from full strength beer is being reworked with regards to licensing requirements. As such, additional language is necessary to adequately appraise the electorate of the Initiative's changes to the beer and liquor codes. Thus, as it reads, the Title for this Initiative is not "capable of informing the voter of the major import of the proposal." *Id.* at ¶ 34 (quoting *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 Nos. 21 and 22*, 44 P.3d 213, 222 (Colo. 2002)).

Finally, the Initiative is so complex in its modification of the existing beer and liquor codes that it is incapable of accurate description by the Title Board via title. It is true that this Court will not interpret the language of the Initiative or predict its application beyond an "examin[ing] the proposal sufficiently to enable review of the Title Board's action." *In re Title, Ballot Title and Submission Clause, for 2007-2008 No. 17*, 172 P.3d 871, 874 (Colo. 2007). However, in examining the text this Court will apply "general rules of statutory construction and accord the language of the measure its plain meaning." *Id.* In doing so, this Court ensures that the title and summary "convey[s] to voters the initiative's likely impact." *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 37*, 977 P.2d 845, 846 (Colo.1999). In this instance a cursory analysis of the text of the Initiative makes it clear that the Initiative will have farther reaching effects than the

title conveys, and such far reaching effects that any title is likely incapable of accurately describing the Initiative's impact.

As stated above, the Initiative adds the term "malt liquors" to the definition of "fermented malt beverage." However, the terms "malt liquors" and "fermented malt beverage" are currently defined and regulated separately in Articles 47 and 46, respectively. For example, C.R.S. § 12-46-104(b) discusses a wholesaler's license for persons "to sell fermented malt beverages upon the payment of an annual license fee of one hundred fifty dollars." However, C.R.S. § 12-47-406 creates a separate wholesaler's license governing, among other beverages, malt liquors. Said license contains additional restrictions beyond those found in C.R.S. § 12-46-104(b). Yet, the new definition of "fermented malt beverage" in the Initiative would allow the selling of "malt liquors" under the Article 46 license. Despite this change, the Title gives no indication to voters of this conflict in licensing. At no point does the Initiative or Title even indicate that these radical changes to licensing will occur.³ Furthermore, to the extent the Title would

³ These are not the only conflicts that are foreseeable with a cursory examination: The term "malt liquors" remains present in Article 47 of Title 12 in over twenty-five individual provisions. See, e.g.: C.R.S. §§ 12-47-103, 106, 202, 301, 309, 311, 312, 313, 401, 402, 405, 406, 406.3, 407, 408, 411, 412, 413, 414, 415, 416, 417, 418, 420, 409, 424, 503, and 505. Many of these provisions list requirements affecting both malt liquors and fermented malt beverages separately, and thus some level of conflict is foreseeable without any detailed analysis. The Title makes no mention of these possibilities.

attempt to do so, it is likely that such changes would not be capable of accurate description.

Whether the changes this Initiative contemplates regarding licensing and composition of businesses selling alcoholic beverages are a desirable amendment to the Colorado Revised Statutes is a political decision that is appropriate for presentation to the voters of this state. However, without alerting voters to the far reaching import of the Initiative's attempts to rework Colorado's beer and liquor codes, the Title omits central elements of the Initiative that will materially alter the current law. Thus, the Title robs voters of the chance to make an informed vote on the Initiative.

For these reasons the Title as set by the Title Board is insufficient, as it is lacking in adequate information to enable voters to intelligently determine whether to support the Initiative and misleading to the extent that it couches the Initiative as merely a definition change. As such, the Title violates the clear title requirement.

VI. CONCLUSION

WHEREFORE, for the reasons set forth above, Petitioners respectfully request that the Court remand the matter to the Title Board with the instructions to amend the title consistent with the concerns set forth above.

Respectfully submitted this 11 day of May, 2016.

RYLEY CARLOCK & APPLEWHITE

By: *s/Matthew K. Tieslau*

Matthew K. Tieslau

Richard C. Kaufman

Attorneys for Petitioners

John Grayson Robinson and John Blake

Harrison

CERTIFICATE OF SERVICE

I certify that on this 11th day of May, 2016, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was filed and served thru ICCES addressed to the following:

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Denver, CO 80203

s/ Ann I. Palius

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DATE FILED: May 11, 2016 5:26 PM

MAR 25 2016

12:41 P.M.

