

<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 #61</p> <p>Petitioner: Jeanne M. McEvoy;</p> <p>v.</p> <p>Respondents: John Blake Harrison and John Grayson Robinson;</p> <p>and</p> <p>Title Board: Suzanne Staiert, David Blake, and Sharon Eubanks.</p>	<p>Supreme Court Case No.: 2016SA31</p>
<p><i>Attorneys for Respondents John Blake Harrison and John Grayson Robinson</i> 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>RESPONDENTS' ANSWER 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 2,367 words.

The brief complies with C.A.R. 28(b).

For the party responding to the issue:
It contains under a separate heading a statement indicating whether respondents agree with petitioner's statements concerning the standard of review and preservation.

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 Respondents John Blake Harrison and
John Grayson Robinson*

TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE ii

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT1

RESPONSE TO PETITIONER’S STANDARD OF REVIEW2

ARGUMENT.....3

 I. Initiative 61 does not violate the single subject requirement.3

 II. The Title Board’s use of the words “full-strength beer and wine” does not render the title misleading where it is undisputed that the Initiative seeks to allow food stores to sell wine and beer containing more than 3.2% alcohol by weight.4

 III. The words “full-strength beer and wine” are not an impermissible “catch-phrase.”7

 IV. The title need not reflect every detail and nuance of the measure.....9

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

A B C Brewing Corp. v. C.I.R., 20 T.C. 515 (1953), *acq.*, *aff'd*, 224 F.2d 483 (9th Cir. 1955)6

Estate of Stroh v Comm'r, 1 T.C.M. (CCH) 453 (T.C. 1943).....7

In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 # 256, 12 P.3d 246 (Colo. 2000)2

In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45, 234 P.3d 642 (Colo. 2010)7, 8

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

Matter of Branch Banking Initiative Adopted on Mar. 19, 1980, & Amended on Apr. 8, 1980, 612 P.2d 96 (Colo. 1980).....10

Matter of Title, Ballot Title & Submission Clause, & Summary Pertaining to Sale of Table Wine in Grocery Stores Initiative Adopted on Mar. 24, 1982, 646 P.2d 916, 921 (Colo. 1982)5

Matter of Title, Ballot Title , & Submission Clause for 2013-2014 #89, 2014 CO 66, 328 P.3d 1723

Matter of Title, Ballot Title and Submission Clause and Summary for 1997-98 No. 62, 961 P.2d 1077 (Colo. 1998).....10

Matter of Title, Ballot Title and Submissions Clause, and Summary for a Petition on Campaign and Political Finance, 877 P.2d 311 (Colo. 1994).....5

Matter of Title, Ballot Title, Submission Clause, & Summary by Title Bd. Pertaining to a Proposed Initiative on Obscenity, 877 P.2d 848 (Colo. 1994)5

Matter of Title, Ballot Title, Submission Clause, & Summary, Adopted Aug. 26, 1991, Pertaining to Proposed Initiative on Educ. Tax Refund, 823 P.2d 1353 (Colo. 1991)3, 10

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995)8, 9

United States v. Fronk, No. 2:13CR484 DAK, 2014 WL 3513164, at *2 (D. Utah July 11, 2014).....6

STATUTES

C.R.S. §§ 12-47-103(19), -103(39).....6

C.R.S. §§ 12-47-407(5); -408(5).....10

Respondents John Blake Harrison and John Grayson Robinson (the “Proponents”), through the undersigned counsel, hereby submit their Answer Brief:

SUMMARY OF THE ARGUMENT

Under current law, the majority of Colorado food stores can only be licensed to sell 3.2% beer. Initiative 61 seeks to change that law by replacing the license under which the stores currently sell alcohol—the license to sell 3.2% beer—with a license allowing the sale of wine and full-strength beer. The repeal of the license to sell 3.2% beer is necessarily and properly connected to the intent of the Initiative that food stores selling alcoholic beverages in Colorado sell *only* full-strength beer and wine and not any other alcoholic products.

