

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 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 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 2,041 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

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

STATEMENT OF THE ISSUES

1. Whether Proposed Initiative #156 violates the single subject requirement.
2. Whether the title for Proposed Initiative #156 is misleading.

STATEMENT OF THE CASE

Bruce Dierking and Jeanne McEvoy (the “Proponents”) seek to circulate Proposed Initiative #156 to obtain the signatures needed to place a measure on the ballot to amend the Colorado Revised Statutes. Initiative #156 is titled “Sale of Intoxicants at Food Stores.” Proponents amended the original draft of #156 after a review and comment period before the Office of Legislative Council and Legislative Legal Services, and submitted their final draft of #156 to the Board on April 8, 2016. *See Cert. Copies of Title Board Record 5.*

The Board conducted a hearing on April 21, 2016, at which it set title for #156. Petitioner John Grayson Robinson filed a motion for rehearing on April 27, 2016. *Id.* at 8. The motion for rehearing argued

that #156 contains multiple subjects and that the title set by the Title Board is confusing and misleading.

A rehearing was held on April 29, 2016. The Board denied the motion finding that the #156 consisted of one subject and that the title was neither confusing nor misleading. On May 5, 2016 John Grayson Robinson filed a petition for review in this Court.

STATEMENT OF THE FACTS

Proposed Initiative #156 would add section 12-47-401.5 to the Colorado Revised Statutes. Title 12, Article 47 addresses alcohol beverages, and part 4 specifically sets forth licensing requirements for those beverages.

The new section is titled “No marijuana or liquor in food stores – exceptions.” *Id.* at 2. As the title suggests, it would prohibit the state or local licensing authority from granting a liquor license to a food store if that store sells marijuana or alcohol beverages. *Id.* Food store is defined by the measure as “any establishment that offers for sale food items at a retail premises, provided that 15% or more of the gross annual income from its total sales is derived from the sale of food items.” *Id.* Thus, Proposed Initiative #156 would prevent the sale of intoxicants in food stores as defined in the statute.

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.

“In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions.” *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). The Court “will only overturn the Title Board's finding that an initiative contains a single subject in a clear case.” *Id.* The Petitioner raised this issue in his motion for rehearing. *Id.* at 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) [hereinafter *Amend TABOR 25*] (quoting § 1-40-106.5(1)(e)(I), C.R.S.). In addition, the requirement seeks to prevent surreptitious measures, surprise and fraud upon the voters.” *Id.* (quoting § 1-40-106.5(1)(e)(II). “The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *Hayes*, 333 P.3d at 79. A “second subject with a distinct and separate purpose not dependent on or connected to the first subject” will not pass muster. *Id.* Accordingly, “umbrella proposals” that attempt to unite separate subjects under a single description are unconstitutional. *Id.* (holding that an initiative that would allow recall of both elected and non-elected governmental officers was two subjects), *see also Amend TABOR 25*, 900 P.2d at 125–26 (holding “revenue changes” was an umbrella proposal);

In re Public Rights in Waters II, 898 P.2d 1076, 1080 (Colo. 1995) (holding that initiative relating to “water” was an umbrella proposal).

In proceedings before the Board, the Petitioner argued that #156 contains multiple subjects because it seeks to address both alcohol and marijuana. The Petitioner argued that the restrictions should be addressed separately for each of those intoxicants.

The measure itself is titled “Sale of Intoxicants at Food Stores.” *Cert. Copies of Title Board Record 2*. It adds a new section to the revised statutes titled “No Marijuana or Liquor in Food Stores – Exceptions.” *Id.* The measure is directed at preventing intoxicants from being sold at food stores, as that term is defined in the measure. That it includes two different intoxicants—marijuana and alcohol—does not mean that it includes two separate subjects. To the contrary, the subject matter of the initiative is necessarily and properly connected. The measure addresses the two otherwise legal intoxicants that might be for sale in Colorado and prevents them from being sold in food stores. 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 Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, and Submission Clause for 2009-10 #45*, 234 P.3d 642, 648 (Colo. 2010) [hereinafter *In re #45*]. 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 Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996) [hereinafter *In re Trespass-Streams*]. The Court will reverse the Board’s decision only if the titles are insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

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 for 2009-10 #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 Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982). The Court will “liberally construe the single-subject requirement to ‘avoid unduly restricting the initiative process.’” *In re Title, Ballot Title, &*

Submission Clause for 2013-2014 #129, 333 P.3d 101, 104 (Colo. 2014) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009)).

In addition to this deferential standard, the court does not consider the merits of the measure. *In re Title, Ballot Title, and Submission Clause for 2013-14 #89*, 328 P.3d 172, 176 (Colo. 2014) [hereinafter *In re #89*] (quoting *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562 (Colo. 2012)). Nor does the Court “review the initiative’s ‘efficacy, construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *Id.* (citing *In re 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010); *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.”)).

The Petitioner preserved this argument by raising the same in his motion for rehearing. *Cert. Copies of Title Board Record 8*.

B. Standards governing titles set by the board.

Section 1-40-106(3)(b), C.R.S. establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, & Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008) [hereinafter *In re #62*]. The statute 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/for” or “no/against” 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/for” (to vote in favor of the proposed law or constitutional amendment) or “no/against” (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.

An initiative title must “consist of a brief statement accurately reflecting the central features of a proposed measure.” *In re Tresspass-*

Streams, 910 P.2d at 24. Accordingly, the title board should “set fair, clear, and accurate titles that do not mislead the voters through a material omission or representation.” *In re #89*, 328 P.3d at 178. An initiative is not required to contain every detail of a proposition and should not speculate as to the effects of enacting the initiative. *Id.*

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

The title the Board set for #156 is a brief statement accurately reflecting the central features of the measure. A yes vote for the measure means that a food store cannot have a liquor license if it sells sealed containers of marijuana, marijuana products, full-strength beer, wine, or liquor for off-premises consumption. *See Cert. Copies of Title Board Record 11.*

The Petitioner asserted in his motion for rehearing that the measure is unclear because currently a food store could only sell alcohol beverages with a liquor license and currently cannot sell marijuana products.

It may be true that food stores can obtain a liquor license to sell alcoholic beverages today. Similarly, food stores may not be able to sell marijuana or marijuana products today. Should the initiative pass, food

stores would no longer be able to obtain a liquor license to sell alcoholic beverages because that action would be forbidden by the law as amended.

Thus, the initiative would change the law and would change what entities could be licensed. The fact that an amendment to the law will change the way it operates is not a source of confusion, it is simply a truth. If anything, voters should expect that the law would operate differently once it was amended.

This Court, in its review, 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 #89*, 328 P.3d at 178. 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 fair, clear, accurate, and complete. *See In re #62*, 184 P.3d at 58. That is the case here. The title set by the Board accurately reflects that if passed it will prevent the state or local licensing authority from granting a liquor license to a food store that sells alcoholic beverages, marijuana, or marijuana products.

Title-setting is about distilling the proposed initiative down to a “reasonably ascertainable expression of the initiative’s purpose.” *In re*

#45, 234 P.3d at 648 (citing *In re Title, Ballot Title, and Submission Clause for 2009-10 #24*, 218 P.3d 350, 356 (Colo. 2009). The Board's title in this case does exactly that—it briefly and plainly expresses the measure's core purpose.

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 19th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on May 19, 2016, I electronically filed a true and correct copy of The Title Board's Opening 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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