BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

James P. Dean and Jeanne M. McEvoy, Objectors,

vs.

Blake Harrison and John Grayson Robinson, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2015-2016 #51

James P. Dean and Jeanne M. McEvoy, through legal counsel, Recht Kornfeld P.C., object to the Title Board's title and ballot title and submission clause set for Initiative 2015-16 #51 ("Food Store License").

I. The Title Board set a title for Initiative 2015-16 #51 on December 2, 2015.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following title:

> A change to the Colorado Revised Statutes concerning the sale of full-strength beer and wine by food stores, and, in connection therewith, creating a license allowing food stores to sell malt and vinous liquors, commonly referred to as full-strength beer and wine, for off-premises consumption; defining a food store as an establishment that earns at least a specified percentage of its annual gross income from the sale of food; allowing a food store that holds a valid license to sell fermented malt beverages, commonly referred to as 3.2% beer, to apply to become a food store licensee and, if granted, to continue operating regardless of the food store's proximity to a school; and prohibiting the sale of full-strength beer or wine by a food store employee who is under twenty-one years of age.

II. The title set for #51 is misleading and prejudicial.

A. The Title Board incorrectly used the political catch phrase, "full-strength beer and wine," in the title.

The Proponents invented the phrase "full-strength beer and wine" and presented a revised ballot title to the Board that used this phrase in the single subject statement at the outset of the title and then again in the body of the title. The Board erred in agreeing to this change.

"Full-strength beer and wine" is a political catch phrase and is thus prohibited from being included in the title. A catch phrase consists of "words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment." *In the Matter of the Proposed Initiative on Casino Gaming*, 649 P.2d 303, 308 (Colo.1982). Evaluating whether particular words constitute a slogan or catch phrase must be

made "in the context of contemporary public debate." *In the Matter of the Proposed Initiative on Workers Compensation*, 850 P.2d 144, 147 (Colo.1993).

When Proponents announced this measure last month, their speakers appeared before two oversized campaign banners that read:

- "42 States Sell ***Full-Strength Beer or Wine*** in Grocery Stores. Why Not Colorado?" (*see* Exhibit A) (emphasis added); and
- "Want to Buy ***Wine and Full-Strength Beer***?" (*see* Exhibit B) (emphasis added).

The two were placed so that they could be displayed in news stories, and they were. (See Exhibit C.) There can be no question that Proponents seek to make "full-strength beer and wine" a prominent part of contemporary political discourse over this issue.

Literally and figuratively, this invented phrase is the backdrop of the Proponents' campaign, and now they seek to intertwine their political rhetoric with the ballot title. As the Supreme Court found in connection with other phrases deemed to be prohibited political catch phrases in ballot titles, "We have little difficulty concluding that [the challenged wording] could form the basis of a slogan for use by those campaigning in favor of the Initiative." *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to an Initiative Designated "Governmental Business,"* 875 P.2d 761, 876 (Colo. 1994). Clearly, "full-strength beer and wine" is ***already*** the "basis of a slogan" to be used by those who are conducting ***this campaign***. A phrase that does not even exist in the initiative itself, "full-strength beer and wine" should not be part of the ballot title because it functions as a political catch phrase for Proponents.

B. The title's omission of 25% food sales as the minimum quantity of such sales for a "food store" was error.

Setting forth the minimum food sales amount allowed under this new licensee is a central element of the measure and is the only way to avoid voter confusion. Even the Proponents thought this to be the case, as they retained the 25% language in the revision they proposed to the Board at the December 2, 2105 hearing.

When provisions relating to the expanse of a proposed initiative could be – but is not – set forth in the title, that title is misleading. For instance, where a measure applied only to certain metro area counties but the title did not make this clear, the Title Board's title was erroneous. *In re Proposed Initiative 1996–17*, 920 P.2d 798, 803 (Colo.1996). This problem is particularly acute where a voter, who quickly scans a ballot title, can be misled into misinterpreting its reach. *See In re Limited Gaming IV*, 873 P.2d 733, 742 (Colo.1994) (voter's quick review of titles could mislead him or her into believing that measure concerned only one city, but initiative also changed provisions applicable to other areas of state where limited gaming was lawful); *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 970 (Colo.1992) (titles and summary which used the term "statewide" were misleading to voters when the proposed amendment was intended to have only limited geographical application).