The title set by the Title Board may be overturned only in a “clear case”: where there is a clear showing that the voters will be misled into voting for or against a proposition by reason of the words employed by the Board. Petitioner does not make that showing here. The true intent and meaning of Initiative 61 is to allow food stores to sell only wine and beer containing more than 3.2% alcohol by weight. The crux of the Petitioner’s argument appears to be the use of the word “full-strength” when referring to beer containing more than 3.2% alcohol by weight, defined in the Colorado Liquor Code—and, accordingly, in the Initiative—

as “malt liquor.” The Title Board’s use of “full-strength beer” when describing “malt liquor” is not clearly misleading to the voters. Exactly the opposite: the title’s language is aimed to ensure that an average voter, with no familiarity with the technical terms of the Code, can understand the meaning of the Initiative.

Likewise, the Title Board’s decision not to include an item-by-item paraphrase of the measure does not render the title clearly misleading. The Title Board determined that the provision giving local licensing authorities discretion to determine whether a current 3.2% beer licensee must go through character evaluation and a neighborhood “needs and desires” hearing again before converting to a food store license is not a central feature of the Initiative. All legitimate presumptions must be made in the Title Board’s favor, and the title should be affirmed.

RESPONSE TO PETITIONER’S STANDARD OF REVIEW AND PRESERVATION

The Petitioner’s Opening Brief fails to acknowledge that in reviewing the actions of the Title Board, the Court grants “great deference to the board’s broad discretion in the exercise of its drafting authority.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 # 256*, 12 P.3d 246, 255 (Colo. 2000) (internal quotations omitted). The Court “liberally construe[s] the single subject requirement” and will “only overturn the Title Board’s finding that an initiative

contains a single subject in a clear case.” *Matter of Title, Ballot Title , & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 8, 328 P.3d 172, 176. All legitimate presumptions must be resolved in favor of the Title Board, and “a board-prepared title should only be invalidated in a clear case.” *Matter of Title, Ballot Title, Submission Clause, & Summary, Adopted Aug. 26, 1991, Pertaining to Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). Proponents agree that the issues raised by the Petitioner have been preserved for appeal.

ARGUMENT

I. Initiative 61 does not violate the single subject requirement.

The Petitioner argues that Initiative 61 contains more than one subject because “authorizing a license for sales of ‘full-strength’ beer and wine are not necessarily or obviously inconsistent with eliminating 3.2% beer” Pet. Op. Br. 7. That argument misconstrues the true intent and meaning of Initiative 61.

“[I]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *Matter of Title, Ballot Title , & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 12. Initiative 61 has one subject—the sale of alcoholic beverages in Colorado food stores. The purpose of Initiative 61 is to allow only the sale of full-strength beer and wine in food stores.

In connection with that purpose, the Initiative seeks to replace the sale of 3.2% beer in these stores with full-strength beer and wine. Both the creation of the new food store license and the repeal of the license to sell 3.2% beer are necessarily and properly connected to the central goal of the Initiative. The two subjects are dependent upon and connected with each other to effectuate the goal of the Initiative. They are related matters which together, if the Initiative passes, will regulate what alcoholic beverages may be sold in Colorado food stores. The Title Board unanimously concluded that Initiative 61 encompasses only a single subject. The Title Board's actions are entitled to all legitimate presumptions and should be affirmed.

II. The Title Board's use of the words "full-strength beer and wine" does not render the title misleading where it is undisputed that the Initiative seeks to allow food stores to sell wine and beer containing more than 3.2% alcohol by weight.

The Petitioner argues that the words "full-strength beer and wine" do not have an identifiable meaning. Pet. Op. Br. 6. To the contrary, their meaning is clear and is intended to apprise the average voter of the subject matter of the Initiative. There is no dispute that the Initiative addresses the sale of wine and beer containing more than 3.2% alcohol by weight. The Petitioner's position that somehow the words "malt and vinous liquors" would be more meaningful to the

average voter, or that they would better inform the voter regarding the true intent and meaning of the Initiative is unreasonable.

