

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

Petitioners: Christopher Fine

v.

Respondents: Steven Ward and Levi
Mendyk

and

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

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Case No. 2022SA149

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 1,008 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 Beer Code’s legislative declaration does not establish that #122 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 argues that, in doing so, the General Assembly simultaneously established that some other measures addressing both beer and other spirits contravene the constitutional single subject requirement as a matter of law. Pet’r’s Opening Br. on Proposed Initiative 2021-2022 #122 (“Third-Party Delivery of Alcohol Beverages”) (“Pet’r’s Opening Br.”) at 7–15 (May 16, 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), 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.

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 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 S.B. 19-11, 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 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 #122 to encompass multiple subjects, which it did not, that declaration would be subject to this Court’s review. And that review would be hard-pressed to distinguish between the regulation of beer and wine at the wholesale level (which, according to Petitioner, the General Assembly does not think are separate subjects) and their regulation at retail (which are). Instead, the more accurate interpretation of § 44-4-102(2) is that the General Assembly believed in 2019 that separate retail regulatory regimes was beneficial, not that retail regulation of beer and wine are two separate subjects for constitutional purposes.

Finally, although the Board must follow “substantive requirements” for the initiative process established by state statute,

that does not enable the General Assembly to dictate the outcome of the Board's single-subject analysis. The General Assembly may establish procedures to which the Board must adhere. *Hayes v. Ottke*, 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.

In 2019, the General Assembly eliminated regulatory distinctions between beer and other alcohol beverages except, in some instances, at the retail level. Proponents here make a different decision, and want to put that question to the voters. That is a proper use of the initiative process, and is not evidence that #122 covers multiple subjects. The single subject requirement is met.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 23rd 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 RESPONSE BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 23rd day of May, 2022.

s/ Peter G. Baumann

Peter G. Baumann