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BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE  
2015-2016 #115

**MOTION FOR REHEARING**

Registered electors, John Grayson Robinson and John Blake Harrison, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2015-2016 No. 115. As set forth below, Mr. Robinson and Mr. Harrison respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

**TITLE AND SUBMISSION CLAUSE**

On April 6, 2016, the Title Board designated the title as follows:

A change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer.

The Title Board set the ballot title and submission clause as follows:

Shall there be a change to the Colorado Revised Statutes to repeal the alcohol content limitation in the definition of fermented malt beverage, commonly known as 3.2% beer, to allow businesses licensed under Colorado law to manufacture, distribute, or sell malt beverages that contain more than 3.2% alcohol by weight or 4% alcohol by volume, including products commonly known as full-strength beer?

**GROUND FOR RECONSIDERATION**

**I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.**

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See* Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; *In re Title, Ballot Title, Submission Clause*, 898 P.2d 1076, 1078-79 (Colo. 1995) (a proposed initiative violates the single subject rule where it "has at least two distinct and separate purposes which are not dependent upon or connected with each other."). The Board set title for Initiative No. 115 despite the fact that it contains multiple, distinct and separate purposes that are not dependent

upon or connected with one another. Specifically, the initiative includes the following unrelated subjects:

- (1) The caption of the initiative acknowledges the central subject of changing the definition of fermented malt beverages under the "Colorado Beer Code," which is contained within Article 46 of Title 12. *See* C.R.S. §§ 12-46-101 et seq.
- (2) The initiative then continues to change portions of the "Colorado Liquor Code" which governs alcoholic beverages well beyond the scope of fermented malt beverages, including changing the relationship between "fermented malt beverages" and "malt liquors" which are each separately defined in the Colorado Beer Code and Liquor Code. *See* C.R.S. § 12-46-103; C.R.S. § 12-47-103.

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

## **II. THE TITLE FOR INITIATIVE NO. 115 IS MISLEADING AND PREJUDICIAL**

### **A. The Title Board Incorrectly used a political catch phrase when setting the title.**

Use of a catch phrase or slogan in the title, ballot title and submission clause should be carefully avoided by the Title Board. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). Catch phrases are words or phrases that "work to a proposal's favor without contributing to voter understanding." *Id.* Such phrases that "provoke political emotion and impede voter understanding" should be avoided. *Id.*

The Title Board has impermissibly included a catch phrase in the title and ballot title and submission clause for Initiative No. 115 by using the term "full-strength beer." The term "full-strength beer" does not accurately represent the scope of Initiative No. 115 and is likely to contribute to voter misunderstanding. The term "full-strength beer" is not defined within either Article 46 or 47 of title 12 and is not a term of art. To the average voter, full strength beer would be understood as just traditional beer. There is no indication in the title of the long standing differentiation of "fermented malt beverages" from "malt liquors" under the Colorado Statutes. Instead, they are now conflated under the Initiative into one term; full-strength beer. While these two terms have historically had overlapping definitions, they have distinct differences that have necessitated separate treatment under Colorado law, as is evidenced by the separate Articles within Title 12 dealing with the respective terms. Furthermore, under the final language put forward by proponents, "fermented malt beverages" will actually be treated more leniently than "malt liquors" (the term the board most likely intended to reference when using the term "full-strength beer"), and thus simply referring to the new status of "fermented malt beverages" as full-strength is less than accurate.

Additionally, the term “full-strength beer” can additionally prejudice voters in favor of the Initiative, while simultaneously skewing an accurate understanding of the actual import of the Initiative. The term “full-strength” denotes positive political emotion, as if beer previously sold in the state was of a lesser, less potent and less enjoyable make. This term could sway voters to vote for the article simple on the principle that they feel they should not be limited to a lesser-strength beer. In fact, the reality of the current regulatory system governing “fermented malt beverages” and “malt liquors” is more complex than just the strength of the beverage being sold.

