

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 11, 2016 4:13 PM</p>
<p>Original Proceeding Pursuant to §1-40-107 (2), C.R.S.(2015) Appeal from the Ballot Title Board</p>	
<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><b>Petitioners:</b> John Grayson Robinson and John Blake Harrison,</p> <p>v.</p> <p><b>Respondents:</b> Jeff Julin and Charlie Brown</p> <p>And</p> <p><b>Title Board:</b> Suzanne Staiert; Sharon Eubanks; and Frederick R. Yarger.</p>	
<p>Attorneys for Respondents:</p> <p>Shayne M. Madsen, No. 8750 Peter S. Almaas, No. 48760 JACKSON KELLY, PLLC 1099 18<sup>th</sup> Street, Suite 2150 Denver, Colorado 80203 Telephone: (303) 390-0003 Facsimile: (303) 390-0177 E-mail: <a href="mailto:smadsen@jacksonkelly.com">smadsen@jacksonkelly.com</a> <a href="mailto:palmaas@jacksonkelly.com">palmaas@jacksonkelly.com</a></p>	<p>Case No.: 2016SA135</p>
<p><b>OPENING BRIEF OF RESPONDENTS</b></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:

This brief complies with C.A.R. 28(g).

It contains 2840 words.

This brief complies with C.A.R. 28(a)(7)(A).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

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/ Shayne Madsen*  
Shayne Madsen

*s/ Peter S. Almaas*  
Peter S. Almaas

JACKSON KELLY PLLC  
Attorneys for Respondents  
Jeff Julin and Charlie Brown

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Jeff Julin and Charlie Brown (jointly “Proponents” or Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the title, ballot title, and submission clause (the “title”) that the Title Board set for Proposed Initiative 2015-2016 #115 (“Initiative #115” or “Initiative”) repealing the limit on the alcohol content of fermented malt beverages in the Colorado Beer Code.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether, pursuant to COLO.REV.STAT. § 1-40-106, the title correctly and fairly express the true intent and meaning of the Initiative.

### **STATEMENT OF THE CASE**

The Proponents seek to place the Initiative on the November 2016 ballot which would repeal the alcohol content of fermented malt beverages in the Colorado Beer Code thereby authorizing persons licensed under Title 12, Article 46, C.R.S., to sell full-strength beer. Proponents serve as both the proponents and designated representatives of the proponents of the Initiative.

In analyzing the case before the Court, Proponents respectfully submit that it is important to note that John Grayson Robinson and John Blake Harrison, Petitioners in this matter (“Petitioners”), were both initiative proponents and

designated representatives for the following 2015-2016 initiatives for which they were represented by the law firm of Lewis Roca Rothgerber Christie LLP.

Initiative Number	Unofficial Caption	Status	Supreme Court Case No.
2015-2016 #51	Beer and Wine in Food Store License	Withdrawn	
2015-2016 #52	Beer and Wine in Food Store License	Withdrawn	
2015-2016 #60	Beer and Wine in Food Store License	Title set	2016SA32
2015-2016 #61	Beer and Wine in Food Store License	Title set	2016SA31
2015-2016 #103	Beer and Wine in Food Store License	Withdrawn	
2015-2016 #104	Beer and Wine in Food Store License	Title set; petition form approved; petitions in circulation	
2015-2016 #105	Beer and Wine in Food Store License	Title set; petition form approved	
2015-2016 #106	Beer and Wine in Food Store License	Title set; petition form approved	

Collectively referred to as the “Beer and Wine Initiatives.” In each and every proposal Petitioners sought approval of variations of the same initiative to authorize the sale of wine and full-strength beer in “food stores.”

Petitioners have now retained a different law firm, Ryley Carlock & Applewhite, in this case to challenge many of the same positions and title

provisions that Petitioners advanced and supported in the Beer and Wine Initiatives and supported in briefs filed with this Court with respect to those matters.

Pursuant to the requirements set forth in Article V, Section 1 of the Colorado constitution and in Title 1, Article 40 of the Colorado Revised Statutes, the Proponents submitted a draft of the Initiative to the Colorado Legislative Council (“Legislative Council”) and the Office of Legislative Legal Services (“Legal Services”) for review and comment. After receiving comments from Legal Services and Legislative Council, the Proponents amended the Initiative and submitted a final version to the Secretary of State for consideration by the Title Board. After a hearing, the Title Board determined that they had appropriate jurisdiction and set a title for the Initiative. On April 13, Petitioners filed a Motion for Rehearing. During the rehearing on April 20, 2016 the Title Board denied the Motion for Rehearing and confirmed the title, ballot title, and submission clause. On April 27, 2016 Petitioners filed a Petition for Review by the Court. In this Petition, the Petitioners raised arguments regarding whether the Initiative satisfied the clear title requirement that were not directly raised in the Motion for Rehearing. Although satisfaction of the clear title requirement was raised in the Motion, the basis of the argument that the Initiative failed to meet the requirement were not. The Petitioners cannot expect that the Title Board has the ability to read

minds, and this Court should not reverse the decision of the Title Board on the basis of grounds not clearly presented to the Board.

