

SUPREME COURT OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2021-
2022 #139

Petitioners: Christopher Fine, Steven Ward, and
Levi Mendyk
v.
Respondents/Proponents: Robert Schraeder and
Joel Allen Cathey
and
Ballot Title Board: THERESA CONLEY,
DAVID POWELL, and JULIE PELEGRIN

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Supreme Court Case No.
2022SA129

**OPENING BRIEF OF PETITIONERS
STEVEN WARD AND LEVI MENDYK**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the 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:

The brief complies with C.A.R. 28(g).

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X It contains **1,918** words.

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For the party raising the issue:

___ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

___ It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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/ Suzanne Taheri
Suzanne Taheri
Attorney for the Petitioner

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Petitioners, Steve Ward and Levi Mendyk, registered electors of the State of Colorado, through undersigned counsel, submits his Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2021-2022 #139 (unofficially captioned as “Third Party-Delivery of Alcohol Beverages”).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Title Board erred in ruling that the measures contain a single subject as required by Article V, § 1(8) of the Colorado Constitution and C.R.S. §1-40-105(4).
2. Whether the Title Board failed to set a ballot title that properly describes the central features of the proposed initiative in violation of C.R.S. § 1-40-106(3)(b).

STATEMENT OF THE CASE

The Petitioner brings this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal of the Title Board’s decision to deny Petitioner’s Motion for Rehearing and set title for Proposed Initiative 2021-2022 #139.

Proposed Initiative 2021-2022 #139 was filed with Legislative Council on March 25, 2022. The Title Board conducted an initial hearing on the initiative and

set ballot title on April 20, 2022. After the initial hearing, Petitioners filed a Motion for Rehearing challenging the Board's actions on the grounds that the Board failed to set a clear title. A rehearing took place on April 28, 2022, and the Petitioners' Motion for Rehearing was granted only to the extent that the Board made changes to the title.

In the Motions concerning the Proposed Initiative Petitioner argued that:

1. The measures violated the single-subject requirement; and
2. The ballot title set by the Title Board violated the clear title requirement.

The Title Board set the final ballot title for Initiative #139 as follows:

A change to the Colorado Revised Statutes concerning authorization for third-party delivery of alcohol beverages from retailers licensed to sell alcohol, and, in connection therewith, establishing a third-party delivery service permit that authorizes an individual or business entity to deliver alcohol beverages sold by licensed alcohol beverage retailers for consumption off the licensed premises; establishing the requirements for obtaining a delivery service permit, including requirements to carry insurance and to provide insurance, health-care benefits or stipend, and reimbursement for fuel costs to employees and independent contractors; requiring persons delivering and receiving alcohol beverages to be at least 21 years of age; removing the limit on the percentage of revenue received from sales of alcohol beverages for delivery; and allowing a technology services company, without obtaining a third-party delivery service permit, to provide software or a digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages.

SUMMARY OF ARGUMENT

The Title Board should not have set titles for the proposed initiative. The measure violates the single-subject and clear title requirements.

More specifically, the measure violates the single-subject requirement because it contains additional subjects beyond the measure's central feature of authorizing third-party delivery. Apart from the permit process that is between the state and the permittee, the measure also changes the contractual requirement between the permittee and its independent contractors. These are separate and distinct subjects.

Therefore, for all the reasons stated above and explained further below, the actions of the Title Board in denying the Motions must be reversed.

STANDARD OF REVIEW

When reviewing a challenge to the Title Board's decision on single subject, clear title, fiscal impact statement and abstract, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action." *In the Matter of Title, Ballot Title, and Submission Clause for 2013-2014 No. 89*, 328 P.3d 172, 176 (Colo. 2014); *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 No. 4*, 2017 CO 57, ¶ 20. Although the right of initiative is to be

liberally construed, “[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider.” *In re Title, Ballot Title, and Submission Clause for 2007-2008 No. 62*, 184 P.3d 52, 57 (Colo. 2008) (citation omitted).

LEGAL ARGUMENT

I. PROPOSED INITIATIVE 2021-2022 #139 CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT

A. The Single-Subject Requirement Protects Against Two Specific Dangers

Article V, § 1(5.5) of the Colorado Constitution requires that “[n]o measure shall be proposed by petition containing more than one subject...” No title can be set and submitted to the people for adoption or rejection at the polls if a measure contains more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other. *People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903); Colo. Const. art. V, § 1(5.5); *see also* § 1-40-106.5 (statutory single-subject requirement).

The single subject requirement guards against two dangers associated with omnibus initiatives. First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various

factions – that may have different or even conflicting interests – could lead to the enactment of measures that would fail on their own merits. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43, 46 P.3d 438, 442* (Colo. 2002). Second, the single subject requirement helps avoid “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Id. see also In re Title, Ballot Title and Submission Clause for Proposed Initiative for 2011-12 No. 3, 274 P.3d 562, 566* (Colo. 2012).

