

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
#128(“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.

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Case No. 2022SA155

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 2,088 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/ Emily Buckley

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TABLE OF CONTENTS

ARGUMENT	2
I. Number 128 satisfies the constitutional single subject requirement.....	2
A. Number128’s central provisions relate to the single subject of expanding the retail sale of alcohol beverages.....	3
A. The Beer Code’s legislative declaration does not establish that #128 covers multiple subjects.	7
CONCLUSION.....	12

TABLE OF AUTHORITIES

CASES

<i>Hayes v. Ottke</i> , 2013 CO 1.....	12
<i>In re Title, Ballot Title and Submission Clause for 2015–2016</i> , 2016 CO 24.....	5
<i>In re Title, Ballot Title and Submission Clause for 2017-2018 #4</i> , 2017 CO 57.....	4
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #315</i> , 2020 CO 61.....	10
<i>In re Title, Ballot Title & Submission Clause for 2021-2022 #16</i> , 2021 CO 55.....	2, 5
<i>In re Title, Ballot Title and Submission Clause</i> , 900 P.2d 121 (Colo. 1995).....	10
<i>People v. Montgomery</i> , 2014 COA 166.....	11

CONSTITUTIONS

Colo. Const. art. V, § 1(5.5).....	9, 10
Colo. Const. art. V, § 21.....	11

STATUTES

§ 1-40-106.5(3), C.R.S. (2021)..... 10

§ 44-4-102(2), C.R.S. (2021)..... 8, 11

S.B. 08-082..... 1

S.B. 16-197..... 1

S.B. 18-243..... 1

S.B. 19-11..... 9

In recent years, Colorado legislators and voters have slowly, but steadily, amended liquor laws to repeal prohibition-era restrictions on the sale of alcohol. *See, e.g.*, S.B. 18-243, (implementing sale of full-strength beer in grocery stores)¹; S.B. 16-197 (repealing, gradually, prohibition on full-strength beer in grocery stores and allowing some grocery stores with pharmacies to sell beer, wine, and spirits)², S.B. 08-082, (repealing law prohibiting sale of alcohol on Sundays)³. Proposed initiative #128 fits into this established pattern. It would enable grocery stores and similar retailers to sell wine, as well as beer, and would allow existing alcohol retailers to deliver those beverages to consumers.

Some may question the wisdom of Colorado's march to liberalize its alcohol laws. But resolution of that question falls on the voters and their representatives. At an initial hearing and on rehearing, after significant debate and consideration, the Title Board concluded that #128 addresses a single subject, expanding the retail sale of alcohol

¹ Available at, <https://tinyurl.com/a2yxxfxj>.

² Available at, <https://tinyurl.com/3a98sh6z>.

³ Available at, <https://tinyurl.com/5b4fypmf>.

beverages, and drafted a clear title informing voters of #128's central features. The Board's actions fell well within the bounds of its considerable discretion, and should be affirmed.

ARGUMENT

I. Number 128 satisfies the constitutional single subject requirement.

“[E]mploy[ing] all legitimate presumptions in favor of the propriety of the Board's actions,” reversal of the Board's single subject determination is appropriate only in a “clear case,” *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (citations and quotations omitted). So long as a proposed initiative's provisions are not “disconnected or incongruous,” the Board's decision that it encompasses a single subject should not be disturbed. *Id.* ¶ 13.

Petitioner's challenge to the Board's single subject determination fails to establish any error, let alone show that the Board's decision was outside the considerable deference to which it is entitled. The Court should affirm.

A. Number 128's central provisions relate to the single subject of expanding the retail sale of alcohol beverages.

Petitioner argues #128 contains multiple subjects separate and apart from its provision enabling the sale of wine in food stores. Pet'r's Opening Br. on Proposed Initiative 2021-2022 #128 ("Sales and Delivery of Alcohol Beverages") ("Pet'r's Opening Br.") at 11–22 (May 16, 2022). But #128's provisions relate to the proposed initiative's single subject of expanding the sale of alcohol beverages.

