

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
#139 (“Third-Party Delivery of Alcohol
Beverages”)

Petitioners: Christopher Fine, Steven
Ward, and Levi Mendyk

v.

Respondents: Robert Schraeder and Joel
Allen Cathey

and

Title Board: Theresa Conley, David
Powell, and Julie Pelegrin.

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Case No. 2022SA129

THE TITLE BOARD’S 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, 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 2,545 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

PETER G. BAUMANN, #51620

Assistant Attorney General

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #139 contains a single subject.

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

STATEMENT OF THE CASE

Proponents Robert Schraeder and Joel Allen Cathey seek to circulate #139 to obtain the requisite number of signatures to place a measure on the ballot to amend Colorado law to authorize delivery of alcohol beverages sole by licensed retailers and establish permits to facilitate that delivery. Record filed May 5, 2022 (“Record”) at 2.

A majority of the Board concluded that the measure contains a single subject at its April 20, 2021, meeting, and the Board proceeded to set title. *Id.* at 9–10. Petitioner Christopher Fine filed a timely motion for rehearing asserting #139 contains multiple subjects and that the title set by the Board violated the clear title requirement. *Id.* at 11–14. Petitioners Steve Ward and Levi Mendyk also filed a timely motion for rehearing asserting #139 contains multiple subjects and that the title

set by the Board violated the clear title requirement. *Id.* at 15–16. On rehearing on April 28, 2022, the Board made edits to the title, but otherwise denied the motions. *Id.* at 7–8.

SUMMARY OF ARGUMENT

The Board’s actions in setting #139 should be affirmed. The single subject of #139 is the delivery of alcohol. Specifically, establishing third-party delivery service permits to facilitate the delivery of alcohol beverages. A legislative declaration in the existing Code does not address delivery, let alone establish that delivery of beer and wine are separate subjects. And the measure’s provisions relating to insurance and other benefits for delivery employees and contractors are implementing provisions directly tied to the delivery of alcohol.

Further, the Board’s title is not misleading. The title faithfully, accurately, and briefly states the central provisions of #139. 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 that both sets of Petitioners preserved the single subject issue by raising it in their respective motions for rehearing. Record at 11–13; 15.

B. The single subject requirement is met.

The single subject of #139 is the delivery of alcohol beverages. Number 139 establishes third-party delivery service permits which would enable permittees to deliver alcohol beverages from certain retailers of alcohol beverages to persons 21 years of age and older in Colorado. It also establishes the terms of the program, and the requirements permittees must satisfy in order to qualify for a third-party delivery service permit.

Neither the terms of the program, nor the specific types of alcohol beverages it encompasses, nor the requirements imposed on putative permittees constitute a second subject. The Board's single subject determination should be affirmed.

1. Delivery of wine and beer are separate subjects.

In the first challenge to the Board’s single subject determination, Petitioner Fine argues that #139 contains multiple subjects because it would allow permittees to deliver both beer and wine. Pet. for Rev. of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2021-2022 #139 at 3 (May 5, 2022) (“Fine Petition”); Record at 12.

Petitioner Fine bases this argument on an existing legislative declaration that “recognizes” that beer is “separate and distinct” from wine and spirits and has a “unique regulatory history in relation to” those other forms of alcohol. § 44-4-102(2). That same declaration notes that “maintaining a separate regulatory framework and licensing structure” for beer and wine “is no longer necessary except at the retail level.” *Id.*

Petitioner cites this language as evidence of separate subjects, theorizing that because the measure addresses “retail level regulation” of beer and wine, it must necessarily encompass multiple subjects. Record at 12. But the legislative declaration at § 4-4-102(2) actually establishes the interconnectivity of #139’s treatment of alcohol delivery.

The relevant passage in § 4-4-102(2) was added to the Colorado Revised Statutes in 2019. *See* SB 19-011.¹ In that legislation, the Colorado General Assembly revised the Colorado Beer Code to convert existing fermented malt beverage manufacturer, wholesaler, and importer licenses into corresponding malt liquor licenses. In effect, the bill eliminated the regulatory distinction between beer and wine as to manufacturing, wholesaling, or importing, while maintaining the distinction for retail purposes.

The General Assembly's choice to establish a single regulatory scheme for beer and wine at the wholesale level (as one example) did not violate the single subject requirement in 2019. Nor does #139's establishment of a single regulatory scheme for their delivery. Even if the General Assembly could make a binding declaration that certain topics violate the single subject requirement—which the Board does not concede—the Colorado Beer Code's legislative declaration does not

¹ Available at <https://tinyurl.com/ycyck4jy>.

address delivery, let alone establish that delivery of beer and wine are separate subjects.

