

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

William D. Hooper, Objector,

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S. WARD

4:32 P.M.

vs.

Kevin Klingsheim and Jazlyne Ford, Proponents.

Colorado Secretary of State

MOTION FOR REHEARING ON INITIATIVE 2017-2018 #60

William D. Hooper, a registered elector of the State of Colorado, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2017-18 #60 ("Repeal of Provisions Concerning Large-Capacity Ammunition Magazines").

The Title Board set a title for #60 on November 1, 2017. At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

Shall there be a change to the Colorado Revised Statutes concerning the regulation of large-capacity ammunition magazines, and, in connection therewith, repealing statutes that, subject to specified exceptions, prohibit the sale, possession, or transfer of such magazines and require the labeling of any such magazine manufactured or assembled in Colorado after July 1, 2013?

I. The single subject statement misstates the fundamental objective of the initiative.

The single subject encapsulation of this measure states that it "concern[s] the regulation of large-capacity ammunition magazines." (Emphasis added.) In fact, this initiative does just the opposite. This measure is a blanket repeal of the entire Part 3 of Article 12 in Title 18. As such, it *eliminates* any "regulation" of those ammunition magazines. Such a fundamental misstatement at the outset of the ballot title is certain to mislead voters who can only conclude that the measure does, in fact, regulate large-capacity ammunition magazines by enhancing existing regulation or providing new, necessary regulation. Of course, the measure does neither.

The Colorado Constitution mandates that an initiative's single subject shall be clearly expressed in its title. Colo. Const., art. V, § 1(5.5). In furtherance of this objective, the Board must "consider the public confusion that might be caused by misleading titles." C.R.S. § 1-40-106(3)(b). The titles are required to "correctly and fairly express the true intent and meaning" of the initiative in question. *Id.*

Where a ballot title incorrectly portrays key elements of a proposed initiative, the Board fails to fulfill its duty to fairly and correctly represent the measure to voters. *Aisenberg v. Campbell*, 987 P.2d 249, 259 (Colo. 1999) (title that stated initiative exempted water, probate, and juvenile judges was flawed and had to be returned to the Title Board because the measure provided no such exemptions). As such, a title that does not reflect the actual terms of the measure must be revised to do so.

The Board misses the mark by identifying “regulation” of large-capacity ammunition magazines without also adding that this measure eliminates such regulation. Here, the Board has set a title that will “obscure the inevitable outcome” of the adoption of this proposal, an error that requires reversal of the Board’s decision. *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002 No. 21 & No. 22*, 44 P.3d 213, 221 (Colo. 2002). The Board must revise the titles for #60 to reflect the measure’s actual aim.

II. The titles fail to inform voters of certain central features of the measure and thus are deficient in their current form.

A. The titles are silent about the felony level crimes associated with large-capacity magazines, crimes that will be repealed by this initiative.

The ballot title omits a central feature of #60 by referring only to the repeal of the ban on the sale, transfer, or possession of high-capacity magazines, when the statute being repealed also creates criminal violations when any person has a high-capacity magazine during the commission a crime of violence or during a felony. C.R.S. § 18-12-302(1)(c).

The goal of the titles is to “unambiguously state the principle of the provision sought to be added, amended, or repealed.” C.R.S. § 1-40-106(3)(b). It is not true or accurate to say that the existing statute bans only the sale, transfer, or possession of these magazines. Currently, a person commits a Class 6 felony by committing a crime of violence or another felony and, at the same time, possessing a high-capacity magazine.

The statute’s prohibitions fundamental difference is reflected by the magnitude of penalty associated with each. The sale, transfer, or possession of a large-capacity magazine is a Class 2 misdemeanor. C.R.S. § 18-12-302(1)(a). In contrast, possessing such a magazine during a crime of violence or a felony is, itself, a felony. C.R.S. § 18-12-302(1)(c). Not only are these two offenses different in nature and severity, they represent different dangers to the public, addressed by existing law but not under Initiative #60. For the Board to portray in the ballot title only the former (and lesser) crime is an error of significant proportion.

A ballot title is invalid where it is “so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶34 (Colo. 2016). Ballot titles that “contain a material and significant omission, misstatement, or misrepresentation” are flawed and cannot be presented to voters. *In re Title, Ballot Title & Submission Clause & Summary for 1997-98 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998) (emphasis added). A title is misleading and thus unlawful if “voters . . . could construe the titles”

in a way that does not accurately represent the text of the initiative. *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 215*, 3 P.3d 11, 16 (Colo. 2000).

