

COLORADO SUPREME COURT

2 East 14th Avenue
Denver, CO 80203

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

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2015-2016 # 156 (“Prohibition on Sale of
Marijuana and Liquor at Food Stores”)

Petitioner: John Grayson Robinson

v.

Respondents: Bruce Dierking and Jeanne
McEvoy

and

Title Board: Suzanne Staiert, David Blake,
and Sharon Eubanks.

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Case No. 2016 SA 157

THE TITLE BOARD'S ANSWER 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 these rules. Specifically, the undersigned certifies that:

1. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 1,432 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and C.A.R. 28(b) because, for the party raising the issue, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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/ W. Eric Kuhn
Attorney for the Title Board

TABLE OF CONTENTS

| | PAGE |
|---|------|
| Summary of the Argument | 1 |
| Argument | 1 |
| I. Proposed Initiative #156 consists of only a single subject. | 1 |
| A. Standard of review and preservation. | 1 |
| B. The Board correctly determined that the initiative addresses the single subject of preventing the sale of intoxicants in food stores. | 2 |
| II. The title is fair, clear, and accurate, and complete. | 5 |
| A. Standard of review and preservation. | 5 |
| B. The title set by the Board is fair, clear, accurate, and complete. | 5 |
| Conclusion..... | 8 |
| Certificate of Service | 9 |

TABLE OF AUTHORITIES

CASES

| | |
|--|------|
| Hayes v. Spalding, 333 P.3d 76 (Colo. 2014)..... | 2 |
| In re Proposed Initiative Amend TABOR 25, 900 P.2d 121 (Colo. 1995)..... | 2 |
| In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #74, 962 P.2d 927 (Colo. 1998)..... | 3 |
| In re Title, Ballot Title, and Submission Clause for 2009-10 #45, 234 P.3d 642 (Colo. 2010)..... | 7 |
| In re Title, Ballot Title, and Submission Clause for 2013-14 #89, 328 P.3d 172 (Colo. 2014)..... | 6, 7 |
| Outcalt v. Golyansky, 917 P.2d 292 (Colo. 1996)..... | 3, 4 |

CONSTITUTIONAL PROVISIONS

| | |
|---|---|
| Colo. Const. art. XVIII, § 16(1)(b) | 4 |
|---|---|

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

SUMMARY OF THE ARGUMENT

The Board’s decision should be affirmed. Proposed Initiative #156 does not violate the single subject rule simply because it concerns two otherwise legal intoxicants. The sole subject of the initiative concerns how intoxicants will be sold in food stores if it is adopted. As set by the Board, the title accurately summarizes the substance of the initiative and is not misleading.

ARGUMENT

- I. Proposed Initiative #156 consists of only a single subject.**
 - A. Standard of review and preservation.**

The Board disagrees with the Petitioner’s statement of the standard of review. The Title Board’s Opening Brief lists the applicable standard. As this Court has observed, its “function is limited to determining whether the contested language within the initiative creates a distinct and separate subject which is not connected to or dependent upon the

remaining aspects of the initiative.” *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014) (citing *In re Proposed Initiative for 1999-2000 #104*, 987 P.2d 249, 258 (Colo. 1999). The Court employs “all legitimate presumptions in favor of the Title Board’s actions” and “will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.* (citing *In re Proposed Initiative for 2011-2012 #45*, 274 P.3d 576, 579 (Colo. 2012)). The Petitioner raised this issue in his motion for rehearing. *Cert. Copies of Title Board Record* 8.

B. The Board correctly determined that the initiative addresses the single subject of preventing the sale of intoxicants in food stores.

The purpose of the single subject rule is to “prohibit the practice of putting together in one measure subjects having ‘no necessary or proper connection,’ for the purpose of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 124–25 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I), C.R.S.). Petitioner claims that #156 contains multiple subjects because it involves both marijuana and alcohol.

This Court has previously observed that “[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces.” *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998). This level of analysis “is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by the Colorado Constitution.” *Id.* Indeed, the “single-subject requirement must be liberally construed ... so as not to impose undue restrictions on the initiative process.” *Id.* (citing *see In re Proposed Initiative on Parental Choice in Education*, 917 P.2d 292, 294 (Colo. 1996)).

The Petitioner argues that #156 contains multiple subjects because some voters might support the alcohol-related portion of the measure and some voters might support the marijuana-related portion of the measure. Petr’s Op. Br. 11. Even if true, any measure can be broken into smaller and smaller pieces that voters *might* approve or disapprove. Just because a voter is capable of disagreeing with part of a measure does not make that portion of the measure a separate subject.

