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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board	**▲COURT USE ONLY▲**
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 No. 156 **Petitioners:** John Grayson Robinson **v.** **Respondents:** Bruce Dierking and Jeanne McEvoy **and** **Title Board:** Suzanne Staiert, David Blake, and Sharon Eubanks.	Supreme Court Case No.: 16SA157
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PETITIONER'S OPENING BRIEF

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 2,618 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
Attorney for Petitioner John Grayson Robinson

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STATUTES

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

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1) Whether Proposed Ballot Initiative 2015-16 No. 156 ("Initiative 156" or the "Initiative") may be sent to voters when its text and title are incomprehensible; and

2) Whether the Initiative violates the constitutional single subject requirement.

STATEMENT OF FACTS AND THE CASE

On March 25, 2016, Proponents Bruce Dierking and Jeanne McEvoy filed Initiative 156 with the Office of Legislative Council. As originally drafted, the first paragraph of the Initiative provided:

> **12-47-401.5 No marijuana or liquor in food stores-exceptions**.
> (1) Notwithstanding any other provision of law and consistent with section 16(1)(b) of article XVIII of the Colorado constitution, no food store may be licensed to, or may, offer for sale, in sealed containers for off-premises consumption the following intoxicants that are regulated pursuant to articles 43.3, 43.4, and 47 of Title 12:
> (a) Marijuana or marijuana product;
> (b) Spirituous liquor, vinous liquor, or malt liquor; or
> (c) Both.

(Certified Record at 5).

The Office of Legislative Council, based on the original draft of the Initiative, assigned the following title to the Initiative: "Prohibition on Sale of Marijuana and Liquor at Food Stores." (Certified Record at 7). A review and comment meeting was held under C.R.S. § 1-40-105(1) on April 8, 2016. Later on the same day, the last day on which to file initiatives proposed for the 2016 general election ballot, the Proponents revised the language of the Initiative and submitted the original, amended, and final drafts to the Secretary of State for title setting. The final version of the Initiative states:

> **12-47-401.5 No marijuana or liquor in food stores-exceptions**.
> (1) Notwithstanding any other provision of law and consistent with section 16(1)(b) of article XVIII of the Colorado constitution, the state or local licensing authority must not issue a license to a food store that offers for sale, in sealed containers for off-premises consumption the following intoxicants that are regulated pursuant to articles 43.3, 43.4, and 47 of Title 12:
> (a) Marijuana or marijuana product;
> (b) Spirituous liquor, vinous liquor, or malt liquor; or
> (c) Both.

(Certified Record at 2).

In addition to modifying C.R.S. § 12-47-401.5, the Initiative would amend C.R.S. § 12-47-901 to provide, "It is unlawful for any person to sell at retail pursuant to this article: (p) For off premises consumption, sealed containers that contain malt, vinous, or spirituous liquors or marijuana or marijuana product at a food store." (*Id.*).

On April 20, 2016, at the last Title Board hearing for initiatives proposed for the 2016 ballot, the Title Board set the Initiative's title, using much of the language from the first paragraph of the Initiative, as amended. The title fixed by the Board states:

> A change to the Colorado Revised Statutes prohibiting a state or local licensing authority from granting a liquor license to a food store that offers for sale, in sealed containers for off-premises consumption**,** full-strength beer, wine, liquor, marijuana, or marijuana products.

On April 27, 2016, Petitioner timely filed a Motion for Rehearing arguing: 1) it is impossible to set title as it is impossible to ascertain from the text and title of the Initiative its intent and meaning, and 2) the Title Board lacked jurisdiction to set title because 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. (Certified Record at 8). The Title Board held a rehearing on April 29, 2016 and denied Petitioner's motion.

SUMMARY OF THE ARGUMENT

The language of the Initiative and its title are unintelligibly worded, and thus no title can be set that would assist the voters in making an informed decision about whether it should be adopted. As currently worded, the Initiative prohibits

the issuance of a liquor license to a food store that sells liquor. The title, which repeats that language, defies logic and is simply incomprehensible.

In addition, the Initiative violates the Colorado Constitution's single subject requirement by regulating multiple subjects. Based on the unofficial title set by the Legislative Council staff, the original draft of the Initiative, and the revised section 901 in Section 2 of the measure, it appears that the Initiative is pursuing three separate purposes: (1) prohibiting food stores from selling liquor; (2) prohibiting food stores from selling marijuana (prohibited under current law); and (3) prohibiting the sale of both liquor and marijuana on the same premises, in this case, a food store (also already prohibited under current law).