The “omission” that plagues these titles is the failure to describe the more serious offenses that the repeal of this statutory scheme would affect. In short, the titles describe the misdemeanors being repealed, not the felonies. As such, the title is inadequate because it excludes essential information that the voters would almost certainly need in making their decisions about signing a petition and in voting on the measure.

Further, the title’s ordering of crimes to be repealed by Initiative #60 is significant. Not only must the repeal of felonies be noted in the titles, it must take precedence. The far-reaching distinctions between felonies and misdemeanors are beyond dispute. “Our supreme court sees the differences between felonies and misdemeanors as ‘important, for many reasons.’” *People v. Schreiber*, 226 P.3d 1221, 1225-26 (Colo. App. 2009)) quoting *Brooks v. People*, 24 P.553, 553 (Colo. 1890). The courts take note of several weighty distinctions.

There are a significant number of important collateral consequences for a felony conviction beyond that of the sentence imposed. These collateral consequences are of a more serious nature than those attending a misdemeanor conviction and include, among others, an effect on the ability to possess a firearm, potential impeachment as a witness, the potential for sentencing as a habitual criminal, as well as intangible effects, such as social disrepute.

People v. Suazo, 867 P.2d 161, 168 (Colo. App. 1993) (citations and quotation marks omitted) (emphasis added). Just as these differences are relevant to the Supreme Court, they would be important to voters considering this petition or, if it is placed on the ballot, this proposal.

Given the very different consequences and legal weight associated with these two forms of crimes, it would be error not to inform voters that #60 repeals the penalties for felonies or to do so after it informs them of the repeal of penalties for misdemeanors.

B. The titles are insufficient by failing to inform voters that the laws to be repealed are criminal laws, not just “prohibitions” relating to large-capacity magazines.

This measure is intended to, and does, decriminalize a number of acts that are taken with large-capacity magazines. It does not repeal a prohibition, for instance, by regulated vendors or impose a civil penalty for violations of its provisions. The only provisions to be repealed are found in Title 18, the state’s criminal code. They impose a series of various penalties, including different misdemeanors and at least one felony. The repealed provisions should be described accurately – as criminal laws.

The Board does not err where it describes criminal provisions accurately, particularly where that is the focus of the legal change accomplished. “Indeed, it is difficult to see how else the Title Board could have described this measure.” *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008) (approving Board’s use of “criminal conduct;” such reference was not an impermissible catch phrase, as it referred to the “conduct constituting the offense” based on existing statutes).

Where a ballot measure imposes criminal penalties in connection with violations of statutes intended to address access to firearms, the Board has prioritized the discussion of criminal penalties that would change under the initiative. For example, the Board described an initiative to require gun-show background checks and specifically referred, as one of that measure's central features, to the fact that it "establish[ed] criminal penalties for violations of these requirements." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1999-2000 #255*, 4 P.3d 485, 501 (Colo. 2000).

The need to inform voters of the criminal penalties affected in #255 was so clear that objectors there did not even raise the issue. This Board should use this prior title setting as a guide for purposes of revisiting the language used in the title for Initiative #60.

C. The title uses "ammunition magazines" without referring to the fact that they are used in the discharge of firearms.

"Ammunition magazine" is not a phrase in common parlance. "Magazine" is sufficiently technical and specialized that persons who are unfamiliar with firearm usage would not have a basis to understand what this measure seeks to accomplish. Here, the title does not shed enough light to inform them.

In the statute to be repealed, there is no reference to an "ammunition magazine." This is a phrase that was constructed by the Board for the titles by inserting "ammunition" in the middle of "large-capacity magazine."¹ That complex and specialized statutory term is full of details that would evade the immediate knowledge of most voters.

The board's insertion of "ammunition" is insufficient to cure any confusion, as "ammunition" is not weapon-specific. As a matter of law, it is part a broader category of *any* "explosive device or substance." C.R.S. § 18-8-203(4) ("Dangerous instrument"... means a firearm, explosive device or substance (including ammunition)..."). Without specifically

¹ C.R.S. § 18-12-301(2) defines what is – and what is not – a magazine that his subject to this part:

(a) "Large-capacity magazine" means:

(I) A fixed or detachable magazine, box, drum, feed strip, or similar device capable of accepting, or that is designed to be readily converted to accept, more than fifteen rounds of ammunition;

(II) A fixed, tubular shotgun magazine that holds more than twenty-eight inches of shotgun shells, including any extension device that is attached to the magazine and holds additional shotgun shells; or

(III) A nontubular, detachable magazine, box, drum, feed strip, or similar device that is capable of accepting more than eight shotgun shells when combined with a fixed magazine.

