

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: May 10, 2022 4:30 PM
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot 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 Title Board: THERESA CONLEY; DAVID POWELL; and JULIE PELEGRIN	▲ COURT USE ONLY ▲
<i>Attorneys for Respondents</i> Martha M. Tierney, No. 27521 Tierney Lawrence LLC 225 E.16 th Ave, Suite 350 Denver, CO 80203 Phone: (303) 356-4870 E-mail: mtierney@tierneylawrence.com	Case No.: 2022SA129
RESPONDENTS' 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 the brief complies with C.A.R. 28(g). It contains 2,717 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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) a citation to the precise location in the record (R. __, p. __), 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.

By: s/Martha M. Tierney

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Robert Schraeder and Joel Allen Cathey (jointly “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the title, ballot title and submission clause that the Title Board set for Proposed Initiative 2021-2022 #139 (“Initiative”).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in ruling that the measure contains a single subject as required by Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-106.5?
2. Whether the Title set by the Title Board for the measure is misleading?

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Title for Initiative #139. On March 25, 2022, Proponents filed the Initiative with the directors of the Legislative Council and the Office of Legislative Legal Services. Pursuant to C.R.S. §1-40-105(1), the Offices of Legislative Council and Legislative Legal Services conducted a review and comment hearing on the Initiative on April 8, 2022.

Proponents filed the Initiative with the Secretary of State’s office on April 8, 2022. At the Title Board hearing on April 20, 2022, the Title Board found that the

Initiative contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and C.R.S. §1-40-106.5. The Title Board set the Title for the Initiative.

On April 27, 2022, Petitioner Christopher Fine filed a Motion for Rehearing, and Petitioners Steven Ward and Levi Mendyk filed a separate Motion for Rehearing. On April 28, 2022, the Title Board granted both Motions for Rehearing only to the extent that it made some changes to the title. Both Petitioner Fine and Petitioners Ward and Mendyk filed Petitions for Review, pursuant to C.R.S. §1-40-107(2) on May 5, 2022.

STATEMENT OF FACTS

Initiative #139 amends the Colorado Revised Statutes authorizing third-party delivery of alcohol beverages from retailers licensed to sell alcohol. The Initiative contains a single subject and the language of the measure is plain and easy to understand.

The Title set for the Initiative by the Title Board correctly and fairly expresses the true intent and meaning of the Initiative and will not mislead the public.

The Title set for Initiative #139 at the hearing on April 20, 2022, reads:

Shall there be 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?¹

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion drafting the title for Initiative #139. The Initiative contains a single subject by authorizing third-party delivery of alcohol beverages from retailers licensed to sell alcohol. The remaining provisions flow from the measure's single subject and are implementation features, including establishing a third-party delivery service permit that authorizes an individual or business entity to deliver alcohol beverages;

¹ Proponents filed a total of six measures, each of which were challenged by Petitioners Steven Ward and Levi Mendyk. Proposed Initiatives 2021-2022 #96 (Case No. 2022SA133), #97 (Case No. 2022SA134), #100 (Case No. 2022SA135), #101 (Case No. 2022SA136), #102 (Case No. 2022SA137), and #139 (Case No. 2022SA129). Petitioner Christopher Fine also challenged Proposed Initiative #139. Some of the same legal issues overlap amongst the six cases, and, thus, there are similarities in the briefs.

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 twenty-one 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.

Initiative #139 does not present either of the dangers attending omnibus measures - the proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions; and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. The text of the measure is plain and sets forth its provisions clearly. The Title fairly and accurately sets forth the major features of the Initiative and is not misleading.

The Title Board is only obligated to fairly summarize the central points of a proposed measure and need not refer to every nuance and feature of the proposed

measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

There is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review.

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S., provide that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012). When reviewing a challenge to the Title Board’s decision, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s action.” *Cordero v. Leahy (In re Initiative for 2013-2014 #90)*, 328 P.3d 155, 158 (Colo. 2014). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.* Respondents agree that Petitioners preserved this issue for appeal.

B. Initiative 2021-2022 #139 Contains a Single Subject.

The Initiative contains a single subject by authorizing third-party delivery for alcohol beverages from retailers licensed to sell alcohol. The remaining provisions flow from the measure's single subject and are implementation features, including 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.

The text of Initiative #139 is plain, and its provisions are directly tied to the measure's central focus.

The single-subject requirement functions to prevent two dangers: (1) "logrolling," or the practice of "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—[in order to] lead to the enactment of measures that would fail on their own merits"; and (2) voter surprise and fraud caused by the "passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *In re Initiative for 2011-2012 #3*, 274 P.3d at 566. Accordingly, the subject matter of a proposed initiative "must be necessarily and properly connected rather than disconnected or incongruous." *In re Initiative for 2013-2014 #90*, 328 P.3d at 159 (quoting *In re Initiative for 2011-2012 #3*, 274 P.3d at 565). But where a proposed initiative "tends to effect or to carry out one general objective or purpose," it presents only one subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 253 (Colo. 2000); accord *In re Initiative for 2013-2014 #90*, 328 P.3d at 159.

