

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
#115 (“Sales and Delivery of Alcohol
Beverages”)

Petitioners: Christopher Fine

v.

Respondents: Steven Ward and Levi
Mendyk

and

Title Board: Theresa Conley, David Powell,
and Jeremiah Barry.

PHILIP J. WEISER, Attorney General
PETER G. BAUMANN, Assistant Attorney
General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6403
FAX: (720) 508-6152
E-Mail: peter.baumann@coag.gov
Registration Number: 51620
*Counsel of Record
Attorneys for the Title Board

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Case No. 2022SA142

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 3,268 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

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Standards governing titles set by the Board.	3
II. The proposed initiative contains a single subject.....	4
A. Standard of review and preservation.	4
B. The single subject requirement is met.	5
1. The measure’s delivery provisions are properly encompassed within its single subject.....	6
2. The regulation of wine and beer at the retail level are not separate subjects.....	9
3. Number 115’s “Repeal and Reenact” provision is not a second subject.....	12
III. The title set by the Board is not misleading.....	15
A. Standard of review and preservation.	15
B. The title accurately describes the measure.	15
1. “An expansion of retail sale of alcohol beverages” is an accurate description of #115’s single subject.....	16

2. The absence of licensing requirements for technology services companies that facilitate third-party delivery of alcohol beverages is not a central feature of the measure.	17
CONCLUSION	18

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Blake v. King</i> , 185 P.3d 142 (Colo. 2008).....	14
<i>In re Proposed Initiative on Trespass-Streams with Flowing Water</i> , 910 P.2d 21 (Colo. 1996).....	3
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #3</i> , 2019 CO 107	15
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #45</i> (“ <i>In re #45</i> ”), 234 P.3d 642, 645 (Colo. 2010)	3
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #91</i> , 235 P.3d 1071 (Colo. 2010).....	3
<i>In re Title, Ballot Title and Submission Clause for 2021-2022 #16</i> , 2021 CO 55	7
<i>In re Title, Ballot Title and Submission Clause of 2013-2014 #90</i> , 2014 CO 63	18
<i>In re Title, Ballot Title and Submission Clause of 2019-2020 #315</i> , 2020 CO 61	6
<i>In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative</i> , 649 P.2d 303 (Colo. 1982)	3
<i>In re Title, Ballot Title, & Submission Clause for 2011-2012 #45</i> , 2012 CO 26	5
<i>In re Title, Ballot Title, Submission Clause for 2007-2008 #62</i> , 184 P.3d 52 (Colo. 2008).....	18
<i>Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16</i> , 489 P.3d 1217 (Colo. 2021).....	11

<i>Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74, 962 P.2d 927 (Colo. 1998)</i>	6
<i>n re Title, Ballot Title, and Submission Clause for 2007-08 #62, 184 P.3d 52 (Colo. 2008)</i>	4

CASES

§ 1-40-106(3)(b), C.R.S. (2021)	4
§ 1-40-106.5(1)(e)(I), C.R.S. (2021).....	7
§ 1-40-106.5(1)(e)(II), C.R.S. (2021)	7
§ 1-40-123(2), C.R.S. (2021).....	12, 13, 14
§ 18-18-429, C.R.S. (2021)	8
§ 24-80-905, C.R.S. (2021)	13
§ 25-5-403(1)(a), (d), C.R.S. (2021)	8
§ 39-28-101(1.3), C.R.S. (2021).....	8
§ 43-4-218(2)(e), C.R.S. (2021).....	8
§ 4-4-102(2), C.R.S. (2021).....	9, 10
§ 44-3-301(12), C.R.S. (2021).....	13
§ 44-4-102(2), C.R.S. (2021).....	9
SB 19-011.....	10

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #115 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 Steven Ward and Levi Mendyk seek to circulate #115 to obtain the requisite number of signatures to place a measure on the ballot to amend Colorado law to establish a new fermented malt beverage and wine retailer license for off-site consumption. Record filed May 5, 2022 (“Record”) at 2–16. The new license would allow grocery stores, convenience stores, and other business establishments licensed to sell beer for off-site consumption to also sell wine. *Id.* The measure also enables the delivery of alcohol. *Id.*

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 19–20. Petitioner Christopher Fine filed a timely motion for rehearing asserting #115 contains multiple subjects and that the

title set by the Board violated the clear title requirement. *Id.* at 21–24. On rehearing on April 28, 2022, the Board made edits to the title, but otherwise denied the motions. *Id.* at 17–18.