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 revising the regulatory scheme to facilitate the delivery of beer and of wine both “point in the same direction” of expanding alcohol delivery. Thus, #139 does not “seek to garner support from various factions” with “different or conflicting goals,” *id.* (quotations and citations omitted).

And neither of these provisions is surreptitiously “coiled up in the folds.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 13. Number 139’s treatment of beer and wine delivery would not surprise voters because #139’s “plain language” unambiguously proposes these changes, and “the proposal is not particularly lengthy or complex.” *Id.* (quotations and citations omitted). If anything, most voters would probably be surprised by a measure affecting delivery of alcohol that did not address both beer and wine.

2. Number 139's standards for delivery employees and contractors are not a separate subject.

In a second Petition, Petitioners Steven Ward and Levi Mendyk argue that #139's provisions relating to delivery employees and contractors are a second subject on top of its treatment of alcohol delivery. Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2021-2022 #139 at 3 (May 6, 2022) ("Ward & Mendyk Petition"); Record at 15. But these are implementing provisions directly tied to the initiative's central purpose.

Petitioners' argument is that #139 violates the single subject requirement by setting standards for the types of insurance coverage and mileage reimbursement third-party delivery service permittees must provide their delivery employees and contractors. Record at 15. 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).

Number 139's single subject is the delivery of alcohol beverages. And the benefits permittees are required to provide delivery employees and contractors is "dependent upon [and] connected] to that single subject. *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 2012 CO 26, ¶ 10. Number 139 does not expand benefits in unrelated industries, or establish new standards for the treatment of independent contractors. Instead, it outlines the promises permittees must make in order to receive a single, specific, delivery permit, including by setting standards for collision, health, and disability insurance. Record at 3. These are all fairly encompassed within #139's single subject: delivery of alcohol.

The Court should affirm the Board's single subject determination and conclude the Board had jurisdiction to set title on the measure.

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 challenges to clear title by timely filing for rehearing. Record at 13; 15–16.

B. The title accurately describes the measure.

The Board’s title for #139 is not misleading. Number 139 proposes to authorize delivery of alcohol beverages, and establishes a permitting process to regulate that delivery. The title set by the Board is as follows:

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?

Record at 7.

Petitioners Ward and Mendyk argue that the title fails to describe the central features of #139. Ward & Mendyk Petition at 4. Specifically, they assert that the title fails to comprehensively describe each of the types of insurance permittees would be required to provide their delivery employees and contractors. They believe that these requirements “would potentially make it cost-prohibitive for third-party delivery companies to operate and profit from third-party delivery in Colorado,” so each needs to be spelled out in detail in the title itself. *Id.*

But the title set by the Board already informs voters that #139 includes “requirements [that permittees] carry insurance and to provide insurance, health-care benefits or stipend, and reimbursement for fuel

costs to employees and independent contractors.” Record at 7. Voters to whom the particularities of these requirements are important may review the specifics in the measure itself or the blue book. The Board need not “recite every detail of the proposed measure” in its title. *In re Title, Ballot Title and Submission Clause of 2019-2020 #315*, 2020 CO 61, ¶ 26. And requiring the board to include particularities as to each form of insurance coverage and compensation mentioned would likely “result in a lengthy and complex title, and this would be contrary to the Board’s statutory charge.” *Id.* ¶ 31 (citing § 1-40-106(3)).

Finally, the Board was not required to explain or address the potential for the insurance requirements to dissuade some potential permittees from applying for a permit. This is a potential effect of the measure that the Board need not include in the title. *See id.* ¶ 26 (“The Board . . . need not explain the meaning or potential effects of the proposed initiative on the current statutory scheme.”).

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. Petitioners may quibble with the Board’s decisions to omit certain granular details, 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*, 2016 CO 24, ¶ 23). The Board’s title “correctly and fairly express the true intent and meaning” of #139, as required by statute. *See* § 1-40-106(3)(b).

The title set by the Board is not deficient for failing to include more specific details about the standards imposed on permittees with regards to their delivery employees and contractors. The Board properly set title for #139, and that title should be affirmed.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 10th 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 OPENING BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 10th day of May, 2022.

s/ Leslie Bostwick

Leslie Bostwick