STANDARD OF REVIEW AND PRESERVATION

Although the Board has discretion in "the exercise of its drafting authority," *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002 No. 21 & No. 22*, 44 P.3d 213, 219 (Colo. 2002), such discretion does not infringe on this Court's broad power to decide legal questions *de novo*. *Valdez v. People*, 966 P.2d 587, 590 (Colo. 1998) ("[Q]uestions of law [] are reviewable de novo."). Likewise, the application of the Colorado Constitution is subject to *de novo* review, *McCool v. Sears*, 186 P.3d 147, 150 (Colo. App. 2008), including the application of Article V Section 1. Accordingly, this Court has reviewed *de novo*

the question of whether the Title Board has authority to set title. *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013) ("The issue here [] concerns the Title Board's statutory authority to act in the first instance, not whether it abused its discretion in exercising that authority. We review the statutes governing the Board's authority to act *de novo*.").

Petitioner properly preserved his objections in his April 27, 2016 Motion for Rehearing. (Certified Record at 8). The Title Board ruled upon those objections when it denied the motion. (*Id.* at 11).

ARGUMENT

I. The Initiative should not be put to voters because its meaning is impossible to comprehend.

Incomprehensible initiatives may not go to the voters. *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999) ("[I]f the Board cannot comprehend the initiatives well enough to state their single subject in the titles the initiatives cannot be forwarded to the voters." (internal quotation marks omitted)). When the Title Board cannot comprehend the meaning of an initiative, it cannot cure that problem simply by copying the incomprehensible language into the title. This Court is empowered to determine whether titles are "clear." *In re Title, Ballot Title & Submission Clause for 2013-2014 No. 89*, 23628 P.3d 172, 176 (Colo. 2014). Titles must "capture, in short

form, the proposal in plain, understandable, accurate language enabling informed voter choice." *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 37*, 977 P.2d 845, 846 (Colo. 1999). A title that copies the incomprehensible language in the body of an initiative necessarily fails this test. *See Matter of Title, Ballot Title, Submission Clause, & Summary by Title Bd. Pertaining to a Proposed Initiative on Obscenity*, 877 P.2d 848, 850 (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. § 1-40-106(3)(b). There may be situations, therefore, where the title and submission clause likely would create public confusion or ambiguity about the effect of an Initiative **even though they merely repeat the language contained in the Initiative itself**.

(emphasis added, internal citation omitted).

In this case, the first section of the Initiative provides that the state must not issue a liquor license to "a food store that offers for sale, in sealed containers for off-premises consumption" liquor or marijuana. The modifier "that" is "used restrictively to narrow a category or identify a particular item being talked about." CHICAGO MANUAL OF STYLE § 5.202 (15th ed. 2003) (comparing "that" to "which," which "is used nonrestrictively—not to narrow a class or identify a particular item but to add something about an item already identified").

Thus, the Initiative can be paraphrased, in part, to prohibit a food store that sells liquor from getting a license to sell liquor.[1] Such a prohibition is nonsensical and circular. This provision of the Initiative simply does not and will never regulate a single store because no store that already sells liquor need apply for a license to sell liquor. The Initiative is not a prophylactic ban on a possible future activity; it directs the state to take certain steps under circumstances that will never arise.

This circular language seems to be the result of a drafting mistake. The text originally submitted to the Office of Legislative Council would have changed the Colorado Liquor Code which to prohibit food stores from being licensed to sell liquor or marijuana. (Certified Record at 5). In response to a comment raised in the Review and Comment Memorandum from the Office of Legislative Council, Proponents sought to rephrase the initiative in the "active voice." (Memorandum from Legislative Council Staff and Office of Legislative Legal Services to Bruce Dierking and Jeanne McEvoy Re: Proposed initiative measure 2015-2016 #156, concerning the Prohibition on Sale of Marijuana and Liquor at food stores (Apr. 6, 2016), attached as Exhibit A). But, in that process, a drafting error was made that

[1] In its second subject, the Initiative prohibits issuance of a liquor license to a food store that sells marijuana. Under current law, food stores may not sell marijuana. 1 C.C.R. § 212-2.402(j). The second subject does not cure the incomprehensibility of the first subject.

resulted in this incomprehensible Initiative. Indeed, the rephrased language has a vastly different meaning than the original. And, because the Initiative was submitted to the Secretary of State on the deadline for the last Title Board meeting of the year, Proponents did not have the opportunity to cure the drafting error by submitting a revised Initiative and have no choice but to move forward with a flawed measure.