SUMMARY OF ARGUMENT

The Board’s actions in setting #115 should be affirmed. The single subject of #115 is expanding the retail sale of alcohol beverages. Specifically establishing a new off-site consumption license that would enable grocery stores and similar retailers to sell both beer and wine, and enabling delivery of alcohol beverages. All aspects of the measure expand the retail sale of alcohol beverages, and none of its provisions are hidden within the initiative’s text. Thus, #115 presents neither of the evils the single subject requirement aims to avoid.

Further, the Board’s title is not misleading. The title faithfully, accurately, and briefly states the central provisions of #115. 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 Petitioner preserved the single subject issue by raising it in their motion for rehearing.

Record at 21–23.

B. The single subject requirement is met.

The single subject of #115 is expanding the retail sale of alcohol beverages. Each of its provisions is directly connected to that purpose. Petitioners mount three challenges to the Board's single subject determination: (1) that the initiative's provisions encompassing delivery of alcohol create a second subject, (2) that an existing declaration in the Colorado Beer Code establishes that the sale of wine at retail is a separate subject than the retail sale of beer, and (3) that the initiative surreptitiously alters current law governing conflicting ballot measures. *Pet. for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #115 ("Sales and Delivery of Alcohol Beverages")* ("Pet.") at 3.

Each of these arguments is without merit, and the Board's single subject determination should be affirmed.

- 1. The measure's delivery provisions are properly encompassed within its single subject.**

Petitioners first suggest that #115's provisions concerning delivery of alcohol establish a second subject. Pet. at 3. But this allegation relies on an overly narrow reading of the initiative's text.

"Multiple 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). Instead, the question is whether an initiative's terms are "necessarily and properly connected rather than disconnected or incongruous[.]" *In re Title, Ballot Title and Submission Clause of 2019-2020 #315*, 2020 CO 61, ¶ 13.

The single subject requirement serves two purposes. First it prevents proponents from combining disparate topics into a single proposal “for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits[.]” *Id.* ¶ 12 (quoting § 1-40-106.5(1)(e)(I)). And second, it prevents the passage of “surreptitious” provisions to “prevent surprise and fraud from being practiced upon voters.” *Id.* (quoting § 1-40-106.5(1)(e)(II)).

Neither of these concerns are relevant here. As to the former, the risk of “logrolling” is minimal because allowing grocery stores to sell wine and allowing third party delivery of alcohol products both “point in the same direction” of expanding the sale and delivery of alcohol. *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 33 (quotations omitted). Thus, #115 does not “seek to garner support from various factions” with “different or conflicting goals.” *Id.*

Nor does #115 seek to surprise voters with surreptitious provisions that might surprise voters upon their enactment. Both its sale provisions and its delivery provisions “relate[] to the same subject,”

id., and the initiative’s “plain language” unambiguously proposes both changes, *id.* Neither evil for which the single subject test exists warrants recognition of a second subject here.