As the Petitioner admits, the purpose of the ballot title is “to fairly reflect the content of the measure.” Pet. Op. Br. 11 (quoting *Matter of Title, Ballot Title and Submissions Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994)). Here, the title does just that. The fact that the title uses words that are not in the Initiative to describe its meaning and intent does not invalidate the title. See *Matter of Title, Ballot Title & Submission Clause, & Summary Pertaining to Sale of Table Wine in Grocery Stores Initiative Adopted on Mar. 24, 1982*, 646 P.2d 916, 921 (Colo. 1982) (fact that specific wording in title was not found in the text of the proposed statute did not preclude the Title Board from adopting language which explained how the proposed law would fit in context of existing law).

This Court has held that the title will not stand even though it uses the words of the measure if those words will cause confusion for the voters. *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). What matters is that the title accurately describes the central features of the Initiative to allow the voters to make an informed choice. *In re Title, Ballot Title, Submission Clause, Summary*

for 1999-2000 No.29, 972 P.2d 257, 266 (Colo. 1999) (“The aim is to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice in pursuit of the initiative rights of Colorado citizens.”).

The Petitioner does not dispute that “vinous liquor” means wine or that “malt liquor” means beer containing more than 3.2% alcohol by weight. *See* C.R.S. §§ 12-47-103(19), -103(39). Instead, the Petitioner appears to take issue with the use of the word “full-strength,” arguing that it is a “non-specific reference.” Pet. Op. Br. 12. But so is “malt liquor,” which includes beer of varying strength, so long as it is over 3.2% alcohol by weight. Courts have referred to “full-strength beer” when wishing to distinguish between 3.2% beer and beer containing a higher level of alcohol. *See United States v. Fronk*, No. 2:13CR484 DAK, 2014 WL 3513164, at *2 (D. Utah July 11, 2014) (“The court takes judicial notice of the fact that the beer sold in grocery and convenience stores cannot exceed 3.2% alcohol by weight. Full-strength beer must be purchased from a Utah state liquor store.”);¹ *A B C Brewing Corp. v. C.I.R.*, 20 T.C. 515, 522 (1953), *acq.*, *aff’d*, 224 F.2d 483 (9th Cir. 1955) (describing how the company started out by selling “3.2 beer” and “upon the repeal of the prohibition amendment began to manufacture and sell full

¹ *See also* Utah Department of Alcoholic Beverage Control Frequently Asked Questions, available at http://abc.utah.gov/laws/law_faqs.html (discussing various rules applicable to “full-strength beer”).

strength beer”). *Estate of Stroh v Comm'r*, 1 T.C.M. (CCH) 453 (T.C. 1943) (describing the company products as “full strength beer containing approximately 3.7 per cent alcohol by weight, 3.2 per cent beer and a small amount of ale and bock beer”).

The Title Board, in the exercise of its broad discretion, used the words “full-strength beer and wine” to adequately apprise the voters of the intent of the measure. As discussed above, using “full-strength beer” in the title is not clearly misleading but indicates to the voters that the proposed license involves beer with more than 3.2% alcohol by weight (in addition to wine). Accordingly, the Title Board’s action should be affirmed.

III. The words “full-strength beer and wine” are not an impermissible “catch-phrase.”

“Catch phrases are words that work in favor of a proposal without contributing to voter understanding.” *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 649 (Colo. 2010). For the same reasons discussed above, “full-strength beer and wine” is not a political “catch-phrase.” As courts have recognized, “full-strength beer” is commonly used to distinguish higher alcohol-content beer from 3.2% beer. The Title Board’s decision to employ commonly used terms to describe the meaning and intent of the Initiative does not turn them into impermissible slogans or catch-phrases. It is precisely why the

media uses these words, as opposed to “malt and vinous liquors,” when discussing the measure – because the voters understand those terms.²

Just because the terms “full-strength beer and wine” have been used in the political campaign in support of the measure does not make their use in the title so impermissible so as to warrant a reversal of the Title Board’s action. *See In Re Title for 2009-2010 No. 45*, 234 P.3d at 650 (“The purpose of the catch-phrase prohibition is to prevent prejudice and voter confusion, not to forbid the use of language that proponents of the initiative might also use in their campaigns.”). The inquiry is whether the words provoke emotion “such that they distract from the merits of the proposal.” *Id.* at 649.