In his Opening Brief, Petitioner describes the choices made by #128's Proponents to submit multiple versions of this measure—including some that disaggregated wine in grocery stores from alcohol delivery. *Id.* at 13–18. In Petitioner's telling, these decisions establish #128's separate subjects, because "[n]either is necessary to address the other." *Id.* at 13.

But nothing in the constitutional single subject requirement, or this Court's jurisprudence, suggests that a measure's single subject determination is based on whether its provisions could conceivably be run as separate measures. Instead, many of the measures upheld as

having single subjects by both the Board and this Court could, conceivably, have been split into multiple initiatives.

For example, in 2017 the Court considered a measure intended to limit housing growth in Colorado. *In re Title, Ballot Title and Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 10. That measure included several provisions to accomplish its aim, including one that limited housing growth to one percent annually in certain jurisdictions, one that empowered local voters to enact or repeal housing regulations, and one that prohibited permits for new residential units in those same jurisdictions. *Id.* ¶¶ 10–11. Each of these could have stood on its own; the proponents could have submitted one measure to establish a one percent cap, one measure to empower local voters, and one measure to prohibit the issuance of new permits. Nonetheless, the Court affirmed the Board’s assessment that each provision was encompassed within the measure’s single subject. *Id.* ¶¶ 10–14.

And its decision was consistent with treatment of other, similar, measures. For example, in 2016 the Court found single subject satisfied in reviewing a proposed initiative that would have made several

significant changes to state law concerning recall elections, even though many (if not all) of those provisions could have been run as stand-alone proposals. *In re Title, Ballot Title and Submission Clause for 2015–2016*, 2016 CO 24, ¶¶ 19–20.

Whether a measure can be separated into multiple initiatives is irrelevant to whether its provisions violate the single subject requirement. Where, as here, multiple provisions that could be run as separate measures still “tend[] to effect or carry out one general objective or purpose,” *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 14 (quotations omitted), the single subject requirement is satisfied.

Finally, Petitioner argues that including these two provisions implicates the single subject requirement’s anti-logrolling purpose. Pet’r’s Opening Br. at 20. In doing so, Petitioner compares #128 to *2021-2022 #16*, which both extended the animal cruelty laws to cover livestock and amended the statutory definition of “sexual act with an animal” for all types of animals. *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 2. There, drawing on

statements from the proponents, the Court held that “incorporating livestock into the animal cruelty statutes” was the “central theme” of the initiative, *id.* ¶ 2, and “criminalizing new conduct, regardless of whether that conduct is directed at livestock or other animals,” was an impermissible second subject, *id.* ¶ 39. The Court did not, however, rely on the single subject requirement’s anti-logrolling purpose. Rather, the Court held that #16 implicated the *other* purpose behind the single subject requirement, avoidance of voter surprise. *Id.* ¶ 41 (holding that “combining the repeal of the livestock exceptions with the criminalization of new conduct toward all animals runs the risk of surprising voters with a surreptitious change”); *id.* ¶ 2 (“Because these subjects are not necessarily and properly connected, there is the potential for the very kind of voter surprise against which the single-subject requirement seeks to guard.”).

Here, Petitioner does not argue that the two provisions are likely to spring a surprise on Colorado voters. Nor could he. Both provisions are highlighted in the measure’s own declaration.

Moreover, as the Board explained in its Title, both provisions would expand retail sale of alcohol. Perhaps a voter might be surprised by a measure which relaxed restrictions on what alcohol could be sold in grocery stores but limited alcohol delivery. Or vice-versa. But here, both provisions point in the direction of liberalizing restrictions on the sale of alcohol. Such directional equity does not implicate the purposes of the single subject requirement.

A. The Beer Code’s legislative declaration does not establish that #128 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. at 19-25. 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 #128 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, are not separate subjects as a matter of statutory law) 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 #128 covers multiple subjects.

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.

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