

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board</p>	<p>▲ COURT USE ONLY ▲</p>
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #126</p> <p>Petitioner: John Grayson Robinson,</p> <p>v.</p> <p>Respondents: James Rodriguez and Lewis Tulper,</p> <p>and</p> <p>Title Board: Suzanne Staiert, David Blake, and Sharon Eubanks.</p>	<p>Supreme Court Case No.: 16SA156</p>
<p><i>Attorneys for Petitioner John Grayson Robinson</i></p> <p>Thomas M. Rogers III, #28809 Hermine Kallman, #45115 LEWIS ROCA ROTHGERBER CHRISTIE LLP 1200 Seventeenth Street, Suite 3000 Denver, CO 80202 Phone: 303.623.9000 Fax: 303.623.9222 Email: trogers@lrrc.com hkallman@lrrc.com</p>	
<p>PETITIONER'S 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 1,961 words.

The 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/ Thomas M. Rogers III

Thomas M. Rogers III

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Petitioner John Grayson Robinson, through his undersigned counsel, hereby submits this Opening Brief:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Initiative 126 contains multiple subjects where it (1) concerns two distinct license types under the Colorado Liquor Code; (2) for each license type, it specifies a ten-license limit; and (3) for each license type, it expands the list of additional types of licenses a licensee may own.

STATEMENT OF THE CASE

Initiative 126 concerns two distinct liquor license types under Colorado law—a retail liquor store license under C.R.S. § 12-47-407 and a liquor-licensed drugstore license under C.R.S. § 12-47-408—and seeks to change the requirements applicable to those license types in two respects: (1) it expands the number of licenses a retail liquor store licensee and a liquor-licensed drugstore licensee may own from one to ten; and (2) it seeks to expand the list of exceptions to the prohibition on owning other types of liquor licenses under C.R.S. § 12-47-407(4) and -408(4) by allowing a retail liquor store licensee to own liquor-licensed drugstore licenses and allowing a liquor-licensed drugstore licensee to own retail liquor store licenses. Combining these changes in a single proposal violates the single subject rule of article V, section (5.5) of the Colorado Constitution and

C.R.S. § 1-40-106.5, and thus the Title Board was without jurisdiction to set title for the Initiative.

STATEMENT OF FACTS

On March 23, 2016, Proponents James Rodriguez and Lewis Tulper filed Proposed Initiative 2015-2016 #126 (the “Initiative”) with the Office of Legislative Council. A review and comment meeting was held under C.R.S. § 1-40-105(1) on April 6, 2016. On April 8, Proponents submitted the original, amended, and final versions of the Initiative to the Secretary of State for title setting.¹ On April 20, 2016, the Title Board set the Initiative’s title. On April 27, 2016, Petitioner timely filed a Motion for Rehearing on the basis that the Title Board lacked jurisdiction to set title because the measure violates the single subject requirement of article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5. The Title Board held a rehearing on April 28, 2016 and denied the Petitioner’s motion.²

¹ See Proposed Initiative 2015-16 #126, attached as Exhibit A.

² See Ballot Title and Submission Clause for #126, attached as Exhibit B:

Shall there be a change to the Colorado Revised Statutes permitting an owner of a licensed retail liquor store or liquor-licensed drugstore under the “Colorado Liquor Code” to own a maximum of ten such licenses combined?

SUMMARY OF THE ARGUMENT

Initiative 126 seeks to make certain changes to two distinct liquor license types under the Colorado Liquor Code: the retail liquor store license under C.R.S. § 12-47-407 and the liquor-licensed drugstore license under C.R.S. § 12-47-408. With respect to each of these license types, Initiative 126 seeks to make two changes to current law: (1) it seeks to expand the number of licenses a retail liquor store licensee or a liquor-licensed drugstore licensee may own from one to ten; and (2) it seeks to expand the exceptions to the current prohibition on these licensees from owning other types of licenses.

These changes are not necessarily or properly connected and constitute multiple subjects under article V, section 1(5.5) of the Colorado Constitution. Voters could support changes to one class of license, but not the other. Or voters could support an expansion of the number of licenses a licensee could own, but not support expanding the types of licenses these licensees could own. Initiative 126 presents an “all or nothing” proposition to the voters, which is the essence of the prohibition against including multiple subjects in a single measure. The Title Board was without jurisdiction to set title for Initiative 126, and its decision should be reversed.