The great deference afforded to the Title Board establishes that the language set by the Board may only be rejected in a clear case. There is no basis advanced by the Petitioners on which reversal is warranted. As a result, the Court should uphold the title as set by the Title Board.

### **STATEMENT OF FACTS**

Pursuant to COLO.REV.STAT. § 1-40-106, the proponents submitted a draft of the Initiative to Legislative Council and Legal Services on March 7, 2016. Legal Services and Legislative Council reviewed the Initiative and provided the Proponents with a Review and Comment Memorandum (the “Memorandum”) dated March 15, 2016. On March 21, 2016 the Proponents met with Legal Services and Legislative Council to discuss the comments and technical questions in the Memorandum. On March 25, 2016 the Proponents filed a final draft of the Initiative with the Secretary of State, accompanied by the original draft and an amended version reflecting changes made in response to the Memorandum.

Both Proponents attended a title setting hearing with the Title Board on April 6, 2016. At this hearing, the Title Board determined that the Initiative

contained only a single subject and set a title, ballot title, and submission clause for the Initiative. The title set by the Title Board reads:

“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 business 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.”

Petitioners John Grayson Robinson and John Blake Harrison (together the “Petitioners”) filed a Motion for Rehearing with the Title Board on April 13, 2016. In this Motion for Rehearing, the Petitioners asserted that the Initiative contained more than a single subject and that the title as set was unclear and misleading. The Title Board held a rehearing on April 20, 2016, during which the Board denied the Motion for Rehearing in its entirety.

The Petitioners filed their Petition for Review by the Court on April 27, 2016. The Court granted the Petition on April 27, 2016.

### **SUMMARY OF THE ARGUMENT**

The title set by the Title Board must clearly and correctly express the subject of the Initiative. The title for Initiative #115 satisfies this clear title requirement in that it accurately and succinctly reflects the central features of the Initiative. A voter presented with the title would be able to determine intelligently whether to

support or oppose the proposal. The Title Board properly exercised its broad discretion to determine the language of the title and declined to require an item-by-item paraphrase of the proposal. The actions of the Title Board are entitled to great deference and should be upheld.

### **STANDARD OF REVIEW**

When reviewing a challenge to the Title Board's decision to set title, the Court employs "all legitimate presumptions in favor of the propriety of the Title Board's actions." *Matter of Title, Ballot Title, & Submission Clause for 2013-2014* #89, 328 P.3d 172, 176 (Colo. 2014). The Court does not consider whether the Title Board set the best possible title, stating "our duty is to ensure that the title fairly reflects the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *Matter of Title, Ballot Title, & Submission Clause for 2007-2008* #62, 184 P.3d 52, 58 (Colo. 2008) (internal quotations omitted). In reviewing the language set by the Title Board, the Court grants "great deference to the board's broad discretion in the exercise of its drafting authority." *Matter of Title, Ballot Title & Submission Clause, & Summary for 1999-2000* # 256, 12 P.3d 246, 255 (Colo. 2000) (internal quotations omitted).

When undertaking a review of the Title Board’s decision, the Court does not consider the merits of the proposed initiative. *Matter of Title, Ballot Title, & Submission Clause for 2011-2012 # 3*, 274 P.3d 562, 565 (Colo. 2012). “At this stage, we do not address the merits of a proposed measure, interpret it, or construe its future legal effects.” *Blake v. King*, 185 P.3d 142, 145 (Colo. 2008).

The Court stated “a board-prepared title should only be invalidated in a clear case.” *Matter of Title, Ballot Title, Submission Clause, and Summary, Adopted August 26, 1991, Pertaining to the Proposed Initiative on Education Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). Unless clearly misleading, the Court should not interfere with the Title Board’s choice of language. *Matter of Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 256*, 12 P.3d 246, 255 (Colo. 2000).

