

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021)
Appeal from the Ballot Title Board

In re Title, Ballot Title, & Submission
Clause for Proposed Initiative 2021-2022
#67 (“Sales and Delivery of Alcohol
Beverages”)

Petitioners: Christopher Fine

v.

Respondents: Steven Ward and Levi
Mendyk,

and

Title Board: Theresa Conley, David
Powell, and Jeremiah Barry.

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Case No. 2022SA101

THE TITLE BOARD’S RESPONSE 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, 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 1,899 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

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In recent years, Colorado legislators and voters have slowly, but steadily, amended liquor laws to repeal prohibition-era restrictions on the sale of alcohol. *See, e.g.*, SB18-243, (implementing sale of full-strength beer in grocery stores)¹; SB16-197 (repealing, gradually, prohibition on full-strength beer in grocery stores and allowing some grocery stores with pharmacies to sell beer, wine, and spirits)², SB08-082, (repealing law prohibiting sale of alcohol on Sundays)³. Proposed initiative #67 fits into this established pattern. It would enable grocery stores and similar retailers to sell wine, as well as beer, and would allow existing alcohol retailers to deliver those beverages to consumers.

Some may question the wisdom of Colorado's march to liberalize its alcohol laws. But resolution of that question falls on the voters and their representatives. At an initial hearing and on rehearing, after significant debate and consideration, the Title Board concluded that #67 addresses a single subject, expanding the retail sale of alcohol

¹ Available at, <https://tinyurl.com/a2yxxfxj>.

² Available at, <https://tinyurl.com/3a98sh6z>.

³ Available at, <https://tinyurl.com/5b4fypmf>.

beverages, and drafted a clear title informing voters of #67’s central features. The Board’s actions fell well within the bounds of its considerable discretion, and should be affirmed.

ARGUMENT

I. Number 67 satisfies the constitutional single subject requirement.

“[E]mploy[ing] all legitimate presumptions in favor of the propriety of the Board’s actions,” reversal of the Board’s single subject determination is appropriate only in a “clear case,” *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (citations and quotations omitted). So long as a proposed initiative’s provisions are not “disconnected or incongruous,” the Board’s decision that it encompasses a single subject should not be disturbed. *Id.* ¶ 13.

Petitioner’s challenge to the Board’s single subject determination fails to establish any error, let alone show that the Board’s decision was outside the considerable deference to which it is entitled. The Court should affirm.

A. Both of #67’s central provisions relate to the single subject of expanding the retail sale of alcohol beverages.

Petitioner argues that #67’s provision regarding delivery of alcohol creates a second subject separate and apart from its provision enabling the sale of wine in food stores. Pet’r’s Opening Br. on Proposed Initiative 2021-2022 #67 (“Sales and Delivery of Alcohol Beverages”) (“Pet’r’s Opening Br.”) at 11–22 (May 16, 2022). But both provisions relate to the proposed initiative’s single subject of expanding the sale of alcohol beverages.

In his Opening Brief, Petitioner describes the choices made by #67’s Proponents to submit multiple versions of this measure—including some that disaggregated wine in grocery stores from alcohol delivery. *Id.* at 13–18. In Petitioner’s telling, these decisions establish #67’s separate subjects, because “[n]either is necessary to address the other.” *Id.* at 16; *see also id.* at 18 (arguing that wine in grocery stores and alcohol delivery are separate subjects because “one can exist without the other”).

But nothing in this constitutional single subject requirement, or this Court's jurisprudence, suggests that a measure's single subject determination is based on whether its provisions could conceivably be run as separate measures. Instead, many of the measures upheld as having single subjects by both the Board and this Court could, conceivably, have been split into multiple initiatives.

For example, in 2017 the Court considered a measure intended to limit housing growth in Colorado. *In re Title, Ballot Title and Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 10. That measure included several provisions to accomplish its aim, including one that limited housing growth to one percent annually in certain jurisdictions, one that empowered local voters to enact or repeal housing regulations, and one that prohibited permits for new residential units in those same jurisdictions. *Id.* ¶¶ 10–11. Each of these could have stood on its own; the proponents could have submitted one measure to establish a one percent cap, one measure to empower local voters, and one measure to prohibit the issuance of new permits. Nonetheless, the Court affirmed

the Board’s assessment that each provision was encompassed within the measure’s single subject. *Id.* ¶¶ 10–14.

And its decision was consistent with treatment of other, similar, measures. For example, in 2016 the Court found single subject satisfied in reviewing a proposed initiative that would have made several significant changes to state law concerning recall elections, even though many (if not all) of those provisions could have been run as stand-alone proposals. *In re Title, Ballot Title and Submission Clause for 2015–2016*, 2016 CO 24, ¶¶ 19–20.

Whether a measure can be separated into multiple initiatives is irrelevant to whether its provisions violate the single subject requirement. Where, as here, multiple provisions that could be run as separate measures still “tend[] to effect or carry out one general objective or purpose,” *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 14 (quotations omitted), the single subject requirement is satisfied.

Finally, Petitioner argues that including these two provisions implicates the single subject requirement’s anti-logrolling purpose.

