

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 3, 2022 4:30 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #67 (“Sales and Delivery of Alcohol Beverages)</p>	
<p>Petitioner: Christopher Fine, v.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Respondents: Steven Ward and Levi Mendyk, and Title Board: Theresa Conley, David Powell, and Jeremiah Barry.</p>	<p>Case No. 2022SA101</p>
<p>PHILIP J. WEISER, Attorney General EMILY BUCKLEY, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6403 FAX: (720) 508-6041 E-Mail: emily.buckley@coag.gov Registration Number: 43002 *Counsel of Record <i>Attorneys for the Title Board</i></p>	
<p>THE TITLE BOARD’S OPENING BRIEF</p>	

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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,087 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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 or 28.1, and C.A.R. 32.

s/ Emily Buckley

EMILY BUCKLEY, #43002

Assistant Attorney General

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

 I. Standards governing titles set by the Board..... 3

 II. The proposed initiative contains a single subject..... 4

 A. Standard of review and preservation. 4

 B. The single subject requirement is met. 5

 III. The title set by the Board is not misleading..... 8

 A. Standard of review and preservation. 8

 B. The title accurately describes the measure..... 8

CONCLUSION 11

TABLE OF AUTHORITIES

CASES	PAGES
<i>In re Proposed Initiative on Trespass-Streams with Flowing Water,</i> 910 P.2d 21 (Colo. 1996).....	3, 10
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #3,</i> 2019 CO 107	8
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #45,</i> 234 P.3d 642 (Colo. 2010).....	3, 10
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #91,</i> 235 P.3d 1071 (Colo. 2010).....	3
<i>In re Title, Ballot Title and Submission Clause Pertaining to</i> <i>Casino Gambling Initiative, 649 P.2d 303 (Colo. 1982)</i>	3
<i>In re Title, Ballot Title, & Submission Clause for 2011-2012 #45,</i> 2012 CO 26	5
<i>In re Title, Ballot Title, and Submission Clause for 2007-08 #62,</i> 184 P.3d 52 (Colo. 2008).....	4

<i>Matter of Title, Ballot Title & Submission Clause for #90, 2014 CO</i>	
63	11
<i>Matter of Title, Ballot Title & Submission Clause for 2015–2016</i>	
#73, 369 P.3d 565 (Colo. 2016).....	11
<i>Matter of Title, Ballot Title and Submission Clause for 2019-2020</i>	
#315, 500 P.3d 363 (Colo. 2020).....	10
<i>Matter of Title, Ballot Title and Submission Clause for 2021-2022</i>	
#16, 489 P.3d 1217 (Colo. 2021).....	6
<i>Matter of Title, Ballot Title and Submission Clause, Summary</i>	
<i>Clause for 1997-1998 No. 74, 962 P.2d 927 (Colo. 1998).....</i>	6

STATUTES

§ 1-40-106(3)(b), C.R.S. (2021)	4, 11
§ 18-18-429, C.R.S. (2021)	7
§ 25-5-403(1)(a), (d), C.R.S. (2021)	7
§ 39-28-101(1.3), C.R.S. (2021).....	7
§ 43-4-218(2)(e), C.R.S. (2021).....	7

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #67 contains a single subject.

(2) Whether the title set by the Board properly advises the voters of the central purpose of the measure.¹

STATEMENT OF THE CASE

Proponents Steven Ward and Levi Mendyk seek to circulate #67 to obtain the requisite number of signatures to place a measure on the ballot to amend article 3 of title 44 in Colorado's revised statutes, known as the "Colorado Liquor Code," to allow the sale of wine in grocery and convenience stores that are licensed to sell beer and to permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. Record filed April 13, 2022 ("Record") at 2.

¹ Number 67 is similar to Proposed Initiative 2021-2022 #66. Accordingly, the Title Board's opening brief in this appeal is substantially similar to its opening brief in *In re Proposed Initiative 2021-2022 #66*, Case No. 2022SA100, which the Board also filed on May 3, 2022.

A majority of the Board concluded that the measure contains a single subject at its March 16, 2021 meeting, and the Board proceeded to set title. *Id.* at 12-13. Petitioners filed a timely motion for rehearing asserting #67 contains multiple subjects and that the title is misleading. *Id.* at 16-19. On rehearing on April 6, 2022, the Board made edits to the title, but otherwise denied the motion. *Id.* at 15.

SUMMARY OF ARGUMENT

The Board's actions in setting #67 should be affirmed. The single subject of #67 is amending the Colorado Liquor Code to allow the sale of wine in grocery and convenience stores that are licensed to sell beer and to permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. Record at 2. The provisions of the measure that Petitioner challenges on single subject grounds are necessarily and properly connected to the initiative's single subject of expanding the sale and delivery of alcohol products. Further, the Board's title is not misleading. The Board should be affirmed.

ARGUMENT

I. Standards governing titles set by the Board.

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* (“*In re #45*”), 234 P.3d 642, 645, 648 (Colo. 2010). 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). The Court will reverse the Board’s decision only if the title is 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).

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, and Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). 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.

II. The proposed initiative contains a single subject.

A. Standard of review and preservation.

When this Court reviews the Board’s single subject decision, “[it] employ[s] all legitimate presumptions in favor of the propriety of the

Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 8 (quotation omitted). The Title Board agrees Petitioners preserved the single subject issue by raising it in a motion for rehearing.

