

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 the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2021-2022 #128 (“Sales and Delivery of
Alcohol Beverages)

Petitioner: 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 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 1,386 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

EMILY BUCKLEY, #43002

Assistant Attorney General

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #128 contains a single subject.

STATEMENT OF THE CASE

Proponents Steven Ward and Levi Mendyk seek to circulate #128 to obtain the requisite number of signatures to place a measure on the ballot to amend the Colorado constitution to expand the sale of alcohol beverages, by allowing a person licensed to sell beer at retail to also sell wine at retail and permitting home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. Record filed May 5, 2022 (“Record”) at 2.

A majority of the Board concluded that the measure contains a single subject at its April 20, 2022 meeting, and the Board proceeded to set title. *Id.* at 3. Petitioner filed a timely motion for rehearing asserting #128 contains multiple subjects. *Id.* at 5-7. On rehearing on April 29, 2022, the Board made edits to the title, but otherwise denied the motion. *Id.* at 3. The Board set the ballot title and submission clause as follows:

Shall there be 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?

Record p. 3.

SUMMARY OF ARGUMENT

The Board's actions in setting #128 should be affirmed. The single subject of #128 is amending the Colorado constitution to expand the sale of alcohol beverages, by allowing a person licensed to sell beer at retail to also sell wine at retail and permitting home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. Record at 2. The provisions of the measure that Petitioner challenges on single subject grounds are necessarily and properly connected to the initiative's single subject. 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 & 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 & 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 & 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, & 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). Petitioners preserved the single subject issue by raising it in a motion for rehearing.

B. The single subject requirement is met.

The single subject of #128 is amending the Colorado constitution to expand the sale of alcohol beverages, allowing a person licensed to sell beer at retail to also sell wine at retail and to permitting home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. Record at 2. In essence, the initiative's single subject is expanding the sale and delivery of alcohol products.

Parsing the language of #128, Petitioners assert the initiative contains numerous subjects. Petition at p 3. But "[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose

initiatives guaranteed by Colorado’s constitution.” *Matter of Title, Ballot Title & Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998). The alleged multiple subjects identified by Petitioners overlap; they are all under the umbrella of expanding the sale and delivery of alcohol products. A review of the initiative demonstrates that it contains a single unifying subject: expanding the sale and delivery of alcohol products.

Further, the initiative presents “neither of the evils that the single-subject requirement aims to prevent.” *Matter of Title, Ballot Title & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1224 (Colo. 2021). The risk of “logrolling” is minimal because allowing a person licensed to sell beer at retail to also sell wine at retail and allowing third party delivery of alcohol products both “point in the same direction” of expanding the sale and delivery of alcohol, thus #128 does not “seek to garner support from various factions” with “different or conflicting goals,” *id.* (quotations and citations omitted). And these provisions would not surprise voters because they “relate[] to the same subject,” #128’s “plain language” unambiguously proposes these

changes, and “the proposal is not particularly lengthy or complex.” *Id.* (quotations and citations omitted).

Further, many statutes cover both sale and delivery, strongly suggesting that sale and delivery of a product may constitute a single subject. For example:

- Section 39-28-101(1.3), C.R.S. (2021) addresses the sale and delivery of cigarettes to consumers.
- Section 18-18-429, C.R.S. (2021) criminalizes the “manufacture, sale or delivery of drug paraphernalia.”
- Section 25-5-403(1)(a), (d), C.R.S. (2021) prohibits “[t]he manufacture, sale, or delivery or the holding or offering for sale of any food, drug, device, or cosmetic that is adulterated or misbranded;” and “The sale, delivery for sale, holding for sale, or offering for sale of any article in violation of section 25-5-412.”
- Section 43-4-218(2)(e), C.R.S. (2021) defines “[r]etail delivery” as a “retail sale of tangible personal property by a retailer or delivery by a motor vehicle owned or operated by the retailer or any other person to the purchaser at a location in this state, which sale includes at least one item of tangible personal property that is subject to taxation under article 26 of title 39,” and further provides that “[e]ach such retail sale is a single retail delivery regardless of the number of shipments necessary to deliver the items of tangible personal property purchased.”

Contrary to Petitioners’ argument, sale and delivery can exist as a single subject.

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/ Carmen Van Pelt

Carmen Van Pelt