PROPOSED INITIATIVE 2015-2016 #115 ORIGINAL TEXT

Colorado Secretary of State

CHANGE TO THE "COLORADO BEER CODE" DEFINITION OF FERMENTED MALT BEVERAGES TO INCLUDE ALL BEER PRODUCTS

Designated Representatives

Jeff Julin, 2000 E. 12th Ave. Denver, CO 80206; Ph. (720) 590-4720
jjulin@julinstrategic.com

Charlie Brown, 2181 S Cook St., Denver, CO 80210, Ph. (303) 906-2070
charliebrown1101@gmail.com

Text of Measure :

Be it Enacted by the People of Colorado:

SECTION 1. In Colorado Revised Statutes, **amend 12-46-102** as follows:

Legislative Declaration. (1) The general assembly hereby declares that it is in the public interest that fermented malt beverages shall be manufactured, imported, and sold only by persons licensed as provided in this article and ARTICLE 47 OF THIS TITLE. The general assembly further declares that it is lawful to manufacture and sell fermented malt beverages ~~containing not more than three and two tenths percent alcohol by weight~~ subject to the provisions of this article and applicable provisions of articles 47 and 48 of this title.

(2) The general assembly FURTHER recognizes that fermented malt beverages AND MALT LIQUORS are separate and distinct from ~~malt~~, vinous, and spirituous liquors, and as such ~~require~~ REQUIRES THE RETENTION OF a separate and distinct regulatory framework under this article. To aid administrative efficiency, however, ~~the provisions in~~ article 47 of this title ~~shall apply~~ APPLIES to the regulation of fermented malt beverages, except when otherwise expressly provided for in this article.

SECTION 2. In Colorado Revised Statutes, 12-46-103, amend (1) as follows:

12-46-103. Definitions. Definitions applicable to this article also appear in article 47 of this title. As used in this article, unless the context otherwise requires:

(1) "Fermented malt beverage" means BEER, MALT LIQUORS AND any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water containing not less than one-half of one percent alcohol by volume ~~and not more than three and two tenths percent alcohol by weight or four percent alcohol by volume~~; except that "fermented malt beverage" ~~shall~~ DOES not include confectionery containing alcohol within the limits prescribed by section 25-5-410 (1) (i) (II), C.R.S.

SECTION 3. In Colorado Revised Statutes, 12-47-901 repeal (8) as follows:

12-47-901. Unlawful acts - exceptions

~~(8) It is unlawful for any manufacturer or wholesaler licensed pursuant to article 46 of this title to sell, deliver, or cause to be delivered to any person licensed pursuant to section 12-47-407 or 12-47-408 any beverage containing alcohol in excess of three and two tenths percent by weight or four percent by volume, or for any fermented malt beverage retailer licensed pursuant to article 46 of this title to sell, possess, or permit the consumption on the premises of any of the beverages containing alcohol in excess of three and two tenths percent by weight or four percent by volume, or for any fermented malt beverage retail licensee licensed pursuant to article 46 of this title to hold or operate under any license for the sale of any beverages containing alcohol in excess of three and two tenths percent by weight or four percent by volume for the same premises. Any violation of this subsection (8) by any fermented malt beverage licensee licensed pursuant to article 46 of this title immediately invalidates the license granted under article 46 of this title.~~

SECTION 4. Effective date. July 1, 2017.

DATE FILED: May 11, 2016 5:25 PM

Ballot Title Setting Board

Proposed Initiative 2015 2016 #115¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer?

Hearing April 6, 2016:

Single subject approved; staff draft amended; titles set.

The Board made technical corrections to the text of the initiative. A corrected version of the final text was filed by proponents on April 7, 2016.

Hearing adjourned 1:17 p.m.