**B. The Title Board set a misleading title.**

Colorado Revised Statute §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion over its meaning and purpose. *Aisenberg v. Campbell*, 987 P.2d 249, 253 (2000). The Title set for Initiative No. 115 violates this statutory provision in the following ways:

- (1) The title discusses the Initiative as a change to the Colorado Revised Statutes as repealing the alcohol content limitation for “fermented malt beverages,” when in fact the Initiative will have the effect of substantially reworking licensing, fees, and penalties surrounding the sale of malt beverages.

For example, Initiative No. 115 amends the definition of “fermented malt beverage” contained within C.R.S. § 12-46-103(1). Previously, “fermented malt beverages” pertained to:

“ . . .any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water *containing not less than one-half of one percent alcohol by volume and not more than three and two-tenths percent alcohol by weight.*”

C.R.S. § 12-46-103(1) (emphasis added).

Additionally, “malt liquors” are currently defined as including:

“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 alcohol by volume.*”

C.R.S. § 12-47-103(19) (emphasis added).

The new definition for “fermented malt beverages will pertain to:

“beer, *malt liquors* and any beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any similar product or any combination thereof in water containing not less than one-half of one percent alcohol by volume.”

PROPOSED INITIATIVE 2015-2016 #115, Corrected Final Text Filed April 7, 2016.

From this it is clear that the new definition for “fermented malt beverage” includes both products previously defined as “malt liquors” *and* products previously defined as “fermented malt beverages. Now, any business previously licensed *only* under Article 46 will also be able to sell beverages previously licensed under Article 47 of Title 12. However, the business licensed under Article 46 will not be subject to the same restrictions as one licensed under Article 47. What the ballot title and submission clause couches as a simple alcohol content limitation is in fact a shift in the regulatory regime governing the sale of alcoholic beverages in this state.

(2) By adding the term “malt liquors” to the legislative declaration in C.R.S. § 12-46-102(2) and to the definition of “fermented malt beverage” C.R.S. § 12-46-103(1), but not modifying the repeated references to malt liquors in Article 47 of Title 12, the Initiative’s provisions are so complex and unquantifiable that the board cannot set a title that accurately encompasses the Initiative.

The term “malt liquors” remains present in Article 47 of Title 12 in over twenty-five individual provisions. *See, e.g.:* C.R.S. §§ 12-47-103, 106, 202, 301, 309, 311, 312, 313, 401, 402, 405, 406, 406.3, 407, 408, 411, 412, 413, 414, 415, 416, 417, 418, 420, 409, 424, 503, and 505. Just observing a few of these provisions shows irreconcilable conflict between Initiative No. 115’s changes and the current statutory regime. Often times provisions list requirements affecting both malt liquors and fermented malt beverages separately.

For example, C.R.S. §§ 12-47-409, 412, 414, 415, 416, and 417 all contain a provision detailing that:

“ . . .during a calendar year, a person selling alcohol beverages as provided in this section may purchase not more than two thousand dollars' worth of:

(I) *Malt*, vinous, and spirituous liquors from a retailer licensed pursuant to section 12-47-407 or 12-47-408; and

(II) *Fermented malt beverages* from a retailer licensed pursuant to section 12-46-104(1)(c)” (emphasis added)

With the definition for “fermented malt beverages” now containing the term “malt liquors,” one is unable to discern whether the two thousand dollar purchase limit applies to each separately, or as a whole, since the terms are so intertwined.

This example is just one of many. C.R.S. § 12-46-104(b) discusses a wholesaler's license for persons "to sell fermented malt beverages upon the payment of an annual license fee of one hundred fifty dollars." However, C.R.S. § 12-47-406 creates a separate wholesaler's license governing, among other beverages, malt liquors. Said license contains additional restrictions beyond those found in C.R.S. § 12-46-104(b), and the Initiative provides no guidance on how such conflicts should be resolved.

The interplay between these provisions throughout Articles 46 and 47 of Title 12 and the now present conflict between the definitions of "malt liquors" and "fermented malt beverages" makes it impossible for the Title Board to set a title and ballot title and submission clause that accurately reflects the import of Initiative #115.

Based on the foregoing, Mr. Robinson and Mr. Harrison respectfully request the Title Board conduct a re-hearing on the title set for Initiative 2015-2016 #115.

Respectfully submitted this 13 day of April, 2016 by:

**RYLEY CARLOCK & APPLEWHITE**



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