COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 16, 2022 2:07 PM
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 #139 ("Sales and Delivery of Alcohol Beverages") **Petitioners**: Christopher Fine, Steven Ward, and Levi Mendyk **v.** **Respondents**: Robert Schraeder and Joel Allen Cathy **and** **Title Board**: Theresa Conley, David Powell, and Julie Pelegrin.	▲ **COURT USE ONLY** ▲
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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 1,707 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/ Peter G. Baumann

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ARGUMENT

I. The proposed initiative contains a single subject.

A. The Beer Code's legislative declaration does not establish that #139 covers multiple subjects.

In 2019, the General Assembly created a single license to cover the wholesale distribution of beer and wine—as well as their manufacture and import—removing the distinction between those beverages that had previously existed in Colorado law.

Petitioner Fine argues that, in doing so, the General Assembly simultaneously established that other measures creating a single licensing regime for beer and wine contravene the constitutional single subject requirement. Pet. Christopher Fine's Op. Br. on Proposed Initiative 2021-2022 #139 ("Fine Op. Br.") at 8–13 (May 10, 2022). Not only would such a declaration contradict the General Assembly's own homogenous treatment of beer and wine licenses in 2019, but it would also lack the binding effect Petitioner hopes to establish here.

First, the legislative declaration at § 44-4-102(2), C.R.S., does not address the single subject requirement. Nothing in it purports to impose

a single-subject determination on the General Assembly, the Title Board, or any other body. Instead, it expresses a legislative judgment that separate licensing regimes are no longer necessary for the manufacture, wholesale, or import of beer and wine, but are still beneficial at the retail level. That judgment expresses no opinion on whether the regulation of beer and wine are so separate and distinct as to create two separate subjects for purposes of the constitutional single-subject requirement.

To create a single-subject issue out of § 44-4-102(2), Petitioner Fine tries to link the declaration's "separate and distinct" language to its judgment that separate retail licenses are still necessary. *See, e.g.*, Fine Op. Br. at 12 ("The General Assembly has already pronounced . . . that the regulation of beer and other alcohol beverages (i.e. wine and spirits) is 'separate and distinct' at the 'retail level.'") (quoting § 44-4-102(2)). But the plain language of the declaration shows no such relation. Rather, the General Assembly acknowledged that regulatory regimes have historically treated beer and wine separately. § 44-4-102(2) (declaring that "fermented malt beverages and malt liquors [i.e.

beer] are separate and distinct from, and have a unique regulatory history in relation to, vinous and spirituous liquors [i.e. wine and spirits]"). From there, the General Assembly explained its opinion that this historical treatment is no longer necessary "except at the retail level." *Id.*

This declaration expresses three separate judgments of the General Assembly: (1) that beer and wine are, and have historically been treated as, "separate and distinct," (2) that despite such distinction, beer and wine should be subject to a single regulatory framework in most instances, and (3) that a separate framework is still beneficial at the retail level. Petitioner Fine asks the Court to apply the first judgment—that beer and wine are "separate and distinct"—to the final step, despite the General Assembly's choice not to apply it to the intermediary. But that would be an inaccurate interpretation of the plain language of the statute. If the General Assembly's determination that beer and wine are "separate and distinct" creates a single subject problem at the retail level, then so does it at the wholesale,

manufacture, and import level. Through its passage of SB19-11, the General Assembly expressly rejected that conclusion.

Second, the single subject requirement is a constitutional obligation that cannot be usurped by legislative declaration. Colo. Const. art. V, § 1(5.5) ("No measure shall be proposed by petition containing more than one subject."). If the General Assembly were to pass a law declaring two subjects separate for constitutional purposes—which it did not here—the Title Board would still need to apply the constitutional single subject requirement notwithstanding the legislative declaration.

Consider, for example, a legislative declaration that the establishment of a tax credit and the adjustment of procedural requirements for future tax-related initiatives share a single subject of "revenue changes." *But see In re Title, Ballot Title and Submission Clause,* 900 P.2d 121, 125 (Colo. 1995) (concluding that these are separate subjects in violation of Article V, § 1(5.5)). This Court's decision holding otherwise, not the legislative declaration, would be binding on the Title Board. *See also* § 1-40-106.5(3) (requiring Title

Board to "apply judicial decisions construing the constitutional single-subject requirement for bills"). So too if the General Assembly declared that "expand[ing] preschool programs and penaliz[ing] local policymakers who ban any form of tobacco or nicotine" are separate subjects. *But see In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 18 (concluding that these are not separate subjects). Here, again, the Title Board would be forced to reject the legislative declaration.