¹ Unofficially captioned “**Change to Definition of Fermented Malt Beverage**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

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DATE FILED: 2016 APR 07 11, 2016 5:25 PM

S. WARD

Colorado Secretary of State

PROPOSED INITIATIVE 2015-2016 #115 CORRECTED FINAL TEXT

CHANGE TO THE "COLORADO BEER CODE" DEFINITION OF FERMENTED MALT BEVERAGES TO INCLUDE ALL BEER PRODUCTS

Designated Representatives

Jeff Julin, 2000 E. 12th Ave. Denver, CO 80206; Ph. (720) 590-4720
jjulin@julinstrategic.com

Charlie Brown, 2181 S Cook St., Denver, CO 80210, Ph. (303) 906-2070
charliebrown1101@gmail.com

Text of Measure :

Be it Enacted by the People of Colorado:

SECTION 1. In Colorado Revised Statutes, **amend 12-46-102** as follows:

Legislative Declaration. (1) The general assembly hereby declares that it is in the public interest that fermented malt beverages shall be manufactured, imported, and sold only by persons licensed as provided in this article and ARTICLE 47 OF THIS TITLE. The general assembly further declares that it is lawful to manufacture and sell fermented malt beverages ~~containing not more than three and two tenths percent alcohol by weight~~ subject to the provisions of this article and applicable provisions of articles 47 and 48 of this title.

(2) The general assembly FURTHER recognizes that fermented malt beverages AND MALT LIQUORS are separate and distinct from malt, vinous, and spirituous liquors, ~~and as such require a separate and distinct regulatory framework under this article.~~ To aid administrative efficiency, however, ~~the provisions in~~ article 47 of this title shall apply APPLIES to the regulation of fermented malt beverages, except when otherwise expressly provided for in this article.

SECTION 2. In Colorado Revised Statutes, 12-46-103, amend (1) as follows:

12-46-103. Definitions. Definitions applicable to this article also appear in article 47 of this title. As used in this article, unless the context otherwise requires:

(1) "Fermented malt beverage" means BEER, MALT LIQUORS AND any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water containing not less than one-half of one percent alcohol by volume ~~and not more than three and two tenths percent alcohol by weight or four percent alcohol by volume;~~ except that "fermented malt beverage" shall DOES not include confectionery containing alcohol within the limits prescribed by section 25-5-410 (1) (i) (II), C.R.S.

SECTION 3. In Colorado Revised Statutes, 12-47-901 repeal (8) as follows:

12-47-901. Unlawful acts - exceptions

~~(8) It is unlawful for any manufacturer or wholesaler licensed pursuant to article 46 of this title to sell, deliver, or cause to be delivered to any person licensed pursuant to section 12-47-407 or 12-47-408 any beverage containing alcohol in excess of three and two tenths percent by weight or four percent by volume, or for any fermented malt beverage retailer licensed pursuant to article 46 of this title to sell, possess, or permit the consumption on the premises of any of the beverages containing alcohol in excess of three and two tenths percent by weight or four percent by volume, or for any fermented malt beverage retail licensee licensed pursuant to article 46 of this title to hold or operate under any license for the sale of any beverages containing alcohol in excess of three and two tenths percent by weight or four percent by volume for the same premises. Any violation of this subsection (8) by any fermented malt beverage licensee licensed pursuant to article 46 of this title immediately invalidates the license granted under article 46 of this title.~~

SECTION 4. Effective date. This act takes effect July 1, 2017.

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DATE FILED: May 13 2016 5:25 PM
APR 13 2016 4:49 P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2015-2016 #115**MOTION FOR REHEARING**

Registered electors, John Grayson Robinson and John Blake Harrison, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2015-2016 No. 115. As set forth below, Mr. Robinson and Mr. Harrison respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On April 6, 2016, the Title Board designated the title as follows:

A change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer.

The Title Board set the ballot title and submission clause as follows:

Shall there be a change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer?