B. The single subject requirement is met.

The single subject of #67 is amending the Colorado Liquor Code to allow the sale of wine in grocery and convenience stores that are licensed to sell beer and to permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. In essence, the initiative's single subject is expanding the sale and delivery of alcohol products.

Parsing the language of #67, Petitioners assert the initiative contains numerous subjects. Petition at p 4. But "[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. Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose

initiatives guaranteed by Colorado’s constitution.” *Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998). The alleged multiple subjects identified by Petitioners overlap—they are all under the umbrella of expanding the sale and delivery of alcohol products. A review of the initiative demonstrates that it contains a single unifying subject: expanding the sale and delivery of alcohol products.

Further, the initiative presents “neither of the evils that the single-subject requirement aims to prevent.” *Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1224 (Colo. 2021). The risk of “logrolling” is minimal because allowing grocery stores to sell wine and allowing third party delivery of alcohol products both “point in the same direction” of expanding the sale and delivery of alcohol, thus #67 does not “seek to garner support from various factions” with “different or conflicting goals,” *id.* (quotations and citations omitted). And these provisions would not surprise voters because they “relate[] to the same subject,” #67’s “plain language” unambiguously

proposes these changes, and “the proposal is not particularly lengthy or complex.” *Id.* (quotations and citations omitted).

Further, many statutes cover both sale and delivery, strongly suggesting that sale and delivery of a product may constitute a single subject. For example:

- Section 39-28-101(1.3), C.R.S. (2021) addresses the sale and delivery of cigarettes to consumers.
- Section 18-18-429, C.R.S. (2021) criminalizes the “manufacture, sale or delivery of drug paraphernalia.”
- Section 25-5-403(1)(a), (d), C.R.S. (2021) prohibits “[t]he manufacture, sale, or delivery or the holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;” and “The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 25-5-412.”
- Section 43-4-218(2)(e), C.R.S. (2021) defines “[r]etail delivery” as a “retail sale of tangible personal property by a retailer or delivery by a motor vehicle owned or operated by the retailer or any other person to the purchaser at a location in this state, which sale includes at least one item of tangible personal property that is subject to taxation under article 26 of title 39,” and further provides that “[e]ach such retail sale is a single retail delivery regardless of the number of shipments necessary to deliver the items of tangible personal property purchased.”

Contrary to Petitioners’ argument, sale and delivery can exist as a single subject.

III. The title set by the Board is not misleading.

A. Standard of review and preservation.

When considering a challenge to a title, the Court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only “ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed.” *Id.* The Board agrees that Petitioners preserved a challenge to the clear title of #67.

B. The title accurately describes the measure.

The Board’s title for #67 is not misleading. Number 67 proposes allowing the sale of wine in grocery and convenience stores that are licensed to sell beer and permitting home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. The title set by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, establishing a new fermented malt beverage and wine retailer license to allow grocery

stores, convenience stores, and other business establishments licensed to sell beer for consumption off the licensed premises to also sell wine for off-premises consumption; automatically converting a fermented malt beverage retailer license authorizing the sale of beer for off-premises consumption that was in effect on March 1, 2023, to the new fermented malt beverage and wine retailer license; allowing fermented malt beverage and wine retailer licensees to conduct tastings on the licensed premises if approved by the local licensing authority; and allowing retail establishments licensed to sell alcohol beverages to deliver all types of alcohol beverages to a person 21 years of age or older through a third-party delivery service that has obtained a delivery service permit from the state licensing authority?

Record at p 15.

Petitioners argue that the title is misleading because it fails to address the central features of #67 and fails to meet the clear title requirement. Record at pp 18-19, Petition at pp 3-4. Specifically,

Petitioners assert the clear ballot title requirement is not met because:

a. The titles' current statement of single subject ("the expansion of retail sale of alcohol beverages") is inaccurate as "delivery" of alcohol is a not a "retail sale" of alcohol and can be accomplished, under this initiative, by unrelated third parties who are not licensed or in any way engaged in retail sales;

b. The titles fail to state this initiative expands alcohol delivery for alcohol beverages that are sold for off-premises consumption as well as for alcoholic drinks that are sold for on-premises consumption.

Petition at pp 3-4.

But these arguments are without merit. The title as set by the Board accurately and properly reflects the intent of the initiative, and Petitioners do not demonstrate how the title could be considered insufficient, unfair, or misleading. *See In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d at 26; *In re #45*, 234 P.3d at 648. Further, Petitioners may quibble with the Board’s decisions to omit certain granular details and to omit the words “delivery” from the first independent clause of the title, but the Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in designating a title and ballot title and submission clause.” *Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315*, 500 P.3d 363, 369 (Colo. 2020) (quoting *Matter of Title, Ballot Title & Submission Clause for 2015–2016 #73*, ¶ 23, 369 P.3d at 569). The Board’s title “correctly and fairly express the true intent and meaning” of #67, as required by statute, § 1-40-106(3)(b).

Petitioners also argue that the title fails to explain certain effects of the measure. However, the title fairly describes #67’s primary

features, and “the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme.” *Matter of Title, Ballot Title & Submission Clause for #90*, 2014 CO 63. Here, the title is not deficient for its failure to include more specific details about how alcohol delivery or retail licenses would be expanded by #67. The Board properly set title for #67.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 3rd day of May, 2022.

PHILIP J. WEISER
Attorney General

/s/Emily Buckley

EMILY BUCKLEY, 43002*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 3rd day of May, 2022.

s/ Xan Serocki

Xan Serocki