As surfaced at the December 2, 2015 hearing, even Title Board members could not know, at first blush, that "food store" was a term broad enough to reach beyond "grocery stores" to include what the Proponents call (and are commonly known as) "convenience stores." Thus, every 7-11 Store in the state could be offering malt beverages and vinous liquors.

To put this in perspective, there are five 7-11 Stores that are no more than four (4) blocks from the Title Board's hearing room and could be licensed as "food store" licensees. (*See* Exhibit D.) Other convenience stores would be eligible for food store licenses, including the Russell's Convenience Store in the atrium of the lobby of the building in which the Board meets. The fact that voters in this or any comparable neighborhood could not discern the potential establishments that are eligible for the new class of liquor licenses when voting based on the ballot title set undermines voter understanding.

More to the point, under the definitions employed in this measure, the "food store" label applies under the measure to many retail outlets that do not have to sell even a majority of their product line that qualifies as "food" as defined in the measure. It is counterintuitive to define something as a "food store" when food is a relatively minor part of its revenue stream. It is as if an auto parts store that also sold NASCAR T-shirts, wind-breakers, socks, sweatshirts, and hats was considered a "haberdashery" even though 75% of its revenue came from the sale of auto parts.

At a minimum, voters should know that the presumptive meaning of this label is not reflected in the text of the measure. A ballot title must address any definition that "adopt[s] a new or controversial legal standard which would be of concern to all concerned with the issue," *In the Matter of the Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo.1990), as opposed to a definition that concerns a term "which is within the common understanding of most voters." *In the Matter of the Proposed Initiative on Taxation III*, 832 P.2d 937, 941 (Colo.1992). This is just such a definition, one that voters could not know means something so different from the normal meaning of "food store," i.e. a store that is dedicated to selling food. The Board can prevent this misperception by using the language from the measure itself regarding the 25% sales threshold for license qualification.

C. The title's reference to "proximity to schools" is incomplete and misleading.

As specified by the measure, liquor licensees may not locate within 500 feet of a school. The measure specifically refers to C.R.S. § 12-47-313(1)(d)(I) which precludes a licensee's location "within five hundred feet of any public or parochial school or the principal campus of any college, university, or seminary."

The title merely refers to "continu(ing) operating regardless of the food store's proximity to a school." This is misleading because it does not inform voters that, for food store licensees, the measure eliminates the buffer between educational institutions and liquor licensed facilities. This failure is error in the title setting process.

Allowing alcohol sales – for the very first time – by a convenience store on the edge of a high school campus or a grocery store on the edge of an elementary school property is a key feature of this measure, one that should be clear and explicit rather than veiled by terms such as

"proximity." Where buffers are proposed by initiatives, they are expressly set forth in the titles. *See Matter of Title, Ballot Title and Submission Clause for 2013-2014 #85*, 328 P.3d 136, 147 (Colo. 2014) (Title Board specified the proposed 1,500 foot buffer between oil and gas operations and occupied structures). Titles were deemed clear because, in part, they "expressly stated" the applicable setback distances. *Id.* The same clarity is required where a setback (or buffer) is eliminated.

The Proponents understand the importance of this aspect of their measure to voters. They eliminated this exception from the 500 foot mandate from their subsequent drafts – Initiatives #60 and #61. They should not be able to circulate petitions or place this matter before voters without being explicit about the added impact their licensing scheme will have on Colorado neighborhoods. Thus, the title should be amended to reflect the actual exemption being granted.

D. The title should inform voters that ownership in multiple licensees is permitted for persons who have an interest in food store licensees, an exception to the long-honored and well-understood prohibition on chain store distribution of alcoholic beverages in Colorado.

Colorado has a long history of limiting owners of liquor licensed establishments to a single license. The Board may take judicial notice of the fact that the chains that will be eligible for food store licenses are statewide and pervade communities with multiple outlets, whether they are Walmarts, Costcos, King Soopers, Safeways, 7-11s, or oil company owned convenience stores.

Where an initiative does not change the licensing requirements for a new category of license, the ballot title should so state and will be sustained if it does so. *Matter of Title, Ballot Title and Submission Clause, and Summary Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 922 (Colo. 1982). But where those requirements are different, there are more substantial grounds for the Title Board to let voters know of a change in the licensing landscape. Here, the fact that the law will permit a significant change – from only single store owners to chain store owners who may operate throughout the state – should be noted in the ballot title.

E. The title fails to state that food store licensees must establish needs and desires of local inhabitants only if local licensing authorities require it.