Here, Petitioner Fine contends that Initiative #139 violates the single subject requirement based upon a legislative declaration by the General Assembly contained in a 2019 bill (SB19-011) that stated:

The general assembly further recognizes that fermented malt beverages and malt liquors are separate and distinct from, and have a unique regulatory history in relation to, vinous and spirituous liquors; however, maintaining a separate regulatory framework and licensing structure for fermented malt beverages under this article 4 is no longer necessary except at the retail level.²

Section 44-4-102(2), C.R.S. First, legislative declarations are not binding authority, nor do they bind this Court. *See Walgreen Co. v. Charnes*, 819 P.2d 1039, 1045 (Colo. 1991).

Second, this declaration does not create a single subject violation for Initiative #139. Indeed, nothing in the legislative declaration addresses delivery of alcohol beverages. Rather, through SB19-011, the General Assembly eliminated the separate regulatory framework and licensing structure for manufacturing and importing of beer, wine, and spirits, while keeping the separate framework for retail sales of beer. *See* SB19-011, section 1. The retention of the retail sales distinction allowed for the expansion of sales of beer into grocery and convenience stores. Initiative #139 is a proposed new law with a single subject that authorizes third-party delivery of alcohol, not retail sales. The language in the SB19-011

² SB19-011 is available here:
https://leg.colorado.gov/sites/default/files/2019a_011_signed.pdf

legislative declaration does not create a single subsection violation in Initiative #139.

Alternatively, Petitioners Ward and Mendyk contend that Initiative #139 violates the single subject requirement because it authorizes third-party delivery of alcohol beverages and requires third-party delivery companies to provide certain benefits to their employees and independent contractors who are delivering the alcohol, including auto insurance, health insurance (or a stipend), disability insurance, and mileage reimbursement. Initiative #139 establishes third-party delivery of alcohol beverages and sets forth implementation features on such third-party alcohol delivery. The benefits provided to third-party delivery drivers do not create a separate subject in the measure.

Initiative #139 does not present either of the dangers the single-subject requirement seeks to prevent. There is no threat of logrolling here because the proponents did not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014). Rather, each subsection of Initiative #139 is tied to the central purpose of the measure: authorizing third-party delivery of alcohol beverages. Initiative #139 will

pass or fail on its merits and does not run the risk of garnering support from factions with different or conflicting goals. *See id.* at 178.

Initiative #139 also fails to trigger the second danger of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any provisions “coiled up in the folds” of Initiative #139. *In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002). No such surprise would occur should voters approve Initiative #139, because the plain language of the measure unambiguously authorizes third-party delivery of alcohol beverages and sets forth the process for obtaining a third-party delivery permit, including the requirements applicable to delivery drivers, which include the provision of certain benefits, and that the drivers be over the age of twenty-one. The measure also removes the limit on the percentage of revenue received from sales of alcohol beverages for delivery; and allows a technology services company to provide software or a digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages. The Initiative does not expand benefits to anyone other than a third-party alcohol delivery employee or independent contractor and does not establish new requirements for independent contractors generally.

Initiative #139 is clear, and its plain language is not confusing. *See In re Initiative for 2011-2012 #3*, 274 P.3d at 567. Initiative #139 complies with the single subject rule.

II. The Title Board Set a Clear Title That Fairly Summarizes the Key Components of the Initiative.

A. Standard of Review.

When reviewing a challenge to the Title Board’s decision, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s action.” *Cordero v. Leahy (In re Initiative for 2013-2014 #90)*, 328 P.3d 155, 158 (Colo. 2014). The Court “will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading.” *Earnest v. Gorman (In re Initiative for 2009-2010 #45)*, 234 P.3d 642, 648 (Colo. 2010); see also *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999) (observing that this court will reverse a title only if it contains a "material omission, misstatement, or misrepresentation"). Respondents agree that Petitioners preserved this issue for appeal.

B. The Title Is Not Misleading.

The Title is clear and does not mislead the voters. “While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative.” *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations

omitted). Here, the Title thoroughly but succinctly captures the key features of the measure, is not likely to mislead voters as to the Initiative's purpose or effect, nor does the Title conceal some hidden intent.

Petitioners Ward and Mendyk claim that the title is misleading because it does not provide descriptions of each of the insurance benefits and the amounts of coverage that must be provided to delivery drivers pursuant to the measure. These suggested additions are not necessary, or they are already included in the title.

For example, the title clearly tells voters that Initiative #139 “establish[es] 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.” The Initiative does not expand benefits to anyone other than third-party alcohol delivery employees and independent contractors and does not establish new requirements for independent contractors generally. As a result, any mention of those issues in the title would be misleading. The title as set by the Title Board is clear and understandable and alerts voters to the central features of the measure.

The Court is not to “consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title “fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or

against a proposition by reason of the words employed by the Board." *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996). Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)).

Only in a clear case should a title prepared by the Title Board be held invalid. *In re Title, Ballot Title & Submission Clause Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982*, 649 P.2d 303, 306 (Colo. 1982). This is not such a case.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board for Proposed Initiative 2021-2022 #139.

Respectfully submitted this 10th day of May 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May 2022 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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