

COLORADO SUPREME COURT

2 East 14th Avenue,
Denver, Colorado 80203

Original Proceeding
Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board

Petitioner:

Christopher Fine

v.

Respondents/Proponents:

Steven Ward and Levi Mendyk

and

Title Board:

Theresa Conley, David Powell, and Jeremiah Berry

COURT USE ONLY

Attorneys for Respondents:

Suzanne Taheri #23411
MAVEN LAW GROUP
6501 E. Belleview Ave., Suite 375
Englewood, Colorado 80111
Phone: (303) 263-0844
Email: staheri@mavenlawgroup.com

Case No.: 2022SA149

Respondents' Opening Brief

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **2,771** words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by Petitioner, 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 Colorado Appellate Rules 28 and 32.

s/ Suzanne Taheri

Suzanne Taheri

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Respondents Steven Ward and Levi Mendyk, registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2021-2022 #122 (“Initiative #122”), through counsel respectfully submit their Opening Brief in support of the title, ballot title, and submission clause (the “Title”) set by the Title Board for Initiative #122.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board clearly err in finding that Initiative #122 properly contains a single subject in conformance with Colo. Const. art. V, §1(5.5.) and Colo. Rev. Stat. § 1-40-106.5?
2. Did the Title Board err in setting a clear title that fully informs voters of the central elements of Initiative #122?

STATEMENT OF THE CASE

This is an original proceeding pursuant to § 1-40-107(2), C.R.S. (2021). Respondents filed Initiative #122 concerning the sales and delivery of alcohol with the Secretary of State on April 8, 2022. Initiative #122 would allow for third-party delivery as alcohol.

The Title Board conducted its initial public hearing and set the title for Initiative #122 on April 20, 2022. Petitioner filed a motion for rehearing on April 27, 2022, alleging that Initiative #122 contained multiple subjects and that the titles

set were misleading and incomplete. The Title Board considered the motion at its April 29, 2022 hearing and granted the motion only to the extent that it made minor changes to the title and submission clause and denied the remainder of the motion.

Accordingly, the Title Board set the final ballot title for the Initiative #122 as:

A change to the Colorado Revised Statutes concerning authorization for the third-party delivery of alcohol beverages, and, in connection therewith, allowing retail establishments licensed to sell alcohol beverages for on-site or off-site consumption to deliver all types of alcohol beverages to a person twenty-one years of age or older through a third-party delivery service that obtains a delivery service permit; prohibiting the delivery of alcohol beverages to a person who is under 21 years of age, is intoxicated, or fails to provide proof of identification; removing the limit on the percentage of gross sales revenues a licensee may receive from alcohol beverage deliveries; 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.

Petitioner sought review of the Title Board's action under § 1-40-107(2), C.R.S. (2021) seeking review of Initiative #122 based on single subject and clear title issues.

SUMMARY OF THE ARGUMENT

The Title Board correctly determined that Initiative #122 contains a single subject. Initiative #122 addresses third-party delivery of alcohol. The provisions

all relate to the implementation of third-party delivery and the Title Board correctly found a single subject in accordance with the law.

The Title Board appropriately exercised its broad discretion drafting the title for Initiative #122, and the title fairly and accurately sets forth the central features of Initiative #122 as required by statute. For these reasons, the decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #122 Meets the Single Subject Requirement

A. Standard of Review

In reviewing the Title Board’s single subject decision, the Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (2016), citing *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010)).

The Court “also liberally construe[s] the single subject requirement to ‘avoid unduly restricting the initiative process.’” *Matter of Title, Ballot Title and Submission Clause for 2013–2014 #90*, 328 P.3d 155, 160 (Colo. 2014), (quoting

In re Title, Ballot Title and Submission Clause for 2009-2010 #24, 218 P.3d 350, 353 (Colo. 2009)). Therefore, the Court ““only overturn[s] the Title Board’s finding that an initiative contains a single subject in a clear case.”” *In re 2013-2014* #89, 328 P.3d 172, 176 (Colo. 2014) (quoting *In re Title, Ballot Title, and Submission Clause for 2011-2012* #3, 274 P.3d 562, 565 (Colo. 2012) and *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 1996* #6, 917 P.2d 1277, 1280 (Colo. 1996)).

B. Provisions Must be Related to One Object or Purpose

“[I]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1080 (Colo.1995). The Title Board need only determine that the initiative “encompasses *related* matters” to establish a single subject. *In re 2013-2014* #89, 328 P.3d at 177, citing *In re Title, Ballot Title, Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Section 2 to Article VII*, 900 P.2d 104, 113 (Colo.1995) (Scott, J., concurring). The Title Board’s determination that the provisions appear to be connected to the Initiative’s

central focus establishes a single subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000).