The problematic language in the revised Initiative appears not only in the text but in the title as well, and, as a result, the title's meaning is just as unintelligible as the Initiative's. Thus, the title does not satisfy the requirements that it be clear, plain, and understandable. In that context, the Initiative, and accordingly its title, are too poorly worded to allow for informed voter action, and the Initiative should not be sent to the voters.

II. The Initiative violates the Colorado Constitution's single subject requirement.

The Title Board may not set the title if the proposed "measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject . . . ." Colo. Const. art. V, § 1(5.5). Therefore, "in order to pass constitutional muster, a proposed initiative must concern only one subject—that is to say it must effect or carry out only one general object or purpose." *In re Title*,

Ballot Title and Submission Clause for 2005-2006 No. 74, 136 P.3d 237, 238–39 (Colo. 2006).

As discussed above, it is impossible to ascertain the true intent and meaning of the Initiative based on the final version submitted to the Secretary of State. But construing the original draft, the unofficial title set by the Legislative Council staff, and the revised section 901 in Section 2 of the Initiative, it appears that the Initiative is pursuing three separate and incongruous purposes: (1) prohibiting the sale of liquor in food stores; (2) prohibiting the sale of marijuana in food stores (something that is already prohibited under Colorado law); and (3) prohibiting the sale of both liquor and marijuana on the same premises, in this case, a food store (also already prohibited under current law).

Indeed, the inclusion of the prohibition against the sale of marijuana, under the broad disguise of "intoxicants" is a classic attempt at logrolling: "combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests . . . ." *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 2012 CO 25, ¶ 11, 274 P.3d 562, 566. The measure attempts to amend the Colorado Liquor Code to prohibit issuance of liquor licenses to food stores. The Proponents have added the prohibition against the sale of marijuana in an

obvious attempt to garner support for the measure, as the sale of marijuana in food stores is likely something that most voters would oppose. The law already prohibits stores that sell marijuana from selling food (other than marijuana edibles) or liquor. *See* C.R.S. § 12-43.4-402(7). Thus, the prohibition in Initiative 156 against the sale of marijuana or marijuana and liquor in food stores is superfluous and is not intended to accomplish anything that does not already exist under current law, but is clearly included to garner voter support for the measure.

Further, marijuana and liquor are not products that are necessarily connected or related to each other. Colorado regulates marijuana and liquor differently—and under separate articles of the Code—because the state's decision-makers perceive them to be distinct substances warranting distinct treatment under law. To name just a few of the myriad examples of different treatment, unlike liquor, marijuana may legally be sold only in limited quantities, C.R.S. § 12-43.4-402(3)(a), for use only on private, non-commercial property within the state, C.R.S. §§ 18-18-406, 25-14-204. And retail marijuana licensees must engage in rigorous product tracking, C.R.S. § 12-43.4-402; 1 C.C.R. § 212-2.309; 1 C.C.R. § 212-2.405, and abide by reporting rules, 1 C.C.R. § 212-2.711, among other requirements that do not apply to liquor licensees. *Compare* C.R.S. § 12-43.4-402

and 1 C.C.R. § 212-2, *with* C.R.S. § 12-47-407. Even more pronounced are the differences in the treatment of marijuana and liquor under federal law.

Thus, in violation of the constitutional requirements, the Initiative impermissibly contains multiple distinct subjects and attempts to carry out multiple objects or purposes. At various stages of the review process, Proponents have attempted to mask these distinct purposes behind a common theme: the regulation of intoxicants. But having a unifying theme must not be confused with addressing a single subject. *2005-2006 No. 55*, 138 P.3d at 278.

Because the Initiative addresses more than one subject, it conflates divergent interests and may allow one part of the Initiative to pass or fail on the other's back. The voters may well support one part of the Initiative but not the other. For instance, the voters might support the Initiative because they object to the sale of liquor and marijuana in the same location. But the voters' position on the concurrent sale of marijuana and liquor has no bearing on the issue of the sale of liquor in food stores. Or the voters might support the sale of liquor in food stores but oppose the sale of marijuana in food stores. Thus, as drafted, the Initiative improperly puts forth multiple distinct questions to the voters; forcing them to answer those questions simultaneously interferes with the passage or failure of each policy on its own merits. *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").

