SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: March 7, 2016 5:59 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2015-2016 #61 ("Food Store License") **Petitioner: Jeanne M. McEvoy** **v.** **Respondents: Blake Harrison and John Grayson Robinson** **and** **Title Board: SUZANNE STAIERT; FREDERICK YARGER ; and SHARON EUBANKS**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2016SA31**
PETITIONER'S ANSWER 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).

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s/ Mark G. Grueskin
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SUMMARY OF ARGUMENT

The proponents of Initiative #61 ("Respondents") convinced the Title Board ("Board") that this measure did not violate the single subject requirement by setting a title for their measure. Yet, the measure deals with unrelated topics – so unrelated that the Board and the Respondents cannot agree on what the single subject of this measure actually is.

Respondents also maintain "full-strength beer and wine" is an appropriate way to describe what this measure allows food store licensees to sell. This is so even though that phrase has no legal meaning and no clear meaning for voters.

The presumption that voters will be mystified by the terms in the statute they could be amending is at odds with the presumption this Court regularly employs. Voters and legislators are deemed to know and understand the law they are changing. The Court has never embraced Respondents' counter assumption, that voters are inherently unaware of the statutes that would be amended. Beyond that, "full-strength beer and wine" is a political slogan that has been used by these proponents since they first floated this proposal at a press conference last year.

The Title Board also erred by failing to inform voters of the fact that this measure takes the otherwise mandatory requirement that neighborhood needs and desires be established prior to licensing and makes it optional for facilities that now have a 3.2% beer license. Colorado citizens have long been involved in the

process of being heard about new or changed liquor licenses in their neighborhoods and have reason to expect that they will continue to be so involved.

The titles are flawed because of these errors and should be returned to the Board.

LEGAL ARGUMENT

I. Initiative #61 violates the single subject requirement.

Respondents argue that the measure is united by the thread of alcohol in food stores and that the single subject is "the sale of alcoholic beverages in Colorado food stores." Respondents' Opening Brief at 8.

The Title Board disagreed with this assessment and described the single subject of the measure quite differently. The Board stated the single subject of the measure in the title: "A change to the Colorado Revised Statutes concerning the sale of 3.2% beer, full-strength beer, and wine for off-premises consumption." The Board's title acknowledges this measure does not just affect food stores but is about ***any*** licensee seeking an off-premises license.

As noted in Petitioners' Opening Brief, the measure does away with a class of license – that which allows the sale of 3.2% beer for off-premises consumption. There is nothing in the statute proposed to be repealed, C.R.S. 12-47-106(a), that requires that 3.2% beer be sold in food stores. In fact, the definition of "food store" is a new one, found only in Initiative #61.

The mere act of authorizing "food store licensees" does not necessarily redirect demand for the products sold under the licenses that exist today. As such, nothing would prohibit a new retail business from opening and selling only beer of that alcohol content. Whether such outlets are popular is unknown and not at all relevant for purposes of this single subject inquiry. Given the prevalence of 3.2% beer in the state's grocery stores and convenience stores now, the market has been flooded with product. However, under the Proponents' initiatives, grocery stores and convenience stores will switch to beers with greater alcohol content, and it cannot be said that a market for retailers selling less potent beers will not then exist. No such evidence was presented to the Board.

The creation of one license and the elimination of a different license are not necessarily and clearly related. "[A]n initiative grouping distinct purposes under a broad theme will not satisfy the single subject requirement." *In re Title & Ballot Title & Submission Clause for 2005–2006 # 55*, 138 P.3d 273, 278 (Colo. 2006). That the Title Board and the Respondents cannot agree on the single subject of this measure is evidence that they see the broad theme of #61 quite differently. The creation of one license and the abolition of another reflect two "distinct and separate purposes that are not dependent upon or connected with each other." *Id.* at 277 (citations omitted). As such, the measure contains two or more subjects, in violation of Colo. Const., art. V, sec. 1(5.5).

Therefore, the Board erred by setting any ballot title for Initiative #61.

II. The Title Board set a ballot title for Initiative #61 that is misleading and unclear.

A. "Full-strength beer and wine," as used in the ballot title, is misleading as it has no legal meaning and is not found in the initiative itself.