(b) "Large-capacity magazine" does not mean:

(I) A feeding device that has been permanently altered so that it cannot accommodate more than fifteen rounds of ammunition;

(II) An attached tubular device designed to accept, and capable of operating only with, .22 caliber rimfire ammunition; or

(III) A tubular magazine that is contained in a lever-action firearm.

identifying the use of such magazines in conjunction with firearms, the Board's reference is simply too confusing to be understood by many voters.

Board-set titles are legally inadequate if they "create confusion and are misleading because they do not sufficiently inform the voters" of the fundamental nature of the initiative. *In re No. 21 & No. 22, supra*, 44 P.3d at 221. The Board errs when it assumes that voters will be able to read between the title's lines to understand what a measure addressing "large-capacity ammunition magazines" actually accomplishes.

The initiative process in Colorado has proliferated, and accordingly, this court and the title board now deal with an increasing number of measures. More importantly, when the proposals acquire the requisite support to be placed on the ballot, the voters now deal with an increasing number of measures. **Particularly in this climate, we conclude that the fixing of an understandable title is of great importance.**

Id. at 222 (emphasis added).

Thus, the title must state that a magazine is used in the discharge of a firearm in order for the title to be clear about the intent of this initiative.

D. The titles unnecessarily refer to exceptions that exist under current statute, reflecting legal behavior under current law and under the proposed measure.

The ballot title for #60 needlessly states that the law to be repealed is "subject to specified exceptions." Voter understanding is not advanced by including this phrase.

First, the exceptions at issue are not specified. Voters would not know from the title what acts are at issue. Overarching references such as this one, particularly where the Board has omitted other language that would assist voters (described above), do not foster the goal of a clear and understandable title. For instance, this Board has erred "stating in a title that the initiative specifies recall and successor election procedures without in any way describing those procedures;" such title language did "not provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal." *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016).

Second, this problem is exacerbated by the fact that the statutory exceptions the title now references are not core concepts within Initiative #60. These exceptions are highly fact-specific and do not represent central features of the existing statute or of this initiative.²

² C.R.S. § 18-12-302(3) sets forth the specific circumstances in which the statute does not apply:

(a) An entity, or any employee thereof engaged in his or her employment duties, that manufactures large-capacity magazines within Colorado exclusively for transfer to, or any licensed gun dealer, as defined in section 12-26.1-106 (6), C.R.S., or any employee thereof engaged in his or her official employment duties, that sells large-capacity magazines exclusively to:

Third, a title need not address the exceptions under current law that will still reflect lawful behavior under the initiative. The ballot title does not inform voters of the change they are considering when it refers to the law that is in effect at present and the law that would be in effect if the measure is adopted. *Id.* at 570 (Board should have deleted the “unnecessary phrase” describing current campaign finance law where the initiative did not change that law).

Thus, this superfluous language should be struck from the ballot title for #60.

WHEREFORE, because they are legally inadequate for the reasons set forth above, the titles set November 1, 2017 for Initiative #60 should be amended as follows:

Shall there be a change to the Colorado Revised Statutes concerning eliminating the regulation of large-capacity ammunition magazines used in the discharge of firearms, and, in connection therewith, repealing criminal penalties for the possession of such magazines during the commission of a felony or crime of violence as well as criminal penalties for statutes that, subject to specified exceptions, prohibit the sale, possession, or transfer of such magazines, and repealing statutes that require the labeling of any such magazine manufactured or assembled in Colorado after July 1, 2013?

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- (I) A branch of the armed forces of the United States;
 - (II) A department, agency, or political subdivision of the state of Colorado, or of any other state, or of the United States government;
 - (III) A firearms retailer for the purpose of firearms sales conducted outside the state;
 - (IV) A foreign national government that has been approved for such transfers by the United States government; or
 - (V) An out-of-state transferee who may legally possess a large-capacity magazine; or
 - (b) An employee of any of the following agencies who bears a firearm in the course of his or her official duties:
 - (I) A branch of the armed forces of the United States; or
 - (II) A department, agency, or political subdivision of the state of Colorado, or of any other state, or of the United States government; or
 - (c) A person who possesses the magazine for the sole purpose of transporting the magazine to an out-of-state entity on behalf of a manufacturer of large-capacity magazines within Colorado.

RESPECTFULLY SUBMITTED this 8th day of November, 2017.

RECHT KORNFELD, P.C.

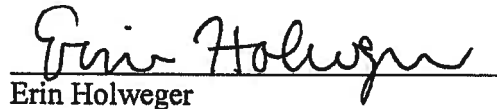


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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2017-2018 #60** was sent this day, November 8, 2017 via first class U.S. mail, postage pre-paid and via email to the proponents at:

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