Because the Initiative fails the constitutional single subject requirement, the Title Board lacked the authority to set title.

CONCLUSION

The Initiative's text and its title are too incomprehensible to enable informed voter choice, and the Initiative violates the constitutional requirement that it address only a single subject. For these reasons, Mr. Robinson requests that the Court reverse the Title Board's decision to set title.

Respectfully submitted this 19th day of May, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Thomas M. Rogers III
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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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MEMORANDUM

TO: Bruce Dierking and Jeanne McEvoy

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 6, 2016

SUBJECT: Proposed initiative measure 2015-2016 #156, concerning the Prohibition on Sale of Marijuana and Liquor at food stores

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purpose

The major purpose of the proposed amendment to the **Colorado Revised Statutes** appears to be:

1. Prohibiting the sale of alcohol, marijuana, and marijuana products at a food store.

EXHIBIT A

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the measure?

2. With regard to proposed § 12-47-401.5 (1):

    a. The measure prohibits the sale of alcohol, marijuana, and marijuana products at a food store by placing the prohibition in article 47 of title 12, C.R.S., which relates to alcohol sales. The regulated sale of marijuana and marijuana products is found in articles 43.3 and 43.4 of title 12, C.R.S. Why is the prohibition not added to articles 43.3 and 43.4 as well? Would the proponents consider adding the prohibition to each article in which the prohibition applies?

    b. Would the proponents explain how a prohibition against licensing a food store to sell malt, vinous, or spirituous liquors is "CONSISTENT WITH SECTION 16 (1) (b) OF ARTICLE XVIII OF THE COLORADO CONSTITUTION"? That constitutional provision pertains to the personal use and regulation of marijuana, so how is restricting the sale of alcohol by certain businesses consistent with a constitutional provision governing marijuana?

    c. The phrase "NO FOOD STORE MAY BE LICENSED TO, OR MAY, OFFER FOR SALE . . ." does not specifically prohibit a food store from being licensed to sell the specified products. Do the proponents intend to prohibit a food store from offering to sell or actually selling the specified products?

    d. The measure states that "NO FOOD STORE MAY BE LICENSED TO. . . ". Food stores are not currently licensed. What is the intent in prohibiting licensure that does not currently exist?

    e. The measure is statutory rather than constitutional. Therefore, a future statutory licensing scheme could amend or repeal this prohibition. Do the proponents intend for the general assembly to be able to change it or repeal it?

    f. The measure prohibits a food store from selling "IN SEALED CONTAINERS FOR OFF-PREMISES CONSUMPTION" marijuana, marijuana products, and alcohol. Do the proponents intend for food stores to sell those items in

unsealed containers? Do the proponents intend for food stores to sell those items for on-site consumption?

g. With regard to initiative number 2015-2016 #104, which proposes to create a new food store license that would allow grocery and convenience stores that obtain the food store license to sell malt, vinous, and spirituous liquors in sealed containers for off-premises consumption, is the intent of this measure to prohibit a grocery or convenience store that, if proposed initiative #104 is approved by the voters, obtains the food store license from actually selling malt, vinous, and spirituous liquors? If this measure and initiative 2015-2016 #104 both appear on the ballot and are both approved by the voters, what would be the effect? Could both measures take effect? Would that create a conflict in the law?

h. If the proponents agree to include the prohibition in each article that governs the products affected by the measure, would the proponents consider stating the prohibition in active voice, specifying the entity that is prohibited from issuing the license? For example, under the "Colorado Liquor Code", article 47 of title 12, C.R.S., the state and local licensing authorities are the government bodies that issue alcohol beverage licenses to persons selling alcohol beverages in sealed containers for consumption off the licensed premises, so to state the prohibition in active voice, the measure could be rephrased as follows: "THE STATE OR LOCAL LICENSING AUTHORITY SHALL NOT ISSUE A LICENSE TO A FOOD STORE TO SELL OR OFFER FOR SALE, IN SEALED CONTAINERS …".