The Respondents argue that the Title Board's choice was limited: either use "full-strength beer and wine" to describe their amendment or use words from their measure ("malt liquor" and "vinous liquor"), the same ones that are used in existing statute. These two phrases, again according to Respondents, are "technical" and "would be confusing to voters." Respondents' Opening Brief at 9.

There are two problems with this position. First, the suggestion that these statutory terms, defined by law,[1] are beyond the comprehension of voters is inconsistent with this Court's rules of construction for voter-adopted initiatives. Voters, like legislators, are considered to understand the statutes that they are amending. "The electorate, as well as the legislature, must be presumed to know

[1] C.R.S. § 12-47-103(19) provides, "'Malt liquors' means 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 of alcohol by volume." C.R.S. § 12-47-103(39) provides, "'Vinous liquors' means wine and fortified wines that contain not less than one-half of one percent and not more than twenty-one percent alcohol by volume and shall be construed to mean an alcohol beverage obtained by the fermentation of the natural sugar contents of fruits or other agricultural products containing sugar."

the existing law at the time they amend or clarify that law." *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000).

Voters are presumed to understand various sources of law when they adopt an initiative. For example, they are deemed to know and understand case law reflecting specific legal standards. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1255-56 (Colo. 2012) (pointing to standards in place because of decisions by the United States Supreme Court and the Colorado Court of Appeals). More important for this appeal, voters are presumed to know the content of applicable Colorado ***statutes*** when they adopt an initiative in the same substantive area as that ballot measure. *Dwyer v. State*, 357 P.3d 185, 188, 191 (Colo. 2015) (Amendment 23 "did not alter the [School Finance] Act's formula" for funding public education; voters who passed Amendment 23 are deemed to have been aware of then-existing law); *see Planned Parenthood of Rocky Mountains Services, Corp. v. Owens*, 287 F.3d 910, 922 n.11, 927 (10th Cir. 2002) (voters adopted initiated statute concerning abortion, adopted in light of then-current law which voters are deemed to know), citing *Common Sense Alliance, supra.*

If Respondents are correct, this rule of construction is inherently flawed. Voters cannot ***both*** understand the law they are amending and ***also*** be so confused by a description of that law that they are unable to appreciate the gravity of a "yes"

vote or a "no" vote. Therefore, accepting Respondents' argument puts at risk a key rule of construction by the courts and puts in question the validity of previous rulings that employ that rule. In the future, it would also hamstring the Court as it entertains post-election litigation addressing the meaning of ballot initiatives.[2]

Second, the Respondents' conundrum (juxtaposing a phrase not found in the measure vs. statutory phrases voters supposedly cannot understand) is misplaced. In part, it is misplaced because the cases upon which Respondents rely caution against using specific wording from initiatives. But those measures did not use existing law. Instead, they created new standards that departed from, rather than embraced, the existing law.[3] Such is clearly not the case here.

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[2] This rule of construction is not inconsistent with the requirement that titles be set to "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." *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010). The ballot title must accurately state the proposed legal changes to voters who are presumed to understand the law they are amending, even if their knowledge is not deep in that field. If the proposed change is inaccurately or, as here, vaguely portrayed, voters who are unfamiliar with the law can be confused. The goal of the ballot title is accuracy to assure that all petition signers and voters may assess a ballot measure fairly.

[3] *See* Respondents' Opening Brief at 9-10, citing *Matter of Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative on Obscenity*, 877 P.2d 848, 850 (Colo. 1994) (initiative proposed new definition of "obscenity" that was more expansive than the one that had been approved by the Supreme Court) and *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 104*, 987 P.2d 249, 259-60 (Colo. 1999) (initiative proposed new standard for signatures necessary to trigger a recall election).

Further, Respondents' analysis ignores the obvious solution – in fact, one that can be found in Respondents' brief – for statutorily defined terms such as "malt liquors" and "vinous liquors." The Title Board should have summarized the pertinent statutory definitions in describing the measure in the title.

Instead of referring to "full-strength beer and wine," the Title Board could have used the definitions in law, C.R.S. §§ 12-47-103(19), (39) for "malt liquor" and "vinous liquors." *See* fn. 1, *supra* at 2. For example, the Board should have summarized Initiative #61 as:

> "a change to the Colorado Revised Statutes concerning the sale of beer containing more than 3.2 percent alcohol and wine."

