

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

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Case No.: 2022SA155

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 **2,530** 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 #128 (“Initiative #128”), 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 #128.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board clearly err in finding that Initiative #128 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 #128?

STATEMENT OF THE CASE

This is an original proceeding pursuant to § 1-40-107(2), C.R.S. (2021). Respondents filed Initiative #128 concerning the sales and delivery of alcohol with the Secretary of State on April 8, 2022. Initiative #128 would expand the ability of retail outlets to sell alcohol by allowing wine to be sold in grocery stores that sell beer and allow for the delivery of alcohol.

The Title Board conducted its initial public hearing and set the title for Initiative #128 on April 20, 2022. Petitioner filed a motion for rehearing on April

27, 2022, alleging that Initiative #128 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 #128 as:

An amendment to the Colorado constitution concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, authorizing a person licensed to sell beer at retail to also sell wine at retail and authorizing home delivery of all alcohol beverages through third-party home delivery service providers that use employees or independent contractors to make deliveries so long as the delivery person and the recipient are both at least 21 years of age.

Petitioner sought review of the Title Board's action under § 1-40-107(2), C.R.S. (2021) seeking review of Initiative #128 based on single subject and clear title issues.

SUMMARY OF THE ARGUMENT

The Title Board correctly determined that Initiative #128 contains a single subject. Initiative #128 addresses the expansion of retail sale of alcohol beverages by expanding the authority of food stores to carry wine in addition to beer and allowing for the home delivery of alcohol. These provisions properly relate to the

retail sale of alcohol, 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 #128, and the title fairly and accurately sets forth the central features of Initiative #128 as required by statute. For these reasons, the decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #128 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 #128 are related to one object or purpose.

Initiative #128's intent is to lessen existing retail sale restrictions on alcohol sales in a highly regulated industry, and its provisions are related to this purpose. Initiative #128 allows the sale of wine at grocery stores which currently are licensed to sell beer. It also authorizes licensed sellers of alcohol beverages, including grocery stores and retailers of all types of alcohol beverages, to deliver their products through third parties.

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 #128 also properly contains one.

Initiative #128's provisions carry out one general object or purpose as identified by the Title Board: the expansion of retail sale of alcohol beverages.

II. Initiative #128 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 #128 does not trigger either of the two “dangers” of multiple-subject initiatives.

First, Initiative #128 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

8128, 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 #128 has the singular purpose of expanding the retail sale of alcohol beverages, 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 #128 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 there are no embedded provisions that would lead to voter surprise or fraud. *In re 2011-2012 No. 45*, 274 P.3d 576, 582 (Colo. 2012). Initiative #128 is limited to a single matter of expanding the ability of retailers related to alcohol sales, and 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).

The 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). There the Court found the initiative contained a single subject of limiting housing growth. The initiative contained various provisions including one that allowed only one percent overall growth and another that prohibited housing permits for a period of time. The Court found the initiative carried out the general objective 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. 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 the instant case. In *Hayes* there was a limitation with connected provisions to carry out the objection. Here there is an expansion where the provision to allow for wine to be sold in grocery and convenience stores is connected to the objective. The third-party delivery is another implementing provision that is connected to the expansion of the sales.

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 1217 (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. In contrast to the livestock initiative, everything in initiative #128 relates to the single subject of the expansion of retail sales of alcohol. Here, the addition of wine in grocery stores and delivery 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 wine and beer provisions of the measure are likewise “separate and distinct” and therefore violates 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. The term in the liquor code does not denote that the licenses cannot be subject to the same regulations or that the term is in any way related to single subject.

Numerous sections of the liquor code apply to 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 only applies to the license type and is not intended to establish a legal requirement for single subject legislation.

Here, the proponents do not seek to stray from the subject of expanding retail sales of alcohol. Initiative #128 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 to expand retail sales of alcohol. Establishing a new beer and wine code, enacting implementation provisions, and providing for delivery of the product 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 #128 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 #128: (1) allowing existing retailers licensed to sell beer to also sell wine; (2) allowing retail establishments licensed to sell alcohol beverages to deliver all types of alcohol

beverages to a person 21 years of age or older through a third-party delivery service. The language closely tracks the initiative. There are no provision covered in the initiative that are not also covered in the Title.

The title clearly, accurately, and fairly describes Initiative #128, 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 #128.

Dated: May 16, 2022

Respectfully submitted,

s/Suzanne Taheri

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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:

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