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COLORADO SUPREME COURT
1300 Broadway
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #60 ("Food Store License")

Petitioner: Jeanne M. McEvoy

v.

Respondents: Blake Harrison and John Grayson Robinson

and

Title Board: SUZANNE STAIERT, DAVID BLAKE, and SHARON EUBANKS.

▲ COURT USE ONLY ▲

Case No.: 2016SA32

Attorneys for the Title Board:
CYNTHIA H. COFFMAN, Colorado Attorney General
LEEANN MORRILL, First Assistant Attorney General*
1300 Broadway, 6th Floor
Denver, Colorado 80203
Phone: (720) 508-6000
Fax: (720) 508-6041
Email: leeann.morrill@coag.gov
Registration Number: 38742
*Counsel of Record

THE TITLE BOARD'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 those rules.

Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g) because it contains 1,481 words.

2. The brief complies with C.A.R. 28(a)(7)(A) because, 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 (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

I acknowledge that the 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/ LeeAnn Morrill
Attorney for the Title Board

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STATUTES

Title Board members Suzanne Staiert, David Blake, and Sharon Eubanks (hereinafter "the Board"), by and through undersigned counsel, hereby submit the following Opening Brief.

STATEMENT OF THE ISSUES

Whether the title's use of "full strength beer and wine" is a political catch phrase?

STATEMENT OF THE CASE

Blake Harrison and John Grayson Robinson (hereinafter "Proponents") seek to circulate Proposed Initiative 2015-2016 #60 ("#60"), to obtain the requisite number of signatures to place a measure on the ballot to amend the Colorado Revised Statutes concerning the sale of full-strength beef and wine by food stores. Proponents amended the original draft of #60 after a review and comment period before the Offices of Legislative Council and Legislative Legal Services, and submitted their final draft of #60 to the Board on December 22, 2015. *See Attachments to Petition for Review.*

The Board conducted an initial public hearing on January 6, 2016, at which it set a title for #60. *See Attachments to Petition for Review*. Petitioner/Objector Jeanne M. McEvoy ("Petitioner") filed a motion for rehearing on January 13, 2016. A rehearing was held on January 20, 2016, at which the Board denied portions of the motion as it pertains to this appeal. *See id*. Petitioner filed a petition for review with this Court on January 27, 2016.

STATEMENT OF FACTS

Colorado law currently defines "beer" in one of two ways: (1) beer that contains not more than 3.2% alcohol by weight is referred to as a "fermented malt beverage"; and (3) beer that contains more than 3.2% alcohol by weight is referred to as "malt liquor." *See* C.R.S. §§ 12-46-103(1) and 12-47-103(19). Proposed initiative #60 would amend Article 47 of Title 12, C.R.S. ("Liquor Code") to allow the sale of malt and vinous liquors, which are commonly known as full-strength beer and wine, in stores that sell food by creating a new licensing category. *See Attachments to Petition for Review*.

SUMMARY OF THE ARGUMENT

The Petitioner asserts three grounds for appeal of the Board's action. *See Petition for Review*, at p. 4. The Board elects to address only the second in this brief, namely that the title's use of "full-strength beer and wine" is an impermissible political catch phrase. With respect to the first and third grounds, the Board rests on the certified copy of the administrative record reflecting its official actions with respect to #60, which are part of the record before this Court because they were attached to the Petition for Review as required by C.R.S. § 1-40-107(2).

The term "full-strength beer and wine" is not a political catchphrase. Rather, it is a fair and accurate description of the type of alcoholic beverages that #60 proposes to allow the sale of by stores that sell food under a newly created licensing category. As a result, the Board's title is not misleading and its actions should be affirmed by this Court.

ARGUMENT

I. The title is fair, clear, and accurate.

A. Standard of review.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.*, at 649, n.3; *In re Trespass-Streams with Flowing Water,* 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *Id.*

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91,* 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission*

Clause, and Summary Pertaining to Casino Gambling Initiative, 649 P.2d 303, 306 (Colo. 1982).

B. Standards governing titles set by the Board.

Section 1-40-106(3)(b), C.R.S. (2015), establishes the standards for setting titles. It provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed…within two weeks after the first meeting of the title board. …Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S. (2015). In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62,* 184 P.3d 52, 58 (Colo. 2008). To avoid misleading the electorate, a title must not contain a political catch phrase.

A catch phrase consists of "words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A),* 4 P.3d 1094, 1100 (Colo. 2000). The Board's "task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal." *Id.*

Catch phrases "form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional

amendment that prejudices the voter understanding of the issues presented to the voters." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 6-7 (Colo. 2000). This Court determines whether a catch phrase exists "in the context of contemporary political debate." *Id.* The party asserting the existence of a catch phrase must offer "convincing evidence" of its existence beyond the "'bare assertion that political disagreement currently exists over' the challenged phrase." *Id.* (quoting *In re Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995)).

C. The title set by the Board does not contain a prejudicial catch phrase.

Petitioner cannot meet her burden of showing by convincing evidence that "full-strength beer and wine" is a political catch phrase because she cannot show that the title is prejudicial or misleading. The measure's subject is, undoubtedly, creating a new licensing category authorizing the sale of malt and vinous liquors, which the Board

properly recognized are more commonly known as "full-strength" alcoholic beverages, in stores that sell food.

To bolster her argument that "full-strength beer and wine" is nevertheless a politically charged catch phrase, Petitioner submits, as she did to the Board, photographs of banners utilized by Proponents to garner support for #60 that employ the phrase "full-strength" to describe the words "beer" and "wine." The Proponents' use of an otherwise innocuous and highly accurate description cannot turn the phrase "full-strength" into a politically-charged catch phrase because "[t]he 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." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45,* 234 P.3d 642, 650 (Colo. 2010).

The reason for the catch phrase prohibition is to prevent confusion and prejudice; it is not to forbid the use of language that proponents might also use in their campaigns. Such a prohibition would make the

Board's job effectively impossible. This Court's precedents show that it is not enough to argue that the title uses words that Proponents or their supporters might favor. The burden on a petitioner claiming the Board has used a catch phrase must be to show that the phrase is misleading or prejudicial. The Petitioner here failed to do so.

The phrase is hardly the sort of phrase that the Court has found to be an "appeal to emotion," *#258(A)*, 4. P.3d at 1100, or that is weighed down with pre-existing understandings that obscure the true purpose of an initiative. *See also*, *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008). It is therefore not a catch phrase.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for #60.

DATED: February 17, 2016.

CYNTHIA H. COFFMAN
Attorney General

s/ LeeAnn Morrill

LEEANN MORRILL, 38742*
First Assistant Attorney General
Public Officials Unit
State Services Section
Attorney for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that on February 17, 2016, I electronically filed a true and correct copy of the foregoing **THE TITLE BOARD'S OPENING BRIEF** with the Clerk of the Court via the ICCES e-filing system, and served a true and correct copy of same on the following counsel of record via ICCES:

Attorneys for Petitioner
Mark G. Grueskin
Megan M. Downing
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202

Attorneys for Respondents/Proponents
Thomas M. Rogers III
Hermine Kallman
LEWIS ROCA ROTHGERBER CHRISTIE LLP
1200 17th Street, Suite 3000
Denver, CO 80202

s/LeeAnn Morrill