STANDARD OF REVIEW AND PRESERVATION

Under the Colorado Constitution and C.R.S. § 1-40-106.5, the Title Board has no authority to set title if the proposed initiative contains multiple subjects. *See Bruce v. City of Colorado Springs*, 252 P.3d 30, 32 (Colo. App. 2010). This Court has reviewed the question of whether the Title Board has authority to set title under a *de novo* standard of review. *Hayes v. Ottke*, 2013 CO 1, ¶ 12, 293 P.3d 551, 554. While the Court does not determine the “efficacy, construction, or future application” of the proposed initiative, it “will characterize the proposal sufficiently to enable review of the Title Board’s action” to determine if it complies with the single subject requirement. *In re Proposed Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). Mr. Robinson’s challenge was raised below in his Motion for Rehearing.³

ARGUMENT

The Title Board did not have jurisdiction to set title for Initiative 126 as it contains multiple, incongruous subjects.

A. *Initiative 126 seeks to simultaneously make changes to two distinct types of liquor licenses that are not necessarily or properly connected to one another.*

Under the Colorado Liquor Code, there are at least seven classes of licenses that permit sale of alcohol for off-premises consumption. *See* C.R.S. §§ 12-47-403

³ *See* Exhibit C.

(limited winery license); -403.5 (wine festival license); -407 (retail liquor store license); -408 (liquor-licensed drugstore license); -415 (brew pub license); -420 (vintner's restaurant license); and -424 (distillery pub license). Initiative 126 singles out two of these license types—a retail liquor store license and a liquor-licensed drugstore license—and changes the requirements and the limitations to which these licenses are subject.

In fact, that is precisely how the Proponents presented the single subject of Initiative 126 to the Title Board: that the Initiative seeks to allow a retail liquor store licensee *and* a liquor-licensed drugstore licensee to have up to ten licenses. *See Hearing Before Title Board on Proposed Initiative 2015-2016 #126, Part I* (Apr. 20, 2016), available at <http://tinyurl.com/zar5zye>, at ~04:04:50 mins. (last visited May 17, 2016).

At the rehearing, the Proponents claimed for the first time that they were seeking to unify the two licenses under a broad subject of setting a limitation on a number of licenses owned by liquor licensees that sell alcohol for off-premises consumption. They clearly manufactured this new single subject argument in response to Mr. Robinson's single subject challenge raised in his Motion for Rehearing. That is not what the Initiative states, and that is not what the title of the Initiative 126 as set by the Title Board states. *See Matter of Title, Ballot Title,*

Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II, 898 P.2d 1076, 1078 (Colo. 1995), *as modified on denial of reh'g* (July 31, 1995) (“the single subject requirement limits the scope of any initiative to a single subject **which must be clearly expressed in its title**”) (emphasis added). As discussed above, there are at least five other license types that allow the sale of packaged alcohol for off-premises consumption. Thus, it is apparent that even assuming, without conceding, that a measure could be valid under a broad general subject regulating licenses to sell alcohol for off-premises consumption, that is not what Initiative 126 does. It simply singles out two license types for certain changes. Either license, by itself, could be addressed by a separate Initiative seeking to set a maximum number of licenses owned. Combining the two into one measure, where the voters could conceivably support the proposed limitation on one type of license, but not the other, violates the single subject requirement. *See In re Title, Ballot Title, & Submission Clause for 2009-2010, No. 24*, 218 P.3d 350, 353 (Colo. 2009) (“the single subject requirement protects against proponents that might seek to secure an initiative’s passage by joining together unrelated or even conflicting purposes and pushing voters into an all-or-nothing decision”).

B. Despite its stated subject of setting a limit on the number of licenses a retail liquor store and liquor-licensed drugstore may have, the measure contains an additional hidden subject—removing the current prohibition on these licensees to own other types of licenses.

