

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 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 1,710 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

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. Standards governing titles set by the Board.....	2
II. The proposed initiative contains a single subject.....	4
A. Standard of review and preservation.	4
B. The single subject requirement is met.	5
III. The title set by the Board is not misleading.....	8
A. Standard of review and preservation.	8
B. The title accurately describes the measure.....	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

<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	8, 9
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #45</i> , 234 P.3d 642 (Colo. 2010).....	2, 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 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	4
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #89</i> , 2014 CO 66	8
<i>In re Title, Ballot Title, and Submission Clause for 2007-08 #62</i> , 184 P.3d 52 (Colo. 2008).....	3
<i>Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16</i> , 489 P.3d 1217 (Colo. 2021)	7

STATUTES

§ 1-40-106(3)(b), C.R.S. (2021)	4
§ 44-4-102(2), C.R.S. (2021).....	5, 6

OTHER AUTHORITIES

Senate Bill 19-011, 72nd Gen. Assemb., 1st Reg. Sess. (Colo.
2019), <https://tinyurl.com/ycyck4jy>6

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #122 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 #122 to obtain the requisite number of signatures to place a measure on the ballot to amend Colorado law to authorize third-party delivery of alcohol beverages. Record filed May 6, 2022 (“Record”) at 2–6.

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. Petitioner Christopher Fine filed a timely motion for rehearing asserting #122 contains multiple subjects and that the title set by the Board violated the clear title requirement. *Id.* at 10–13. On rehearing on April 29, 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 #122 should be affirmed. The single subject of #122 is delivery of alcohol beverages. Specifically allowing retail establishments licensed to sell alcohol to deliver that alcohol through third-party delivery services. A legislative declaration in existing law does not address delivery, let alone establish that delivery of beer and wine are separate subjects.

Further, the Board's title is not misleading. The title faithfully, accurately, and briefly states the central provisions of #122, including the provision Petitioner challenges as absent. 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 10–12.

B. The single subject requirement is met.

The single subject of #122 is the delivery of alcohol. Each of its provisions is directly connected to that purpose. Petitioner alleges 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. But that declaration does not address alcohol delivery, let alone establish that delivery of beer and wine are separate subjects. The Board's single subject determination should be affirmed.

1. The regulation of wine and beer delivery are not separate subjects.

Petitioner argues that #122 contains multiple subjects because it addresses both beer and wine. Pet. for Rev. of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2021-2022 #122 at 3 (May 6, 2022). Petitioner bases this on an existing declaration from the Colorado Beer Code that “recognizes” 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, 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 would allow delivery of both beer and wine, it must necessarily encompass multiple subjects. But the legislative declaration at § 44-4-102(2) actually establishes the interconnectivity of #122’s treatment of alcohol sales.

The relevant passage in § 44-4-102(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.

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

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 #122’s decision to establish a single regulatory scheme for beer and wine 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 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, #122 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 122’s treatment of beer and wine delivery would not surprise voters because #122’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.

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 12.

B. The title accurately describes the measure.

The Board’s title for #122 is not misleading. Number 122 proposes to allow the delivery of alcohol beverages, and includes provisions to facilitate that authorization. The title set by the Board is as follows:

Shall there be 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 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; and removing the limit on the percentage of gross sales revenues a licensee may receive from alcohol beverage deliveries?

Record at 9.

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 Petitioner is mistaken. The title expressly states that #122

“allow[s] 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.

Accordingly, Petitioner’s challenge to clear title should be rejected.

CONCLUSION

The Court should affirm the decisions of the Title Board.

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

s/ Peter G. Baumann

Peter G. Baumann