And this would be the case even in instances where this Court has not yet weighed-in; the General Assembly could not declare food safety and outdoor recreation a single subject, and expect the Title Board to adhere to that determination. Or, for that matter, that the regulation of beer brewed by New Belgium Brewing Company is separate and distinct from regulation of beer brewed at Denver Beer Co. Article V, section 1(5.5) imposes upon the Board an obligation to independently assess whether an initiative satisfies the single-subject requirement.

Moreover, even the General Assembly's single subject determinations are subject to judicial review. *See* Colo. Const. art. V,

§ 21 (prohibiting passage of non-appropriations bills containing more than one subject); *People v. Montgomery*, 2014 COA 166, ¶14–17 (considering whether enactment of General Assembly satisfied single subject requirement). Thus, even if the General Assembly had declared #139 to encompass multiple subjects, which it did not, that declaration would be subject to this Court's review.

Finally, although the Board must follow "substantive requirements" for the initiative process established by state statute, that does not mean the General Assembly may dictate the outcome of the Board's single-subject analysis. *See* Fine Op. Br. at 12 (citing *Hayes v. Ottke*, 2013 CO 1, ¶ 16). The General Assembly may establish procedures to which the Board must adhere. *Hayes*, 2013 CO 1, ¶ 28. But nothing in statute or law suggests that the General Assembly may tie the Board's hands as to its independent constitutional obligation to ensure proposed initiatives encompass a single subject.

Third, and finally, nothing in § 44-4-102(2) addresses the regulation of beer and wine delivery. Thus, even if that declaration expressed an opinion as to the single subject requirement (which it does

not), and even if that opinion was binding on the Title Board (which it is not), that opinion would only be germane as to retail regulation and licensure. *See* § 44-4-102(2) (noting that "a separate regulatory framework and licensing structure . . . is no longer necessary except at the retail level"). Number 139 does not address beer and wine at the retail level, but rather their delivery. The legislative declaration cited by Petitioner offers no reason why the delivery of alcohol should be treated more like retail (keeping beer and wine separate) than like distribution (where they are subject to a single regulatory framework). Proponents chose the latter, and there is nothing impermissible about that choice.

The Title Board correctly concluded that #139 satisfied the constitutional single subject requirement, and nothing in the Colorado's Beer Code's legislative declaration establishes otherwise. The Court should affirm the Board's determination.

B. The treatment of delivery employees and independent contractors is not a second subject.

In a second Petition, Steven Ward and Levi Mendyk argue that #139 fails the single-subject requirement because the insurance and other benefits permittees must offer delivery employees and contractors is a "second important purpose" in addition to #139's establishment of delivery permits. Op. Br. of Pet'rs. Steven Ward & Levi Mendyk ("Ward & Mendyk Op. Br.") at 6 (May 10, 2022). But these benefits are not "discrete" or "unconnected" from the delivery of alcohol, and therefore do not constitute a second subject. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 12 ("[A] proposed initiative cannot seek to accomplish multiple, discrete, unconnected purposes.").

Petitioners Ward and Mendyk's argument that these provisions establish a second subject assumes that #139 "alters the independent contractor relationship" so broadly that voters interested in such alterations may support the measure despite not wanting to authorize third-party delivery of alcohol. Ward & Mendyk Op. Br. at 6–7. But the

logical leaps required to draw that conclusion are substantial, and are absent from Petitioners' Opening Brief. More realistically, voter support for #139 will be driven predominantly by attitudes towards alcohol delivery. The risk of "logrolling" is nonexistent. A voter opposed to alcohol delivery, but supportive of benefits for delivery contractors and employees will likely oppose the measure. And a voter supportive of delivery, but skeptical of these particular benefits, will weigh that skepticism in casting their vote.

The Board's single subject determination should be affirmed.

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

Next, Petitioners Ward and Mendyk challenge the Board's title on the grounds that it does not fully explain the types of insurance and benefits permittees must provide delivery employees and contractors. Ward & Mendyk Op. Br. at 8–10. Contrary to Petitioners' argument, none of these are "central features" of the measure that must be enunciated in detail in its title. *See In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 16 ("The Board's

duty in setting a title is to summarize the central features of a proposed initiative.").

The title set by the Board already summarizes for voters the benefits and compensation permittees must promise to provide employees and contractors. Record at 7 (". . . establishing the requirements for obtaining a delivery 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."). This summary balances the "interrelated problems of length, complexity, and clarity" the Board is given great discretion to resolve. *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 26. And Petitioners offer no compelling reason why more detail as to these requirements is necessary or required.

The Court should affirm the clarity of the Board's title.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 16th day of May, 2022.

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<u>CERTIFICATE OF SERVICE</u>

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 16th day of May, 2022.

s/ Peter G. Baumann
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