Petitioning to determine whether a community wants the licensed premises to offer regulated products is the most commonly understood aspect of the liquor licensing process. To affected neighborhoods often sign petitions to indicate their support of or opposition to the proposed license. *See, e.g., Kornfeld v. Yost,* 519 P.2d 219, 220 (Colo. App. 1976) (1,300 signatures on petitions in favor of and opposed to license), rev'd on other grounds, 567 P.2d 383 (Colo. 1977); *Bd. of Cty. Com'rs v. Whale*, 154 Colo. 271, 272 (1964) (969 signatures on petitions in favor of and opposed to license); *Schooley v. Steinberg*, 365 P.2d 245, 246 (Colo. 1961) (1,210 signatures on petitions in favor and opposed to license).

Such a showing of the needs and desires of the neighborhood can be sufficient to make a *prima facie* case for the granting of a liquor license. *Bd. of Cty. Com'rs of Adams Cty. v. Nat'l Tea Co.*, 367 P.2d 909, 910 (Colo. 1961) (granting of license was warranted where 1,230

residents, business owners, and employees of the neighborhood signed petitions in support of the license, as did 227 non-residents; one competitor opposed the license). Thus, the recognized legal impact of such a demonstration establishes that the ability of a local licensing authority to bypass such requirement is a central feature that must be addressed in the title.

Voters would likely be surprised to discover that a routine requirement for new licenses, applicable across the various categories of licenses to be granted, will become optional for this new class of license. Given the wide breadth of licensing activity (all grocery stores and all convenience stores are eligible licensees, as stated by proponents at the December 2, 2015 hearing), the significance of this change is statewide, affecting every neighborhood that has such a retail outlet in its midst. As a result, the citizens' voice in the licensing process could be silenced if permitted at the local level. Where a ballot initiative deprives citizens of the right to engage in a central democratic right such as the petitioning of government, it is certainly a notable aspect of the measure that requires voter awareness. *See Evans v. Romer*, 854 P.2d 1270, 1282 (Colo.1993).

This conclusion is supported by the Supreme Court's decision on a comparable measure. There, where grocery stores were to operate under the same requirement for a demonstration of needs and wants of the neighborhood as applied to other liquor licensees, the ballot title stated that the new class of license was subject to those requirements. *Table Wine in Grocery Stores, supra*, 646 P.2d at 922. However, here, there is a deviation from those requirements, and the title is silent on the issue. That silence is error that can be corrected by a plain statement that food store licensees may not be required to make such showings, based on the decision of the local licensing authority.

F. The title fails to state that the measure sets a presumptive and conclusive test for a licensee's reputation/character/record if the applicant has an unexpired fermented malt beverage retailer license.

For the reasons stated above, the initiative creates a new – and lesser – standard for establishing a licensee's reputation, character, and record, namely by referring only to its existing fermented malt beverage retailer license and the absence of an administrative or criminal prosecution against the applicant. This change in the law deserves mention in the ballot title.

Currently, there is no such limitation in the law. C.R.S. § 12-47-307(1(a)(II)-(V). The law requires that an applicant be "of good character and reputation satisfactory to the respective licensing authorities." *Id.* The ability of local officials to exercise discretion in determining whether to license persons who acquire and resell alcoholic beverages is an important element of current law. That discretion is eliminated by the provision in question. A title that informs voters that their licensing officials will be unable to make character and reputation assessments themselves is a central feature of the measure and should be disclosed in the titles.

For instance, the failure to be truthful in an application is sufficient reason for a licensing authority to deny a license on this ground. *See Fueston v. City of Colo. Springs*, 713 P.2d 1323, 1326 (Colo. App. 1985) (misstatements made to licensing officials in other states were adequate grounds for license denial); *see also MacLarty v. Whiteford*, 496 P.2d 1071, 1072-73 (Colo. App. 1972) (police chief made inquiries for licensing authority about applicant's character and

reputation). The local authority's total inability to consider the veracity and licensing record of companies that seek licenses in various jurisdictions is central to this measure. The Board should correct the title to reflect this aspect of the measure.

G. The title should reflect the imposition of a fee for this license.

Where a new license is created, it is appropriate to inform voters of the fee associated with such license. Where the Supreme Court has rewritten ballot titles regarding licensed activities, it included specific reference to such fees and did so of its own accord. *Dye v. Baker*, 354 P.2d 498, 460-61 (Colo. 1960) (to titles for measure legalizing certain gambling activities and licensing in connection therewith, adding language about "fees for the licenses provided for and disposition of the fees realized from licensed operations"). The Board should follow the Court's lead on this issue and add language to reflect the imposition of the fee on food store licensees.