The Respondents do not disagree with the accuracy and completeness of these definitions. In their brief, they point to the current statutory definitions of "malt liquor" and "vinous liquor" and state, "There is no dispute that 'malt liquor' means beer with over 3.2% alcohol by weight. There is also no dispute that 'vinous liquor' means wine." Respondents' Opening Brief at 10 (citations to pertinent existing statutes omitted).

Thus, the dilemma posed by Respondents of asking the Court to choose between an artificial phrase and specific statutory references in current law (and in #61 itself), is an unnecessary one. The title could easily contain the clear definitions in current law, language about which there is "no dispute" regarding its legal accuracy or ease of understanding.

The Board's task is to set a legally sufficient title. This Court need not rewrite it to make it "perfect," but it must ensure that petitions and the ballot contain a fair and understandable title. *Matter of Election Reform Amendment*, 852 P.2d 28, 36 (Colo. 1993). Given its ability to correct this title so that it is accurate and understandable for voters, the Court should choose the language that advances that objective.

The Respondents argue that voters are not familiar with "malt liquor" and "vinous liquors" and would therefore think them to be other forms of alcohol such as whisky, gin, and vodka. Respondents' Opening Brief at 11. Their citation to *In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916 (Colo.1982), is inapposite. In *Table Wine*, the initiative itself used the phrase "table wine" and even defined this phrase. 646 P.2d at 920. The initiative text did not refer to or use "vinous liquors" at all. Thus, unlike Initiative #61 which does use those terms, there would have been no reason to use "liquor" in that title or even, as the objector there contended, in the summary of the measure.

The decision in *Table Wine* is a full response to Petitioners' point. The Title Board may not use extraneous verbiage that is not reflective of the measure before it. Having used verbiage that cannot be found in the initiative text here, the Board erred.

B. "Full-strength beer and wine" is a prohibited catch phrase.

"Full-strength beer and wine" is an advertising term that is intended to advance one end: make Initiative #61 more salable to voters without informing them of anything of substance. This is the very essence of a political slogan, i.e., a catch phrase.

As the Respondents admit, "'full-strength beer and wine' have been used in the political campaign in support of the measure" but insist that this "does not make their use in the title so impermissible so as to warrant a reversal of the Title Board's action." Respondent's Opening Brief at 13. The test, they insist, is this: "If the chosen words accurately convey the meaning of the initiative, their inclusion in the title is proper." *Id.* at 12.

First, a title's inclusion of a slogan that is found in the initiative text is not proper and has been rejected by this Court. The stated goal of a language immersion proposal was to have all children in Colorado schools be taught English "as rapidly and effectively as possible." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 258(A)*, 4 P.3d 1084, 1100 (Colo. 2000). There, the phrase "as rapidly and effectively as possible" was taken directly from the text and placed in the title. The Court found it to be an impermissible catch phrase, observing that the Title Board was not permitted to include language from the initiative text in the title "if, as here, it constitutes a catch phrase." *Id.* Thus,

contrary to Respondents' position, the mere fact that a catch phrase accurately reflects an initiative's text is not enough.

In *258(A)*, the Court addressed why political slogans do not belong in a ballot title. A prohibited catch phrase will "generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *Id.* Such slogans "work to a proposal's favor without contributing to voter understanding." *Id.* They are "tailored for political campaigns – brief striking phrases for use in advertising or promotion." *Id.*

"Full-strength beer and wine" meets all of these tests. The phrase is not found in the text and cannot fairly be said to reflect the "proposal itself." The phrase is so devoid of meaning that it must be qualified within the existing title as referring to "malt and vinous liquors." It is ideal for the political campaign as it is a "striking phrase" that lends itself to "advertising or promotion." And in fact, that is exactly how the Respondents used it – in signs and banners that were used in press conferences to announce their campaign, predating the filing of the first version of this measure by weeks.

Respondents insist that they resisted "the perverse incentive" to use a phrase that is "helpful to the campaign" in the proposed measure itself. Respondents' Opening Brief at 11, n. 5. Their admission that "full-strength beer and wine" is a boon to their campaign, coupled with their overt political use of it, brings it within

the tests for political slogans set forth above. And as to the incentive Respondents say they avoided, the Court's decision in *#258(A)* clearly indicates the use of a political statement within the measure does not justify using that same phrase in the ballot title. 4 P.3d at 1100.