C. The provisions of Initiative #122 are related to one object or purpose.

Initiative #122 allows retailers to deliver their products through third parties. The provisions in the initiative relate to the implementation of the single subject.

Two enacted Colorado Senate bills had a similar single subject of “concerning the retail sales of alcohol beverages” and made legislative changes in multiple areas related to this subject. The first 26-page bill restricted the issuance of new liquor-licensed drugstore and retail liquor store licenses, allowed liquor-licensed drugstore and retail liquor store licensees to obtain additional licenses, and repealed the limit on the alcohol content of fermented malt beverages.

Colorado Senate Bill 16-197. The second 28-page bill addressed various issues related to the retail sales of alcohol beverages including details regarding the retail sales of beer in sealed containers, delivery of beer, distance requirements for beer retailers from liquor stores, buyer age verification, and beer sales on Christmas day. Colorado Senate Bill 18-243. Assuming these bills properly contained a single subject, Initiative #122 also properly contains one.

Initiative #122’s provisions carry out one general object or purpose as identified by the Title Board: authorization for the third-party delivery of alcohol.

II. Initiative #122 Does Not Implicate Dangers to be Prevented by Single Subject Requirement

As set forth in the Colorado Constitution and affirmed by state statute, the express purpose of the single-subject requirement for proposed voter initiatives is to prevent two “dangers” of multi-subject initiatives: first, it prevents the enactment of combined measures that would fail on their individual merits; second, it protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. Colo. Const. art. 5, § 1(5.5); Colo. Rev. Stat. Ann. § 1-40-106.5. Initiative #122 does not trigger either of the two “dangers” of multiple-subject initiatives.

First, Initiative #122 does not include “incongruous subjects in the same measure” with “no necessary or proper connection, 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[.]” *Hedges v. Schler (In re Title, Ballot Title & Submission Clause for 2019-2020 #3)*, 442 P.3d 867, 870 (Colo. 2019), citing *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016); and C.R.S. § 1-40-106.5(1)(e)(I). An “initiative will be held to violate the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes.” *Id.*

Initiative #122 has the singular purpose of authorizing the third-party delivery and its provisions are properly connected to this purpose. “[J]ust because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected [does not mean] that it necessarily violates the single-subject requirement. It is enough that the provisions of a proposal are connected.” *In re Title v. John Fielder*, 12 P.3d 246, 254 (Colo. 2000), citing *In re Proposed Initiative for 1999-2000 # 25*, 974 P.2d 458, 463 (Colo. 1999).

Second, Initiative #122 will not lead to the “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative” because Initiative #122 is limited to a single matter of expanding the ability of retailers related to alcohol sales. *In re 2011-2012 No. 45*, 274 P.3d 576, 582 (Colo. 2012). There are no hidden provisions that are unrelated to the initiative’s “central theme.” See *Matter of Title, Ballot Title and Submission Clause for 2013-2014 #129*, 333 P.3d 101, 104 (Colo. 2014).

Proponent’s initiative is analogous to Initiative 2017-2018 #4, limiting housing growth. *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 395 P.3d 318 (Colo. 2017). In that case, the Court held that the initiative contained a single subject of limiting housing growth even though it contained various provisions including one that allowed only one percent overall

growth and another that prohibited the issuance of housing permits for a specified time. The Court found the initiative carried out the general objective of limiting growth by providing a means to accomplish its purpose. The provisions are thus interrelated and necessarily and properly connected to the subject of limiting housing growth in Colorado. *Id. See, e.g., In re 2009-2010 #45, 234 P.3d at 647* (finding provisions “seek[ing] to achieve the central purpose of the initiative” to be “directly connected and related” to the initiative’s single purpose).

The principle is the same in this case. In *Hayes* there was a limitation with connected provisions to carry out the objective. Here there is an expansion with connected provisions to allow for wine to be sold in grocery and convenience stores and third-party delivery of the product to the consumers.

At the rehearing, Petitioner relied heavily on the Court’s findings last year in an initiative involving changes to the animal cruelty statutes. *VanWinkle v. Sage (In re Title, Ballot Title & Submission Clause for 2021-2022 #1)*, 489 P.3d 1227 (Colo. 2021).