i. What is meant by the terms "marijuana" and "marijuana product"? Neither term is defined in article 43.3 or 43.4 of title 12, C.R.S. The terms are defined in section 16 of article XVIII of the Colorado constitution. Do the proponents intend that these terms have the meaning set forth in the constitution? If so, would the proponents include a cross reference to the constitutional citations where the terms are defined? If not, would the proponents consider using terms that are defined in articles 43.3 and 43.4 of title 12, C.R.S., to ensure the measure is clear as to what products it applies to?

j. The term "food store" is defined under subsection (1). Would the proponents consider defining the term "food store" in § 12-47-103, C.R.S., the definitions section of the "Colorado Liquor Code"?

k. What is meant by the term "intoxicants"? Would the proponents consider defining that term?

l. What is meant by the term "retail premises"? That term is not defined in the "Colorado Liquor Code", the "Colorado Medical Marijuana Code", article 43.3 of title 12, C.R.S., or the "Colorado Retail Marijuana Code", article 43.4 of title 12, C.R.S.

3. With regard to § 12-47-401.5 (2):

a. If the prohibition does not apply to a restaurant, does that mean a restaurant would not be prohibited from obtaining a license to sell or offer to sell marijuana?

b. The term "medical marijuana center" is not defined in § 12-43.4-104 (8), C.R.S. Would the proponents consider including the correct citation indicating where that term is defined in state statute?

c. Since the prohibition does not apply to a medical marijuana center or retail marijuana store, could either of those businesses be licensed to sell malt, vinous, or spirituous liquors?

4. With regard to § 12-47-401.5 (3):

a. The measure requires the division of liquor enforcement to have rules in effect by July 1, 2017. What if the division misses the deadline?

b. Under § 12-47-202 (1) (b), C.R.S., the state licensing authority is the entity required to adopt rules, not the "liquor enforcement division". Would the proponents consider referring to the state licensing authority?

c. Is the state licensing authority's duty to adopt rules limited to defining ""FOOD ITEMS" AND RELATED TERMS"? Could the state licensing authority adopt rules related to the measure that do not pertain to defining terms?

5. With regard to section 2 of the measure:

a. Since the language prohibits a person from selling "SEALED CONTAINERS THAT CONTAIN" the specified products, could those products be sold in unsealed or open containers or for on-premises consumption at a food store?

b. Does § 12-47-401.5 (2) actually "authorize" the sale of the specified products at a food store? Is the intent to clarify that the prohibition in paragraph (p) does not apply to licensees exempted under § 12-47-401.5 (2)?

c. Section 2 of the measure makes it unlawful to sell alcohol, marijuana, or marijuana products "at retail pursuant to this article . . . AT A FOOD STORE…". Article 47 of title 12, C.R.S., only applies to alcohol beverages, not marijuana or marijuana products. What is the intent of section 2 as it applies to marijuana and marijuana products?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. For purposes of this statutory initiative, the word "shall" is defined in § 2-4-401 (13.7), C.R.S., and it means "that a person has a duty". The related word "must", which is defined in § 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply". Furthermore, "'must' does not mean that a person has a duty". When defining terms in law, the standard format is to set off the term in quotation marks followed by the word "means", rather than "shall mean".

2. The definition for "food store" should be in its own subsection or other subdivision within § 12-47-401.5.

3. Since the term "restaurant" is a defined term for the entire article, the definition § 12-47-103 (30) applies wherever that term appears in article 47 of title 12, C.R.S. Accordingly, there is no need to refer to the statutory citation where the term is defined when using the term "restaurant" in article 47 of title 12, C.R.S. If the proponents want to keep the reference "SUBSECTION (30) OF SECTION 12-47-103" it should be "SECTION 12-47-103 (30)".

4. Unless a specific term is being defined, the term should not be set off in quotation marks. The measure defines "food store" and appropriately sets the term off in quotation marks. The measure is not defining the terms restaurant,

medical marijuana center, and retail marijuana store, so those terms should not appear in quotation marks.

5. In § 12-47-401.5 (2) of the measure, the reference "MEDICAL MARIJUANA CENTER" AS DEFINED IN SECTION 12-43.4-104 (8)" should be ""MEDICAL MARIJUANA CENTER" AS DEFINED IN SECTION 12-43.3-104, C.R.S.,".

6. It is standard drafting practice that when referencing a statutory section, Colorado Revised Statutes is abbreviated, for example, "AS DEFINED IN SECTION 12-43.4-104 (8), C.R.S.".