The Title Board argues that the purpose of the catch phrase prohibition is not to exclude political jargon that proponents "might also use in their campaign." Title Board Opening Brief at 8. Allegedly, that test would make the Board's job "virtually impossible." *Id.* at 9. But this Court did not take that view in its *258(A)* decision. Instead, it set a test of whether a phrase was a "brief striking phrase[] for use in advertising or promotion." 4 P.3d at 1100. The United State Supreme Court has already held that "full-strength beer" is an influential advertising phrase. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995). Thus, contrary to the Board's position on appeal, a phrase cannot be formatted and employed to "sell" an initiative and also be appropriate for inclusion in the ballot title.

Thus, the Board erred by using this catch phrase in its titles.

II. The ballot title must refer to #61's change in making the license applicant's demonstration of neighborhood needs and desires for a new form of license optional rather than mandatory.

Respondents insist a licensee's ability to change from 3.2% beer sales to "full-strength" beer sales, without the required showing the neighbors need and

desire such a license change, is a mere detail of the measure. Respondents' Opening Brief at 15-16.

The entire point of this measure is to enable currently licensed and unlicensed facilities to sell a much more potent alcoholic product than they ever have before and to do so literally where people live – at neighborhood grocery stores and convenience stores that dot each and every town and city in the state. In other words, this measure allows the sale of more potent alcohol where families buy their groceries, diapers, and the necessities of day-to-day life.

When licenses have been granted previously, those in the designated neighborhoods may have their voice heard as a part of the licensing process. The presumption of Initiative #61 is that if neighbors were heard as to a 3.2% beer license, they may well have no other concern when the product changes to full-strength beer and wine. It might be true, in particular instances.

Nonetheless, voters should know that this statutory mandate will now become optional and will be a choice that is vested in the hands of an administrative official, largely unseen and unheard by those affected by the change in the law. Voters should know that their own historic role, guaranteed by law, is now a question of bureaucratic whim. That Respondents are so determined to exclude this element from the title ought to underscore just how important it is if the electorate is to make a fair decision on Initiative #61. As addressed in

Petitioner's Opening Brief, Respondents admitted to the Board that there are 1,500 such locations – suggesting several hundred neighborhoods throughout the state will be affected by this change. *See* Petitioner's Opening Brief at 12. This ***is*** a central feature of the initiative.

This Court has noted that information regarding a grocery store liquor license, meeting the needs and desires of the neighborhood, is appropriate for disclosure to the voters. *Table Wine,* 646 P.2d at 922, 924. The inclusion of this language in the summary in that case was appropriate because that reference "reflect[ed] the content of the initiative." *Id.* at 922. The provision in this measure, allowing this showing to become discretionary, would reflect the content of Initiative #61.

Respondents argue that this element of their measure is merely a "nuance" or "detail" that need not be addressed in the title. Respondents' Opening Brief at 16. That approach marginalizes the right of petitioning one's government, a right that is guaranteed by the First Amendment to the United States Constitution. *See California Motor Transport Co. v. Trucking Unltd.*, 404 U.S. 508, 513 (1972). The curtailment of that right is never a mere footnote to legislative change, particularly where it addresses an issue directly affecting the quality of life in one's neighborhood and where hundreds of neighborhoods in the state are affected. Thus, the Board erred by excluding this information.

CONCLUSION

The Title Board erred. This measure authorizes one category of liquor license (food store licenses) and prohibits another (3.2% beer licenses.) Respondents can get the legislative change they seek, as reflected by their proposed Initiative 2015-2016 #60, without curtailing the business opportunities of other persons who seek to offer a distinct product. This measure should be returned to Respondents, as the Board lacked jurisdiction to set a title because the single subject requirement was violated.

The Board incorporated into the title a vague and invented phrase that no one denies is a campaign tool to also be used in the ballot title. The use of "full-strength beer and wine" is misleading and politically loaded, both of which are grounds for invalidating the Board's decision here.

Neither is there cause for hiding from voters that 1,500 locations statewide can become much different types of alcohol retailers without satisfying the current requirement that public input be solicited as part of the licensing process. It is a consideration that voters would value knowing, particularly as it sets new obstacles that can limit their right to petition government on these licensing issues.

The Title Board can easily correct these errors. The Court should order it do so.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the PETITIONER'S ANSWER BRIEF was sent this day, March 7, 2016 via ICCES electronic filing to counsel for the proponents at:

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