The Petitioner does not explain how these words distract from the merits of the proposal. The case on which the Petitioner relies, *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), does not address the issue presented – whether “full-strength beer and wine” may properly be included in the title of a proposed ballot initiative that seeks to allow the sale of those beverages in food stores. *Rubin* addressed whether a federal ban on including the alcohol content of beer labels was unconstitutional under the First Amendment. The U.S. Supreme Court held that it

² *See, e.g., Grocers may take wine, full-strength beer sales question to voters*, The Denver Post, Oct. 20, 2015, available at http://www.denverpost.com/news/ci_28996834/beer-battle-brewing-again-grocers-back-push-wine.

was, finding that the ban was not necessary to advance a governmental interest in preventing “strength wars” involving beer. *Id.* at 491. *Rubin* is inapposite here.

The use of “full-strength beer and wine” instead of the technical definitions found in the statute does not render those words an impermissible catch phrase or make the title set by the Title Board clearly misleading. It helps explain to the voters what the Initiative seeks to accomplish. The title set by the Title Board should be affirmed.

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

Petitioner argues that the Title Board erred in omitting the details of the measure giving the local licensing authority the discretion to require a second “needs and desires” hearing before approving a current 3.2% licensee’s application to convert to a food store license. Petitioner argues that this is a significant departure from current law which should be included in the title. Pet. Op. Br. 15-17.

First, giving the local licensing authority the discretion to determine whether to require a current valid license holder that has already gone through character examination and a “needs and desires” hearing to do so again is not a new concept or a significant departure from current law. Under the current statutory scheme, local licensing authorities already have that discretion when considering

applications from current retail liquor store licensees to convert to a liquor-licensed drugstore license or vice versa. *See* C.R.S. §§ 12-47-407(5); -408(5).

Second, the title does not need to reflect all of the details or “every nuance and feature of proposed measure.” *Matter of Educ. Tax Refund*, 823 P.2d at 1355. Ballot titles are intended to be a brief and plain statement, not an item-by-item paraphrase of the proposed measure. *Matter of Title, Ballot Title and Submission Clause and Summary for 1997-98 No. 62*, 961 P.2d 1077, 1083 (Colo. 1998). The details and effects of the measure must be left to the public debate. *See Matter of Branch Banking Initiative Adopted on Mar. 19, 1980, & Amended on Apr. 8, 1980*, 612 P.2d 96, 99 (Colo. 1980).

Here, the central feature of Initiative 61 is clear: it seeks to allow only the sale of full-strength beer and wine in stores that sell food. It defines food store and permits ownership of multiple food store licenses, including by those who are currently prohibited from owning more than one license under Article 47 and provides that licenses to sell 3.2% beer are being repealed under the measure. These features are properly set forth in the title to allow the voters to make an informed choice. The Title Board’s action in setting title is entitled to great deference and should be affirmed.

CONCLUSION

For the reasons stated, Respondents respectfully request that the Court affirm the Title Board's action and approve the title set for Initiative 61.

Respectfully submitted: March 7, 2016.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Thomas M. Rogers III

Thomas M. Rogers III

Hermine Kallman

*Attorneys for Respondents John Blake Harrison
and John Grayson Robinson*

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, I filed a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** using the ICCES electronic filing system and served electronic copies to the following:

Mark G. Grueskin
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
Attorney for Petitioners

Cynthia Coffman
LeeAnn Morrill
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Attorneys for the Title Board

s/ Jonelle S. Martinez

Jonelle S. Martinez