

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

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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 #97

Petitioner: STEVE WARD and LEVI MENDYK

▲ COURT USE ONLY ▲

v.

Supreme Court Case No.
2022SA134

Respondents/Proponents:

ROBERT SCHRAEDER and JOEL ALLEN
CATHEY **And**

Ballot Title Board: THERESA CONLEY,
DAVID POWELL, and JULIE PELEGRIN

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PETITIONER'S OPENING BRIEF

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).

Choose one:

It contains **1693** words.

It does not exceed 30 pages.

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) 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 #97 (unofficially captioned as “Concerning Liquor Licenses”).

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 #97.

Robert Schrader and Joel Allen Cathey (hereafter “Proponents”) proposed Initiative 2021-2022 #97 (the “Proposed Initiative”). Proponents submitted their Proposed Initiative to the Title Board for the setting of a title and submission clause pursuant to § 1-40-106, C.R.S.

The Title Board held a hearing on April 20, 2022, where it determined that the Proposed Initiative contained a single subject as required by Colo. Const. art. V, §1(5.5) and § 1-40-106.5, C.R.S., and set a title. On April 27, 2022, Petitioners filed a Motion for Rehearing stating that the titles were misleading and did not accurately describe the measure. Title Board held a rehearing on April 28, 2020, at which time it denied Petitioners' Motion to Rehearing.

In the Motion concerning the Proposed Initiative Petitioner argued that the title did not contain a single subject and did not adequately describe the central features of the measure. The Title Board set the final ballot title for Initiative #97 as follows:

A change to the Colorado Revised Statutes concerning the number of retail liquor licenses in which a person may hold an interest, and, in connection therewith, increasing the number of retail liquor store licenses and decreasing the number of liquor-licensed drugstore licenses, including licenses for sale of liquor in grocery stores, a person may own or hold an interest in, on and after January 1, 2027, to a maximum of 12 licenses for each type of retail establishment.

SUMMARY OF ARGUMENT

The Title Board was incorrect in its determination that the Proposed Initiative contains a single subject, and this Court should vacate the titles and remand to the Title Board with instructions to dismiss for lack of jurisdiction.

Alternatively, because the Title does not properly set forth the central features of the Proposed Initiative as required by statute the Court should direct the Board to correct the titles to fairly, accurately, and completely describe central features of the measure.

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. The Proposed Initiative violates the single subject requirement, and the Title Board does not have jurisdiction to set a Title.

A. Standard of Review.

Colo. Const. art. V, § 1(5.5) requires that “[n]o measure shall be proposed by petition containing more than one subject.” *See also* section 1-40-106.5, C.R.S., (statutory single-subject requirement). A proposal has a single subject when the initiative’s provisions are “necessarily and properly” related to the general single subject, rather than “disconnected or incongruous” with that subject. *Title v. Apple (In re Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17))*, 920 P.2d 798, 802 (Colo. 1996).

While the Court does "employ all legitimate presumptions in favor of the propriety of the Board's actions," it will overturn the Title Board's single subject determination in a clear case. *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016), citing *Kemper v. Hamilton (In re Title, Ballot Title & Submission Clause for 2011-2012 #3)*, 274 P.3d 562, 565 (Colo. 2012) (quoting *Earnest v. Gorman (In re Title, Ballot Title & Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 645 (Colo. 2010)).

B. The Proposed Initiative contains two separate and distinct subjects.

The Proposed Initiative has two distinct purposes, 1) it increases statewide licenses for retail liquor stores and 2) it drastically decreases statewide licenses for liquor licensed drug stores.

1. Increasing access to one type of alcohol retail license and decreasing access to another do not advance the same objective or purpose.

An initiative may not address incongruous subjects in the same measure; provisions must have a necessary or proper connection. C.R.S. § 1-40-106.5(1)(e)(I). If an initiative advances separate and distinct purposes, the fact that they both relate to the same general concept or subject is insufficient to satisfy the single subject requirement. *Johnson*, 374 P.3d at 462.

Under the Proposed Initiative, access to liquor store licenses for the retailers would be expanded while licenses for liquor licensed drug stores much lower limits would be eliminated. These provisions to both expand and reduce access to alcoholic beverage retail licenses do not “point in the same direction,” but have “different or conflicting goals.” See *Kemper v. Leahy (In re Title Ballot Title, & Submission Clause for 2013-2014 #89)*, 328 P.3d 172, 178 (Colo. 2014).

These are two distinct and disconnected subjects that do not share a common objective. The first has the goal of expanding certain alcohol licenses, retail liquor licenses, but the second significantly reduces liquor licensed drug store licenses.

2. The significant reduction in the availability of liquor licensed drug store licenses would be a surprise to voters

The single-subject requirement is intended to protect against “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Kemper v. Hamilton ((In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)*, 274 P.3d 576, 582 (Colo. 2012).

In order to benefit retail liquor licensees, the proponents expand access to these licenses from three to eight after January 1, 2022; from four to twelve after January 1, 2027 and decrease liquor licensed drug stores from an eventual unlimited number to maximum of twelve.

As a result, the initiative will prohibit the licenses that a grocery store or other retailer qualifying as a liquor licensed drug store can obtain. It is not clear that the Proposed Initiative, will overall reduce consumer access liquor. Voters will be surprised that voting yes on the question will reduce their access to convenient retail liquor options.

Voters are likely in favor of expanding retail options, or they are not. Here they have to choose between disconnected topics.

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 initiative fails to describe the differences between a retail liquor store and a liquor licensed drug store. Not until initiative #100 was before the board did the board start adding descriptive language. Voters would be surprised to know that a liquor licensed drugstore bears little resemblance to a drugstore.

Although many license requirements are tied to the presence of a pharmacy it is primarily held by grocery stores and other retailers that sell items beyond those found in a typical drug store.

The measure also does not describe the relative increases and decreases. Instead it advises the voters that all licenses will be set at a maximum of 12, but voters won't know that the proponents are advocating for a drastic reduction in the options for liquor sales. Where previously, liquor licensed drug stores would soon be unlimited, they are essentially frozen at twelve as of January 2027. They also will not be advised that the total number of retail liquor stores will triple. Without some context to the numbers voters will not be advised as to the central purposes of the measure.

CONCLUSION

Petitioner respectfully requests this Court hold that 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/MAILING

I hereby certify that on 10th day 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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