Current law prohibits a retail liquor store licensee from owning, or directly or indirectly being interested in any other license under Article 47 of Title 12. *See* C.R.S. § 12-47-407(4) (“It is unlawful for any owner, part owner, shareholder, or person interested directly or indirectly in a retail liquor store to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article.”). There are three specific exceptions to that prohibition: a retail liquor store licensee may have an interest in (1) an arts license under section 417 of Article 47, (2) an airline public transportation system license under section 419, and (3) a financial institution as defined in C.R.S. § 12-47-308(4). *See* C.R.S. § 12-47-407(4). Accordingly, there can be no dispute that under current law, a retail liquor store licensee is prohibited from owning a liquor-licensed drugstore license under section 408 of Article 47.

Likewise, a liquor-licensed drugstore licensee is prohibited from owning or directly or indirectly being interested in another type of liquor license, including another liquor-licensed drugstore license, with three specific exceptions: a liquor-licensed drugstore licensee may have an interest in an arts license, an airline public transportation system license, or a financial institution. *See* C.R.S. § 12-47-408(4).

Thus, a liquor-licensed drugstore licensee is currently prohibited from owning a retail liquor store license. *See id.*

As the Proponents have stated, Initiative 126 seeks to expand the number of licenses a retail liquor store licensee and a liquor-licensed drugstore licensee may own from one to ten. *See Hearing Before Title Board on Proposed Initiative 2015-2016 #126*, Part I (Apr. 20, 2016), available at <http://tinyurl.com/zar5zye>, at ~04:04:50 mins. (last visited May 17, 2016).

However, hidden in the coils of the Initiative, there is a second purpose: to remove the current prohibition on a retail liquor store licensee from owning a liquor-licensed drugstore license and to remove the prohibition on a liquor-licensed drugstore licensee from owning a retail liquor store license. *See Ex. A*, proposed subsection (II) under 12-47-407(4) (“An owner shall be limited to a maximum of ten licenses issued under this section **and section 12-47-408 combined**”) (emphasis added); *see also id.* proposed subsection (II) under 12-47-408(4) (“An owner shall be limited to a maximum of ten licenses issued under this section **and section 12-47-407 combined**”) (emphasis added). In fact, during the rehearing, the Proponents themselves appeared to be surprised at the challenge raised by Mr. Robinson that the Initiative lifts the current prohibition on retail liquor stores from owning a liquor-licensed drugstore and the prohibition on liquor-licensed

drugstores from owning a retail liquor store. They insisted that the only purpose of the Initiative is to limit the number of licenses owned by these licensees. *See Rehearing Before Title Board on Proposed Initiative 2015-2016 #126*, Part I (Apr. 28, 2016), available at <http://tinyurl.com/zar5zye>, at ~01:46:36-01:47:14 mins. (last visited May 17, 2016). But as is apparent from the language in proposed subsection (II) for both section 407 and 408 of Article 47, the Initiative does more than that: it expands the number of licenses a single licensee may own pursuant to those respective sections *and* allows that licensee to have *another* type of license it is currently prohibited from owning. This is an additional—and hidden—subject of the Initiative, and the Title Board erred in setting title for Initiative 126, as it lacked jurisdiction to do so under article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5.

CONCLUSION

Petitioner respectfully requests that this Court find that Initiative 126 contains multiple incongruous subjects, the Title Board lacked jurisdiction to set title for Initiative 126, and to reverse the action of the Title Board in setting title for Initiative 126.

Respectfully submitted this 19th day of May, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Thomas M. Rogers III

Thomas M. Rogers III

Hermine Kallman

Attorneys for Petitioner John Grayson Robinson

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, a true and correct copy of the foregoing was served on the following via ICCES:

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s/Jonelle Martinez

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APR 08 2016

S. WARD
9:35 A.M.

Proposed Initiative 126 -- Final

Colorado Secretary of State

DATE FILED: May 19, 2016 4:21 PM

Change to Colorado Revised Statutes Limiting Liquor Stores and Drug Stores to Ten Licenses.

Text of Measure:

Be it Enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 12-47-407, amend (4) as follows:

12-47-407. Retail liquor store license.