GROUND FOR RECONSIDERATION**I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.**

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See* Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; *In re Title, Ballot Title, Submission Clause*, 898 P.2d 1076, 1078-79 (Colo. 1995) (a proposed initiative violates the single subject rule where it "has at least two distinct and separate purposes which are not dependent upon or connected with each other."). The Board set title for Initiative No. 115 despite the fact that it contains multiple, distinct and separate purposes that are not dependent

upon or connected with one another. Specifically, the initiative includes the following unrelated subjects:

- (1) The caption of the initiative acknowledges the central subject of changing the definition of fermented malt beverages under the "Colorado Beer Code," which is contained within Article 46 of Title 12. *See* C.R.S. §§ 12-46-101 et seq.
- (2) The initiative then continues to change portions of the "Colorado Liquor Code" which governs alcoholic beverages well beyond the scope of fermented malt beverages, including changing the relationship between "fermented malt beverages" and "malt liquors" which are each separately defined in the Colorado Beer Code and Liquor Code. *See* C.R.S. § 12-46-103; C.R.S. § 12-47-103.

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

II. THE TITLE FOR INITIATIVE NO. 115 IS MISLEADING AND PREJUDICIAL

A. The Title Board Incorrectly used a political catch phrase when setting the title.

Use of a catch phrase or slogan in the title, ballot title and submission clause should be carefully avoided by the Title Board. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). Catch phrases are words or phrases that "work to a proposal's favor without contributing to voter understanding." *Id.* Such phrases that "provoke political emotion and impede voter understanding" should be avoided. *Id.*

The Title Board has impermissibly included a catch phrase in the title and ballot title and submission clause for Initiative No. 115 by using the term "full-strength beer." The term "full-strength beer" does not accurately represent the scope of Initiative No. 115 and is likely to contribute to voter misunderstanding. The term "full-strength beer" is not defined within either Article 46 or 47 of title 12 and is not a term of art. To the average voter, full strength beer would be understood as just traditional beer. There is no indication in the title of the long standing differentiation of "fermented malt beverages" from "malt liquors" under the Colorado Statutes. Instead, they are now conflated under the Initiative into one term; full-strength beer. While these two terms have historically had overlapping definitions, they have distinct differences that have necessitated separate treatment under Colorado law, as is evidenced by the separate Articles within Title 12 dealing with the respective terms. Furthermore, under the final language put forward by proponents, "fermented malt beverages" will actually be treated more leniently than "malt liquors" (the term the board most likely intended to reference when using the term "full-strength beer"), and thus simply referring to the new status of "fermented malt beverages" as full-strength is less than accurate.

Additionally, the term “full-strength beer” can additionally prejudice voters in favor of the Initiative, while simultaneously skewing an accurate understanding of the actual import of the Initiative. The term “full-strength” denotes positive political emotion, as if beer previously sold in the state was of a lesser, less potent and less enjoyable make. This term could sway voters to vote for the article simple on the principle that they feel they should not be limited to a lesser-strength beer. In fact, the reality of the current regulatory system governing “fermented malt beverages” and “malt liquors” is more complex than just the strength of the beverage being sold.

B. The Title Board set a misleading title.

Colorado Revised Statute §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion over its meaning and purpose. *Aisenberg v. Campbell*, 987 P.2d 249, 253 (2000). The Title set for Initiative No. 115 violates this statutory provision in the following ways:

- (1) The title discusses the Initiative as a change to the Colorado Revised Statutes as repealing the alcohol content limitation for “fermented malt beverages,” when in fact the Initiative will have the effect of substantially reworking licensing, fees, and penalties surrounding the sale of malt beverages.

For example, Initiative No. 115 amends the definition of “fermented malt beverage” contained within C.R.S. § 12-46-103(1). Previously, “fermented malt beverages” pertained to:

“ . . .any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water *containing not less than one-half of one percent alcohol by volume and not more than three and two-tenths percent alcohol by weight.*”

C.R.S. § 12-46-103(1) (emphasis added).

Additionally, “malt liquors” are currently defined as including:

“beer and shall be construed to mean any beverage obtained by the alcoholic fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof, in water *containing more than three and two-tenths percent of alcohol by weight or four percent alcohol by volume.*”

C.R.S. § 12-47-103(19) (emphasis added).