Pet’r’s Opening Br. at 20. In doing so, Petitioner compares #67 to 2021-2022 #16, which both extended the animal cruelty laws to cover livestock and amended the statutory definition of “sexual act with an animal” for all types of animals. *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 2. There, drawing on statements from the proponents, the Court held that “incorporating livestock into the animal cruelty statutes” was the “central theme” of the initiative, *id.* ¶ 2, and “criminalizing new conduct, regardless of whether that conduct is directed at livestock or other animals,” was an impermissible second subject, *id.* ¶ 39. The Court did not, however, rely on the single subject requirement’s anti-logrolling purpose. Rather, the Court held that #16 implicated the *other* purpose behind the single subject requirement, avoidance of voter surprise. *Id.* ¶ 41 (holding that “combining the repeal of the livestock exceptions with the criminalization of new conduct toward all animals runs the risk of surprising voters with a surreptitious change”); *id.* ¶ 2 (“Because these subjects are not necessarily and properly connected, there is the

potential for the very kind of voter surprise against which the single-subject requirement seeks to guard.”).

Here, Petitioner does not argue that the two provisions are likely to spring a surprise on Colorado voters. Nor could he. Both provisions are highlighted in the measure’s own declaration.

Moreover, as the Board explained in its Title, both provisions would expand retail sale of alcohol. Record at 15. Perhaps a voter might be surprised by a measure which relaxed restrictions on what alcohol could be sold in grocery stores but limited alcohol delivery. Or vice-versa. But here, both provisions point in the direction of liberalizing restrictions on the sale of alcohol. Such directional equity does not implicate the purposes of the single subject requirement.

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

The Board has “broad discretion” in drafting titles, and this Court grants “great deference” to the decisions it makes in doing so. *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23. Particularly to those choices it makes to resolve “interrelated problems of length, complexity, and clarity in designating a title and

ballot title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 26. This deference reflects the “straits” the Board must navigate “between brevity and unambiguously stating the central features of the provision sought to be added, amended, or repealed.” *Id.* Accordingly, the Board’s Title should only be rejected if it is “clearly misleading.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23.

Petitioner challenges the Board’s title on two grounds, neither of which approaches the type of “material and significant omission, misstatement, or misrepresentation” necessary to justify reversal. *See In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 27.

A. The title for #67 accurately describes the measure.

First, Petitioner argues that the Board erred by describing the purpose of the measure as concerning “the expansion of retail sale of alcohol.” Pet’r’s Op. Br. at 4-5, 23-26. Petitioner’s argument is that #67’s delivery provisions are not encompassed in this description.

But this argument fails for the same reasons that #67's delivery provisions do not establish a second subject. An average voter would consider an additional channel for alcohol purchases (through delivery services) as an expansion of the sale of alcohol. Here, again, Petitioner draws formalistic distinctions between different means of acquiring alcohol beverages; although such distinctions that may be meaningful from a historical regulatory perspective, that is not the case for the average voter.

As importantly, the title explicitly mentions #67's delivery provisions. Record at 15 ("A change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, . . . allowing retail establishments licensed to sell alcohol beverages to deliver all types of alcohol beverages . . ."). By clearly expressing its delivery provisions, #67 mitigates any (unlikely) confusion that might arise from its introductory clause.

The authorities cited by Petitioner do not suggest otherwise. In *In re Title, Ballot Title, & Submission Clause Approved February 2, 1994, Respecting the Proposed Initiated Constitutional Amendment*

Concerning Limited Gaming in the City of Antonito (Limited Gaming IV), 873 P.2d 733, 736 (Colo. 1994), the Court considered a measure with “two distinct parts.” The Court disapproved of the title drafted by the Board because it intermingled the descriptions of those parts, “bur[ying]” provisions related to one between references to the other. *Id.* It held that “to correctly and fairly express the true intent and meaning of the Initiative, all provisions solely concerning [the first part] must be grouped together, and not separated and placed like bookends at both the beginning and the end of the title and submission clause.” *Id.* at 742.

That is exactly what the Board did here. If, as Petitioner argues, #67 “works two, equally important changes to Colorado law,” Pet’r’s Opening Br. at 26, then those changes must not be intermingled in the title. Instead, as it did here, the Board should fully describe the measure’s provisions related to retail establishments, and then its provisions related to delivery.

B. The title does not omit a central feature of the proposed initiative.

Finally, Petitioner argues that the Court should reject the title because it fails to “properly appraise voters” that #67 authorizes delivery from both off-premises and on-premises consumption liquor licensees. Pet’r’s Opening Br. at 26-28. But the title does state that #67 would allow delivery by “retail establishments licensed to sell alcohol beverages”—thus impliedly encompassing *all* retail establishments—whether or not those establishments are licensed for off- or on-premises liquor consumption. Further, the Board “must balance the requirement of brevity against the requirement that the title unambiguously set forth the measure's central features.” *In re Title, Ballot Title and Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 31. Including minute details of an alleged measure, including the off-premises or on-premises liquor consumption distinction Petitioner cites here, can “result in a lengthy and complex title, and this would be contrary to the Board’s statutory charge.” *Id.* The title set by the Board is clear, and this Court should affirm the Board’s decision.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 23rd day of May, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S RESPONSE BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 23rd day of May, 2022.

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