(4) (a) EXCEPT AS PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (4), it is unlawful for any owner, part owner, shareholder, or person interested directly or indirectly in a retail liquor store to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article. ; ~~except that such a person~~

(b) (I) AN OWNER, PART OWNER, SHAREHOLDER, OR PERSON INTERESTED DIRECTLY OR INDIRECTLY IN A RETAIL LIQUOR STORE may have an interest in:

(A) An arts license ~~or~~ GRANTED UNDER THIS ARTICLE;

(B) An airline public transportation system license granted under this article; ;
or ~~in~~

(C) A financial institution referred to in section 12-47-308 (4).

(II) AN OWNER SHALL BE LIMITED TO A MAXIMUM OF TEN LICENSES ISSUED UNDER THIS SECTION AND SECTION 12-47-408 COMBINED.

SECTION 2. In Colorado Revised Statutes, 12-47-408, amend (4) as follows:

12-47-408. Liquor-licensed drugstore license.

(4) (a) EXCEPT AS PROVIDED IN PARAGRAPH (b) OF THIS SUBSECTION (4), it is unlawful for any owner, part owner, shareholder, or person interested directly or indirectly in a liquor-licensed drugstore to conduct, own either in whole or in part, or be directly or indirectly interested in any other business licensed pursuant to this article.; ~~except that such a person~~

(b) (I) AN OWNER, PART OWNER, SHAREHOLDER, OR PERSON INTERESTED DIRECTLY OR INDIRECTLY IN A LIQUOR-LICENSED DRUGSTORE may have an interest in:

(A) An arts license ~~or~~ GRANTED UNDER THIS ARTICLE;

(B) An airline public transportation system license granted under this article; ~~;~~
or ~~it~~

(C) A financial institution referred to in section 12-47-308(4).

(II) AN OWNER SHALL BE LIMITED TO A MAXIMUM OF TEN LICENSES ISSUED UNDER THIS SECTION AND SECTION 12-47-407 COMBINED.

SECTION 3. Effective date. This act takes effect January 1, 2017.

Ballot Title Setting Board

Proposed Initiative 2015-2016 #126¹

DATE FILED: May 19, 2016 4:21 PM

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

A change to the Colorado Revised Statutes permitting an owner of a licensed retail liquor store or liquor-licensed drugstore under the "Colorado Liquor Code" to own a maximum of ten such licenses combined.

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 permitting an owner of a licensed retail liquor store or liquor-licensed drugstore under the "Colorado Liquor Code" to own a maximum of ten such licenses combined?

*Hearing April 20, 2016:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 12:57 p.m.*

*Rehearing April 28, 2016:
Motion for Rehearing denied.
Hearing adjourned 11:48 a.m.*

¹ Unofficially captioned "**Limit on Specified Liquor Licenses**" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

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APR 27 2016

S. WARD
12:07 P.M.

BEFORE COLORADO STATE TITLE SETTING BOARD

Colorado Secretary of State

DATE FILED: May 19, 2016 4:21 PM

In re Ballot Title and Submission Clause for 2015-2016 Initiative #126 ("Limit on Specified Liquor Licenses")

JOHN GRAYSON ROBINSON, Objector.

MOTION FOR REHEARING

Pursuant to C.R.S. § 1-40-107, Objector, John Grayson Robinson, a registered elector of the State of Colorado, through his legal counsel, Lewis Roca Rothgerber Christie LLP, submits this Motion for Rehearing of the Title Board's April 20, 2016 decision to set a title for 2015-2016 Initiative #126 (the "Initiative"), and states:

The Board Lacks Jurisdiction to Set Title for the Initiative

The Initiative violates the single subject requirement of article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 because it contains multiple subjects. Specifically, the measure changes the current limit of one license for a retail liquor store licensee under C.R.S. § 12-47-407; (2) changes current law that prohibits a retail liquor store licensee from owning any other type of Article 47 license except as specified; (3) changes the current limit of one license for a liquor-licensed drugstore licensee under C.R.S. § 12-47-408; and (4) changes current law that prohibits a liquor-licensed drugstore licensee from owning any other type of Article 47 license except as specified.

WHEREFORE, Objector respectfully requests that the Title Board set Initiative 126 for rehearing pursuant to C.R.S. § 1-40-107(1).

DATED: April 27, 2016.

s/Hermine Kallman

Thomas M. Rogers III

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2016, a true and correct copy of this **MOTION FOR REHEARING** was served on proponents via U.S. Mail as follows:

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