## **ARGUMENT**

**I. The title of Initiative 115, as set by the Title Board, accurately and succinctly expresses the true intent and meaning of the measure and should be upheld.**

A. The title properly reflects the true intent and meaning of the Initiative.

The Colorado Constitution dictates that an initiative’s single subject shall be clearly expressed in the title. Colo. Const. art. V, § 1(5.5). When setting a title, the Title Board must avoid unclear titles. C.R.S. § 1-40-106(b)(3). Titles and

submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *Matter of Title, Ballot Title, & Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 648 (Colo. 2010).

The fact that the General Assembly is tasked to define terms or implement provisions as the result of an initiative does not render the title misleading or ambiguous. *Matter of Title, Ballot Title & Submission Clause, & Summary Approved April 6, 1995, and April 20, 1994, for the Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d 853, 857 (Colo. 1994). “The pertinent question is whether the general understanding of the effect of a yes or no vote will be unclear from reading the title.” *Matter of Title, Ballot Title, Submission Clause, & Summary by Title Board Pertaining to a Proposed Initiative on Obscenity*, 877 P.2d 848, 850 (Colo. 1994).

The intent of the Initiative is to repeal the alcohol limitation in the definition of fermented malt beverages and allow entities currently licensed to sell beer containing 3.2% alcohol by weight to sell beer containing in excess of 3.2% alcohol by weight, commonly known as full-strength beer.

Petitioners have objected to the title claiming that the title provisions are so “vague that the title does not encompass and reflect the purpose of the proposal.”

*Petition for Review* at 3. Specifically, Petitioners claim that the title fails to inform the voter of the multiple licenses that govern the sale of alcohol, claimed alterations in licensing procedures and fees and the creation of a “two-tier” beer licensing system. *Petition for Review* at 4. Petitioners’ arguments are inaccurate and misplaced.

First, the proposal deals only with licenses under Title 12, Article 46, C.R.S., the “Colorado Beer Code.” There are no alterations to licensing procedures and no changes in licensing fees. With the exception of the change to the alcohol content limitation and the Legislative Declaration, the remainder of Article 46 remains unchanged.

B. The title need not reflect every detail and nuance of the measure.

Under Colorado law, the title does not need to reflect all of the details or “every nuance and feature of the proposed measure.” *Matter of Title, Ballot Title, Submission Clause, and Summary, Adopted August 26, 1991, Pertaining to the Proposed Initiative on Education Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). The Title Board “need not and cannot describe every feature of a proposed measure in the title or in the ballot title and submission clause.” *Matter of Title, Ballot Title & Submission Clause Concerning Ltd. Gaming in Manitou Springs*, 826 P.2d 1241, 1244 (Colo. 1992). “The titles are intended to be a ‘relatively brief

and plain statement by the Board setting forth the central features of the initiative for voters,' rather than 'an item-by-item paraphrase of the proposed constitutional amendment or statutory provision.'" *Blake v. King*, 185 P.3d 142, 146 (Colo. 2008).

Section 3 of the Initiative repeals the penalty provisions of Title 12, Article 47, C.R.S., for the manufacturing, selling or possessing fermented malt beverages with an alcohol content in excess of 3.2 percent by weight or 4 percent by volume. This provision naturally implements the single subject of the Initiative and is correctly included in the measure, but as a mere implementation and need not be included in the title as it is not a central feature of the measure.

### **CONCLUSION**

The Petitioners have failed to present compelling evidence or argument that the Initiative fails to satisfy the clear title requirement. The Title Board is entitled to great deference in setting title, a deference that the Petitioner's claims cannot overcome. For the reasons stated herein, the Proponents respectfully request that the Court uphold the title, ballot title, and submission clause for Initiative #115.

Respectfully submitted this 11<sup>th</sup> day of May, 2016.

*s/ Shayne Madsen*  
Shayne Madsen

*s/ Peter S. Almaas*  
Peter S. Almaas

JACKSON KELLY PLLC  
Attorneys for Respondents  
Jeff Julin and Charlie Brown

**CERTIFICATE OF SERVICE**

I hereby certify that on May 11, 2016, I electronically filed a true and correct copy of the foregoing OPENING BRIEF OF RESPONDENTS via the Colorado ICCES system which will send notification of such filing and service upon the following:

Richard C. Kaufman  
Matthew K. Tieslau  
Ryley Carlock & Applewhite  
1700 Lincoln Street, Suite 3500  
Denver, Colorado 80203  
*Attorneys for Petitioners*

Matthew Grove  
Assistant Solicitor General  
Ralph L. Carr Judicial Building  
1300 Broadway, 6th Floor  
Denver, Colorado 80203  
*Attorneys for the Title Board*

/s/ Mi Vo  
Mi Vo, Paralegal