WHEREFORE, the titles set on December 2, 2015 should be modified to account for the concerns raised in this Motion for Rehearing.

RESPECTFULLY SUBMITTED this 9th day of December, 2015.

RECHT KORNFELD, P.C.

Mark Grueskin
Megan Downing
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rklawpc.com; megan@rklawpc.com

Objector's Addresses:

Jeanne M. McEvoy
10451 Truckee, Unit #E
Commerce City, CO 80022

James P. Dean
5040 Yates Court
Broomfield, CO 80020

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2015-2016 #51 was sent this day, December 9, 2015 via first class U.S. mail, postage pre-paid to the proponents and their counsel at:

Blake Harrison
8243 E. 24th Drive
Denver, CO 80238

John Grayson Robinson
23752 E. Hinsdale Place
Aurora, CO 80016

Thomas Rogers III, Esq.
Hermine Kallman, Esq.
Lewis Roca Rothgerber
1200 Seventeenth Street
Suite 3000
Denver, CO 80202

Erin Holweger

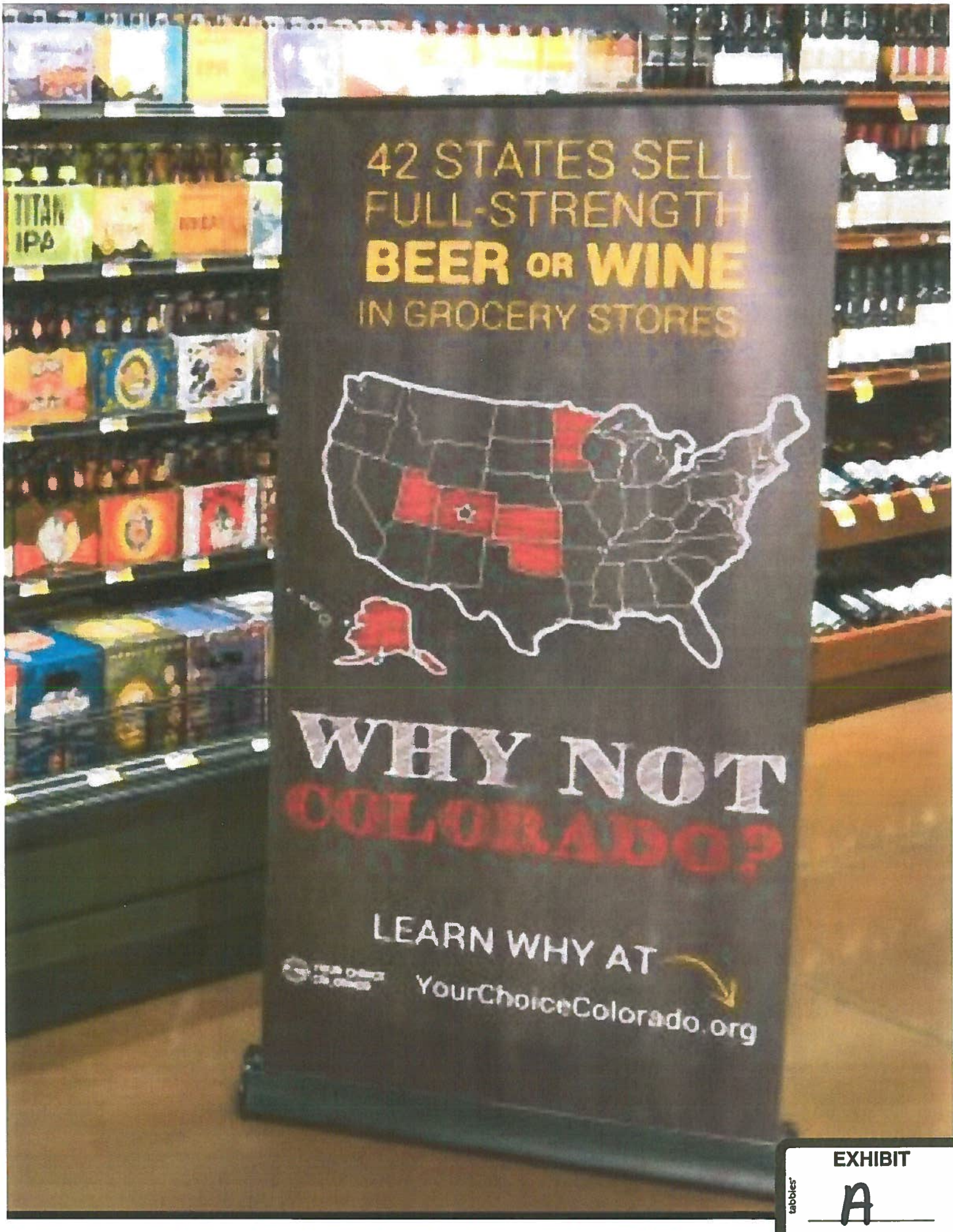

42 STATES SELL
FULL-STRENGTH
BEER OR WINE
IN GROCERY STORES
WHY NOT
COLORADO?
LEARN WHY AT
YourChoiceColorado.org
TITAN
IPA

EXHIBIT
A

tabbies

EXHIBIT

B

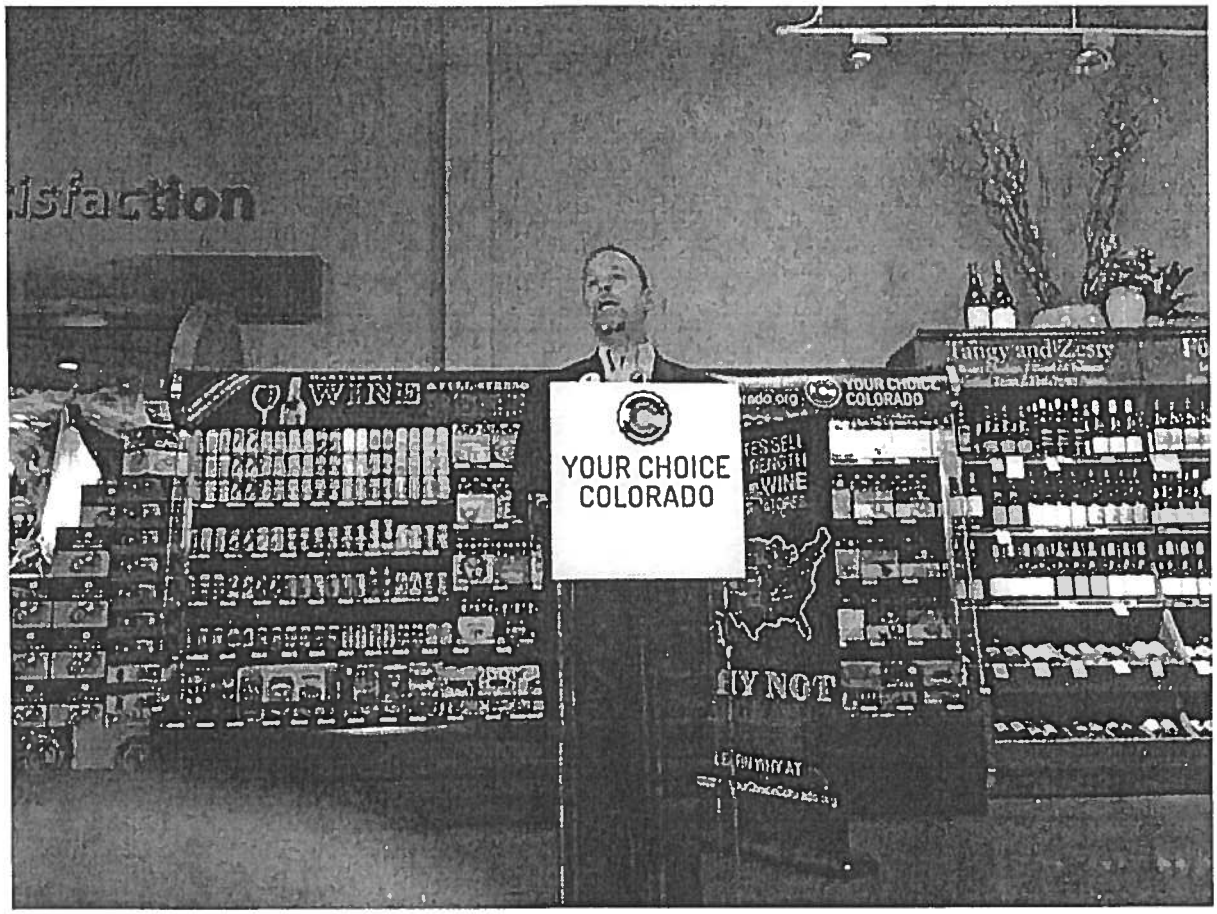
CORTEZ || DOLORES || MANCOS

The Journal

Grocers launch effort to sell full-strength beer and wine

Initiative would allow stores to sell full-strength beer and wine

By Peter Marcus



Enlargephoto

John Brackney, chief executive of the South Metro Denver Chamber of Commerce, stands Wednesday at a King Soopers in Denver to make the case for a ballot proposal that would allow all grocery stores to sell full-strength beer and wine.