Further, many statutes cover both sale and delivery, strongly suggesting that sale and delivery of a product may constitute a single subject. For example:

- Section 39-28-101(1.3), C.R.S. (2021) addresses the sale and delivery of cigarettes to consumers.
- Section 18-18-429, C.R.S. (2021) criminalizes the “manufacture, sale or delivery of drug paraphernalia.”
- Section 25-5-403(1)(a), (d), C.R.S. (2021) prohibits “[t]he manufacture, sale, or delivery or the holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;” and “The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 25-5-412.”
- Section 43-4-218(2)(e), C.R.S. (2021) defines “[r]etail delivery” as a “retail sale of tangible personal property by a retailer or delivery by a motor vehicle owned or operated by the retailer or any other person to the purchaser at a location in this state, which sale includes at least one item of tangible personal property that is subject to taxation under article 26 of title 39,” and further provides that “[e]ach such retail sale is a single retail delivery regardless of the number of shipments necessary to deliver the items of tangible personal property purchased.”

Contrary to Petitioner’s argument, sale and delivery can exist as a single subject, just as they do in this measure.

2. The regulation of wine and beer at the retail level are not separate subjects.

Petitioner also argues that an existing declaration in the Colorado Revised statutes establishes that regulation of wine and beer and the retail level are separate subjects. Pet at 3. That declaration, which is found in the Colorado Beer Code, “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). It also notes, however, 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. But the legislative declaration at § 4-4-102(2) actually establishes the interconnectivity of #115’s treatment of alcohol sales.

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 #115's decision to establish a single regulatory scheme for grocery stores and other similar retailers. 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

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

Code’s legislative declaration does not address delivery, let alone establish that delivery of beer and wine are separate subjects.

And again, 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 eliminate regulatory distinctions between beer and wine does not “seek to garner support from various factions” with “different or conflicting goals,” *id.* (quotations and citations omitted). The entire measure points in the direction of liberalizing existing regulations governing the sale of alcohol.

Moreover, the measure plainly states in its declaration that it will permit the “sale of wine in grocery and convenience stores that are licensed to sell beer.” Record at 2. Thus, there is no concern that voters will be surprised that the new license established by the measure enables the sale of both beer and wine.

3. Number 115’s “Repeal and Reenact” provision is not a second subject.

Petitioner next alleges that #115’s “repeal and reenact” clause establishes a second subject by “alter[ing] the generally applicable ballot initiative procedure for resolving conflicts among ballot initiatives.” Pet. at 3. But on its face, #115 does not address conflicts between initiatives. And the suggestion that its repeal and reenact clause would alter application of relevant legal principles in that scenario is both unlikely and a legal effect of the measure irrelevant to the Board’s (and this Court’s) single subject analysis.

When voters approve of multiple measures with conflicting provisions, “the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict.” § 1-40-123(2). This is current law, and nothing in #115 purports to address § 1-40-123(2), let alone change it for this or any other provision.

Number 115 does accomplish its changes to Colorado alcohol laws by repealing the laws it addresses and reenacting those laws with the relevant adjustments. *See, e.g.*, Record at 2 (noting that the proposed

initiative would “repeal and reenact, with amendments,” § 44-3-301(12)). On its face, the effect of these “repeal and reenact” provisions would be to repeal any legislative changes made to the relevant sections between when the measure was drafted and the adoption of #115.

It does not, however, address changes made to those sections as a result of conflicting initiatives. In the event another initiative is adopted by the people, and that initiative conflicts with #115, there is nothing in #115 that would affect the operation of current law as codified at § 1-40-123(2). The measure receiving the greatest number of votes would prevail.

A hypothetical is instructive. Imagine a “repeal and reenact” measure to make the larkspur the state flower of Colorado. *See* § 24-80-905 (establishing the white and lavender columbine as the Colorado state flower). If a competing measure to coronate the bluebell also passes, and receives more votes, there would be no question that this flower, not the larkspur, would usurp the Colorado columbine. The former’s “repeal and reenact” clause would not change the analysis under § 1-40-123(2).

To be sure, the more complicated scenario arises when two measures conflict in some provisions but not others. But in such cases, “in all particulars as to which there is a conflict” the measure receiving more votes will prevail. § 1-40-123(2). Including, presumably, where that conflict occurs by operation of the repeal and reenact clause.