That case is clearly distinguished here. The Court found that the initiative’s central theme was incorporating livestock into the animal cruelty statutes, but redefining “sexual act with an animal” was a second subject because it addressed the bodily integrity of all animals, not just livestock. Because those subjects were

not necessarily and properly connected, there was the potential for surprise by voters who might not understand that a livestock initiative also affects the care of all animals. However, the Court also rejected the argument that the initiative's safe harbor provision was another subject, because ending exemptions and creating the safe harbor "point in the same direction" of increasing the welfare of livestock. *Id.* at 1224. Here, the delivery and the implementation provisions point in the same direction.

At the rehearing, Petitioner also argued that statutory references to the regulation of beer at the retail level as "separate and distinct" from regulation of wine means the measure's wine and beer provisions are likewise "separate and distinct" in violation of the single-subject requirement.

The term "separate and distinct" appears 141 times in Colorado Statute. It is a term used to describe elements of crimes, ballot styles, fiduciary obligations, and a host of other topics. In the context of liquor licensing each license is "separate and distinct" and it is unlawful for a person to exercise any privilege granted under one license other than the license the person holds. C.R.S. § 44-10-313. But, nowhere in the liquor code does the term infer or denote that the licenses cannot be subject to the same regulations or suggest that the term is even in any way related to single subject.

Numerous sections of the liquor code apply across the board to various types of “separate and distinct licenses.” *See* C.R.S. § 44-3-304 (State licensing application procedures) C.R.S. § 44-3-307 (Prohibiting the types of persons that can hold a license); C.R.S. § 44-3-308 (Unlawful financial assistance); C.R.S § 44-3-601 (Disciplinary actions); C.R.S. 44-3-701 (Inspection of Books); Article 44, Part 8, Judicial Review and Civil Liability; Article 44, Part 9, Unlawful Acts.

Under Petitioner’s argument none of these statutes could be contained in a single initiative or bill because they apply to separate and distinct licenses/subjects. This interpretation would ground legislation to a halt. Each license would have to have its own full statutory scheme which repeatedly covered the topics cited above. The legislative intent is clear that this language applies only to the license type and is not intended to establish a legal requirement for single subject legislation.

Proponents do not seek to stray from the subject of authorizing for the third-party delivery. Initiative #122 does not wrap in matters unrelated to its single subject and no voter will be surprised that by voting yes on the question they will be voting for third-party delivery of alcohol. Providing for delivery of the product and enacting implement provisions all “point in the same direction” and do not have “different or conflicting goals.” *See In re 2013-2014 #89*, 328 P.3d 172, 178 (Colo. 2014).

III. The Title Clearly and Accurately Describes the Central Features

A. Standard of Review

“The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 415 P.3d 151, 153 (Colo. 2016). When reviewing a title for clarity and accuracy, the Court will only reverse the Title Board’s decision if the title is “insufficient, unfair, or misleading.” *In re Initiative for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). Accordingly, the Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *In re 2015-2016 #156*, 415 P.3d at 153 (quoting *In re 2013–2014 #89*, 328 P.3d at 176 and *In re 2009–2010 #45*, 234 P.3d at 645).

B. The Title Clearly, Accurately, and Fairly Describes Initiative #122 and Incorporates All Central Features

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), citing *In re Proposed Petition on Campaign and Political Fin.*, 877 P.2d 311, 313 (Colo. 1994). The Title Board must “capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice in pursuit of the

initiative rights of Colorado citizens.” *In re Title, Ballot Title & Submission Clause for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999). A title 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 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)).

Here, the Title captures every central feature of Initiative #122, allowing delivery of all types of alcohol beverages to a person 21 years of age or older through a third-party delivery service.

Petitioner argues in his Notice of Appeal that the title is unclear because it does not refer to the role of technology companies. However, this Title does capture that language, “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.” While Proponent’s argued against the language, it is unclear what objection the Petitioner has.

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 1229, 1225 (Colo.

2000), citing *In re Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994). Including this in the title would stray from the critical aspects and central features of the proposal.

The title clearly, accurately, and fairly describes Initiative #122, incorporates all of its central features, and voters can understand the meaning of a “yes” or “no” vote.

CONCLUSION

For all these reasons, Respondents respectfully request that the Court affirm the actions of the Title Board for Initiative #122.

Dated: May 16, 2022

Respectfully submitted,

s/Suzanne Taheri

Suzanne Taheri (#23411)

MAVEN LAW GROUP, LLP

*Attorney for Respondents Steven Ward and
Levi Mendyk*

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2022, I electronically filed a true and correct copy of this **Respondents' Opening Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

Attorneys for Title Board

s/ Suzanne Taheri _____
Suzanne Taheri