EXHIBIT
tabbies
C

DENVER – Colorado grocers on Wednesday launched a ballot effort to allow all supermarkets to sell full-strength beer and wine.

The long-anticipated initiative is being touted as a matter of choice and convenience for consumers, who currently must purchase beer and wine at liquor stores.

Only a handful of grocery stores in Colorado sell full-strength beer and wine, as state law allows for only one license per business. That means major chains, such as City Market and Albertsons, can choose only one store in which to sell the products unless they're selling low-alcohol beer.

"It became a stupid law, it's a silly law now," said John Brackney, chief executive of the South Metro Denver Chamber of Commerce, who spoke at a news conference announcing the effort. "We know the law is going to change. ... It just doesn't make any sense."

Proponents will need ballot-language approval from the state to begin collecting the 98,492 signatures to qualify for the 2016 ballot. Previous attempts before the Colorado Legislature failed, forcing supporters to head the ballot route.

Speaking at a King Soopers that sells beer and wine in an enclave of Denver, proponents said the initiative would benefit craft brewers, who would have additional shelf space in grocery stores throughout the state.

But noticeably absent from speaking at the news conference was any representative of the thriving craft-beer industry. The industry has largely united against the initiative, launching an opposition campaign months ago.

The concern is about potential bureaucracy within management at large chains. Brewers currently enjoy walking into a small liquor store and quickly striking a deal to place products on shelves. They worry that it would be much more difficult to deal with grocery store managers.

"I don't see brewers supporting this," said Steve Kurowski, marketing director for the Colorado Brewers Guild. "These brewers that have been in this game for a long time, they know where they came from, they know the laws that made them as large and as profitable as they are. There's no reason to change the landscape." Durango-based Steamworks Brewing Co. has joined the coalition of brewers opposing the initiative. In August, Steamworks became the second brewery in the state to produce a special beer, Keep Colorado LocALE, opposing the effort.

"If local liquor stores go out of business, Colorado's 300-plus craft breweries lose a critical link in their distribution networks," said Ken Martin, head brewer at Steamworks. "We're brewing the LocALE to remind people that 'if it ain't broke, don't fix it.'"

Mike Rich, owner of Wagon Wheel Liquors in Durango, said he is more willing than supermarket managers to place local products.

"Within days we are able to get it on our shelves and into customers' hands," Rich said. "That's the kind of quick turnaround you get with a local store, but the bureaucracy of big corporate chain stores can tie up a small brewery for months or even years."

But Darren Minich, adult beverage category manager at King Soopers, said his goal is to stock store shelves with local products.

"We have tons of breweries opening up," Minich said, pointing to Durango-based Ska Brewing Co. as an example of local beers stocked at grocery stores. "At least two to three times a week I'm in a new brewery just seeing where they're at."

pmarcus@durangoherald.com

http://www.cortezjournal.com/article/20151022/News05/151029967/Grocers-launch-effort-to-sell-full-strength-beer-and-wine--

Found 25 Stores Near You

A **Bcp Store #39706 (0.4 mi)**
401 16TH STREET
Denver, CO 80202
303-623-1533
Features
Driving Directions • Walking Directions

B **7-Eleven Store #35503 (0.6 mi)**
1560 COURT PL
Denver, CO 80202
303-534-5687
Features
Driving Directions • Walking Directions

C **7-Eleven Store #36019 (0.3 mi)**
1800 WELTON STREET
Denver, CO 80202
303-297-1060
Features
Driving Directions • Walking Directions

D **7-Eleven Store #34357 (0.6 mi)**
621 17TH STREET
Denver, CO 80293
303-297-7728
Features
Driving Directions • Walking Directions

E **7-Eleven Store #35365 (0.2 mi)**
360 E 17TH AVE
Denver, CO 80203
303-861-4829
Features
Driving Directions • Walking Directions

Next

Most stores are open 24 hours a day, 7 days a week

EXHIBIT
tabbies
D