The new definition for “fermented malt beverages will pertain to:

“beer, *malt liquors* and any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water *containing not less than one-half of one percent alcohol by volume.*”

PROPOSED INITIATIVE 2015-2016 #115, Corrected Final Text Filed April 7, 2016.

From this it is clear that the new definition for “fermented malt beverage” includes both products previously defined as “malt liquors” *and* products previously defined as “fermented malt beverages. Now, any business previously licensed *only* under Article 46 will also be able to sell beverages previously licensed under Article 47 of Title 12. However, the business licensed under Article 46 will not be subject to the same restrictions as one licensed under Article 47. What the ballot title and submission clause couches as a simple alcohol content limitation is in fact a shift in the regulatory regime governing the sale of alcoholic beverages in this state.

- (2) By adding the term “malt liquors” to the legislative declaration in C.R.S. § 12-46-102(2) and to the definition of “fermented malt beverage” C.R.S. § 12-46-103(1), but not modifying the repeated references to malt liquors in Article 47 of Title 12, the Initiative’s provisions are so complex and unquantifiable that the board cannot set a title that accurately encompasses the Initiative.

The tem “malt liquors” remains present in Article 47 of Title 12 in over twenty-five individual provisions. *See, e.g.:* C.R.S. §§ 12-47-103, 106, 202, 301, 309, 311, 312, 313, 401, 402, 405, 406, 406.3, 407, 408, 411, 412, 413, 414, 415, 416, 417, 418, 420, 409, 424, 503, and 505. Just observing a few of these provisions shows irreconcilable conflict between Initiative No. 115’s changes and the current statutory regime. Often times provisions list requirements affecting both malt liquors and fermented malt beverages separately.

For example, C.R.S. §§ 12-47-409, 412, 414, 415, 416, and 417 all contain a provision detailing that:

“ . . .during a calendar year, a person selling alcohol beverages as provided in this section may purchase not more than two thousand dollars’ worth of:

(I) *Malt*, vinous, and spirituous liquors from a retailer licensed pursuant to section 12-47-407 or 12-47-408; and

(II) *Fermented malt beverages* from a retailer licensed pursuant to section 12-46-104(1)(c)” (emphasis added)

With the definition for “fermented malt beverages” now containing the term “malt liquors,” one is unable to discern whether the two thousand dollar purchase limit applies to each separately, or as a whole, since the terms are so intertwined.

This example is just one of many. C.R.S. § 12-46-104(b) discusses a wholesaler's license for persons "to sell fermented malt beverages upon the payment of an annual license fee of one hundred fifty dollars." However, C.R.S. § 12-47-406 creates a separate wholesaler's license governing, among other beverages, malt liquors. Said license contains additional restrictions beyond those found in C.R.S. § 12-46-104(b), and the Initiative provides no guidance on how such conflicts should be resolved.

The interplay between these provisions throughout Articles 46 and 47 of Title 12 and the now present conflict between the definitions of "malt liquors" and "fermented malt beverages" makes it impossible for the Title Board to set a title and ballot title and submission clause that accurately reflects the import of Initiative #115.

Based on the foregoing, Mr. Robinson and Mr. Harrison respectfully request the Title Board conduct a re-hearing on the title set for Initiative 2015-2016 #115.

Respectfully submitted this 13 day of April, 2016 by:

RYLEY CARLOCK & APPLEWHITE



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DATE FILED: May 11, 2016 5:25 PM

Ballot Title Setting Board

Proposed Initiative 2015 2016 #115¹

The title as designated and fixed by the Board is as follows:

A change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer.

The ballot title and submission clause as designated and fixed by the Board is as follows:

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Hearing April 6, 2016:

Single subject approved; staff draft amended; titles set.

The Board made technical corrections to the text of the initiative. A corrected version of the final text was filed by proponents on April 7, 2016.

Hearing adjourned 1:17 p.m.

Rehearing April 20, 2016:

Motion for Rehearing denied.

Hearing adjourned 8:55 a.m.

¹ Unofficially captioned “**Change to Definition of Fermented Malt Beverage**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.