B. Proposed Initiative #139 Contains Multiple Subjects Separate from the Measure’s allowance for third-party delivery

The measure’s stated single subject is, “authorization for third-party delivery of alcohol beverages from retailers licensed to sell alcohol”, but the measure doesn’t just authorize third-party deliver and establish the legal framework. The initiative changes the relationship between the third-party permittee and its employees or independent contractors by requiring the permittee provide the following to each employee or independent contractor:

- (I) comprehensive and collision insurance coverage for the vehicle used for deliveries, including uninsured and underinsured motorist coverage;
- (ii) short-term and long-term disability insurance;

(iii) health insurance or quarterly health-care stipend in an amount equivalent to what a covered person would pay for an insurance plan on the individual market; and

(iv) reimbursement for fuel costs incurred while delivering alcohol for the delivery service permittee.

This is not a connected purpose. The third-party delivery is the subject most likely to garner voters' sole attention and this second important purpose will be lost.

The additional subjects described above and contained within the Petitioner's Motion for Rehearing implicate the very "dangers" the single-subject requirement is designed to prevent. First, they are "coiled up in the folds" of the measure. A voter who supports the measure because he or she supports third-delivery not realize the measure changes the well-established legal structure of the independent contractor relationship. This subject is buried in the measure. Second, the measure could garner support from different and competing factions and thus cause the measures to pass on their own even though their multiple subjects might not have been able to pass separately. There is no reason to presume that voters who may support third-party delivery would additionally vote for a scheme that alters the independent contractor relationship. There is likewise no reason to presume that voters interested in altering the independent contractor

relationship to provide benefits, and other compensation for the employees and independent contractors would also support the third-party delivery of alcohol.

In other words, the measure could gain support from each part without passing on the merits of either separate subject. Such measures, which can pass only by combining subjects that appeal to different factions, violate the single-subject requirement. *See In re 2011-2012 No. 3*, 274 P.3d at 566.

Because delivery of alcohol beverages and compensation of individuals who perform alcohol beverage delivery are separate subjects, the Board lacked jurisdiction to set a ballot title for Proposed initiative 2021-2022 #139.

II. THE TITLES OF THE PROPOSED INITIATIVE ARE MISLEADING

The constitution requires an initiated measure's subject to be "clearly expressed in its title." Colo. Const. art. V, § 1(5.5). "In setting a title, the title board shall consider the public confusion that might be caused by misleading titles." Colo. Rev. Stat. § 1-40-106(3)(b). The clear title requirement seeks to "prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose." *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016). Voters, "whether or not they are familiar with the subject matter of a particular proposal," should be

able to "determine intelligently whether to support or oppose the proposal." *Id.*, citing *In re 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016).

A title shall correctly and fairly express the true intent and meaning of the proposed measure and "shall unambiguously state the principle of the provision sought to be added, amended, or repealed." Colo. Rev. Stat. § 1-40-106(3)(b), *In re the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 29*, 972 P.2d 257, 266 (Colo. 1999). The Title Board is tasked with "focusing on the most critical aspects of the proposal, not simply [restating] all of the provisions of the proposed initiative." *Percy v. Embury (In re Title for 1999-2000 # 235(a))*, 3 P.3d 1219, 1225 (Colo. 2000), citing *In re Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994).

The ballot title as set by the board omits a number of elements which would be useful to voters in evaluating what the initiative does.

First, the requirement to provide short-term and long-term disability insurance is omitted from the measure. The title states that the third-party delivery company is required to provide insurance but does not include the specific, expensive requirements such as general liability insurance for \$1,000,000 per occurrence. The title makes no mention of the requirement to provide short-term

and long-term disability insurance to both employees and independent contractors – something that is simply unheard of in the independent contractor market today and represents a substantial change from current requirements for compensation of independent contractors.

Next, the title does not state that uninsured motorist and comprehensive and collision coverage must be provided for the vehicle used for deliveries and does not note that there is no exclusion to this requirement which would allow the company to provide such insurance only while the vehicle is in operation to make deliveries.

Use of the word “insurance” alone does not fairly describe the requirement. The measure requires full-coverage automobile insurance, uninsured motorist coverage, and both long-term and short-term disability coverage along with \$1,000,000 in liability insurance. These five types of insurance are in addition to the health insurance which is specifically called out in the measure, and they must be included in order to fully inform the voters of the measure’s requirements.

The insurance and compensation requirements of Proposed Initiative 2021-2022 #139 contains overarching and expensive compensation requirements which would potentially make it cost-prohibitive for third-party delivery companies to

operate and profit from third-party delivery in Colorado. Petitioners submit that those requirements constitute central features and, arguably, the very purpose of the measure. They therefore must be individually called out in the title.

CONCLUSION

Petitioner respectfully requests this Court reverse the Title Board's setting of Title for the proposed initiatives and hold that:

1. The measure violates the single-subject requirement, and thus the measures should return to the Proponents because the Title Board lacked the authority to set title;
2. The title for the proposed initiative is misleading and thus violates the clear title requirement.

Respectfully submitted this 10th day of May, 2022.

MAVEN LAW GROUP

/s/ Suzanne Taheri

Suzanne Taheri

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on 10th of May, 2022 a true and correct copy of the **PETITIONER'S OPENING BRIEF** was served via the State of Colorado's e-filing system, properly addressed to the following:

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