The single-subject requirement mandates only that incongruous subjects are not included in an initiative. *Outcalt v. Golyansky*, 917 P.2d 292, 294 (Colo. 1996). An initiative can have multiple provisions, as

long as those provisions all sufficiently connected to the subject of the measure. The “single-subject provision will not be violated, however, if the ‘initiative tends to effect or carry out one general object or purpose.’” *Id.* (quoting *In re Proposed Amendment Entitled “Public Rights in Waters II”*, 898 P.2d 1076, 1079 (Colo. 1995)).

The initiative here, as submitted to the Title Board, prohibits the Department of Revenue from issuing a liquor license to a “food store that offers for sale, in sealed containers for off-premises consumption,” full strength liquor, wine, or beer, marijuana, or marijuana products. *Cert. Copies of Title Board Record 2*. The subject of the initiative is to prevent the state licensing authority from issuing a liquor license to a store that sells food and an otherwise-legal intoxicant. Alcohol and marijuana are both intoxicants considered by the measure, but both are sufficiently connected to the single subject of the measure.

Nor does the fact that sometimes alcohol and marijuana are treated differently determine whether they are properly connected in this initiative. The Petitioner lists a myriad of ways in which marijuana and alcohol are treated differently. Petr’s Op. Br. 10–11. The Respondents list the many ways in which they are treated the same, including the constitutional provision requiring marijuana to be regulated like alcohol. Resp’ts Op. Br 4–5; *see also* Colo. Const. art. XVIII, § 16(1)(b)

“In the interest of the health and public safety of our citizenry, the people of the state of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol.”).

While alcohol and marijuana could comprise separate subjects, they do not here. The initiative, as submitted, places a limit on the licensing authority such that a store cannot sell food and either alcohol or marijuana. There is one limit contained in the measure, and that limit is the sole subject. This Court should thus affirm the Board’s conclusion that #156 contains only a single subject.

II. The title is fair, clear, and accurate, and complete.

A. Standard of review and preservation.

The appropriate standard of review is listed in the Title Board’s Opening Brief. The Petitioner preserved this argument by raising the same in his motion for rehearing. *Cert. Copies of Title Board Record 8.*

B. The title set by the Board is fair, clear, accurate, and complete.

The Petitioner complains that the measure is unintelligible because “no store that already sells liquor need apply for a license to sell liquor.”

Pet'rs Op. Br. 7. They state that the measure is not a prophylactic ban on possible future activity. *Id.*

Yet that is exactly the effect of the portion of the measure they cite. Currently there *are* food stores in the state that are licensed to sell full strength beer, wine, and liquor. ¹ If the measure passed, and one of the stores currently selling full-strength beer, wine, or liquor “offers for sale food items at a retail premises” and derives 15% or more of its gross annual income from those sales, then it would no longer be eligible for a license. The same would be true for a food store that sold marijuana, or both alcohol and marijuana.

Essentially though, the Petitioner’s complaint is about the drafting or efficacy of the measure, and not how well the title reflects the measure. This Court does not consider “the initiative’s ‘efficacy, construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *In re Title, Ballot Title, and Submission Clause for 2013-14 #89*, 328 P.3d 172, 176 (Colo. 2014) (quoting *In re 2009-2010 #45*, 234 P.3d 642, 645

¹ *E.g.* King Soopers #124 is licensed as a Liquor Licensed Drug Store to sell full strength beer, wine, and liquor. Colo. Dept. of Rev., All State Liquor Licenses, available at <https://www.colorado.gov/pacific/sites/default/files/LiquorLicenses050416%20w-%20numbers.xls>.

(Colo. 2010); also citing *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000) (“[T]he initiative’s efficacy, construction, or future application ... is a matter for judicial determination in a proper case should the voters approve the initiative.”)). How well the amendment is drafted or how it would be interpreted is not a consideration at this stage.

Rather, the question is whether the title as set by the Board is a fair, clear, accurate, and complete statement of the measure. See *In re Title, Ballot Title, & Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). The title-setting process is about distilling the proposed initiative down to a “reasonably ascertainable expression of the initiative’s purpose.” *In re Title, Ballot Title, and Submission Clause for 2009-10 #45*, 234 P.3d 642, 648 (Colo. 2010) (citing *In re Title, Ballot Title, and Submission Clause for 2009-10 #24*, 218 P.3d 350, 356 (Colo. 2009)). The title set by the Board accurately reflects that if passed it will “prohibit the state or local licensing authority from granting a liquor license to a food store that offers for sale, in sealed containers for off-premises consumption, full-strength beer, wine, liquor, marijuana, or marijuana products.” *Cert. Copies of Title Board Record* 11. The Board’s title in this case it briefly and plainly expresses the measure’s core purpose and it should be affirmed.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for Proposed Initiative #156.

Respectfully submitted this 2nd day of June, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on June 2, 2016, I electronically filed a true and correct copy of The Title Board's Answer Brief with the Clerk of the Court via ICCES and served a true and correct copy of the same on the following via ICCES:

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