Moreover, any argument otherwise relies on speculation as to the legal effect of the measure. And such conjecture is not proper in this limited proceeding. *See, e.g., Blake v. King*, 185 P.3d 142, 145 (Colo. 2008) (“At this stage, we do not address the merits of a proposed measure, interpret it, or construe its future legal effects. Instead, these are matters for judicial determination in a proper case should the voters approve the initiative.”) (citations and quotations omitted). Nothing in #115 suggests that it would change the operation of current law in such cases, and any argument that it would is legal guesswork.

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 Petitioner preserved a challenge to clear title by timely filing for rehearing. Record at 24.

B. The title accurately describes the measure.

The Board’s title for #115 is not misleading. Number 115 proposes to liberalize existing alcohol laws by allowing the sale of wine in grocery stores and similar retailers and authorizing delivery of alcohol beverages. The title set by the Board is as follows:

Shall there be a change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, establishing a new fermented malt beverage and wine retailer license for off-site consumption to allow grocery stores, convenience stores, and other business establishments licensed to sell fermented malt

beverages, such as beer, for off-site consumption to also sell wine; automatically converting such a fermented malt beverage retailer license to the new license; allowing fermented malt beverage and wine retailer licensees to conduct tastings if approved by the local licensing authority; allowing retail establishments, including restaurants and liquor stores, to deliver any alcohol beverages, they are licensed to sell, to a person 21 years of age or older through a third-party delivery service that has obtained a delivery service permit; and removing the limit on the percentage of gross sales revenues a licensee may derive from alcohol beverage deliveries?

Record at 17.

Petitioner challenges the Board's title in two ways. Neither constitutes an abuse of the Board's considerable discretion.

1. **“An expansion of retail sale of alcohol beverages” is an accurate description of #115's single subject.**

Petitioner first argues that “expansion of retail sale of alcohol beverages” is an inaccurate single subject statement “because ‘delivery’ of alcohol is not a ‘retail sale’ of alcohol and does not necessarily expand such sales.” Pet. at 4. But to the average voter, provisions that liberalize existing alcohol laws in ways that increase opportunities to purchase alcohol fit neatly within the Board's single subject statement. Although

regulatory attorneys may distinguish between retail sale, wholesale, and delivery, the average voter draws no such distinctions. Allowing a customer to purchase wine from their local grocer expands opportunities for the retail sale of alcohol, as does allowing that same customer to have alcohol delivered. The Board's title encompasses the various provisions of #115.

2. The absence of licensing requirements for technology services companies that facilitate third-party delivery of alcohol beverages is not a central feature of the measure.

Finally, Petitioner challenges the Board's decision not to include in the title that "technology services companies can play a central role in third-party delivery of alcohol beverages but are expressly exempt from having to obtain any state or local permit or license for their role." Pet. at 4. But the absence of these licenses is not a central feature of the proposed initiative.

"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 Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60

(Colo. 2008). Here, the absence of a licensing requirement for technology providers that facilitate third-party alcohol delivery is not a central feature of the measure. As written, #115 spans more than a dozen pages, making changes to an equal number of statutory sections. In drafting its title, the Board was charged with “resolving interrelated problems of length, complexity, and clarity,” *In re Title, Ballot Title and Submission Clause of 2013-2014 #90*, 2014 CO 63, ¶ 24, and this Court offers it discretion in doing so, *id.* Electing not to discuss the measure’s licensing decisions as to technology providers falls within the bounds of that discretion.

Number 115’s title fairly and concisely informs voters about central features of the proposed initiative. Nothing in it is misleading or fails to fairly reflect the initiative. The Board’s title should be affirmed.

CONCLUSION

The Court should affirm the decisions of the Title Board.

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

PHILIP J. WEISER
Attorney General

/s/Peter G. Baumann

PETER G. BAUMANN, 51620*

Assistant Attorney General

Public Officials Unit

State Services Section

Attorneys for the Title Board

*Counsel of Record

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 16th day of May, 2022.

s/ Peter G. Baumann

Peter G. Baumann