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Colorado Supreme Court
2 East 14th Avenue, Denver CO 80203

On certiorari to the Colorado Court of Appeals, 2015CA1327

Petitioner:

Jared J. Przekurat

v.

Respondents:

Samuel Stimson, Peter Stimson, Mitchell Davis, Christopher Torres

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2017 SC 15

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PETITIONER'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, I certify that:

This reply brief complies with the applicable word limit set forth in C.A.R. 28(g). It contains 5967 words [will file motion to exceed word count] (reply brief does not exceed 5700 words).

This reply brief also complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), to an appropriate extent in light of the discussion of those requirements in the opening and answer briefs.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

/s Timms R. Fowler

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I.
Introduction.

Although this Reply further analyzes the cases relied upon by the Respondents, those liquor licensee related cases can be distinguished and do not control over the unique intent, purpose, and text of H.B. 05-1183 (the 2005 Amendments).

In the social host setting applicable to this case, the 2005 Amendments seek to foreclose *all* venues for underage drinking by setting a low standard of culpability upon which to impose social host venue-based liability: "knowingly" providing any underage social guest "a place to consume alcohol". Service of alcohol is not required. *See* H.B. 05-1183, section 6; C.R.S. § 12-47-801(4)(a)(I).

That drafting and word choice have great importance for two reasons. First, the legislature likewise reduced the previous higher standard of culpability upon which to impose social host service-based liability from "willfully and knowingly" to match the new lower venue-based standard of culpability based just on the word "knowingly". *See id.*

Second, although the social host service-based culpability standard explicitly was *lowered* to match the new venue-based liability standard, the *higher* liquor licensee civil liability culpability standard was not changed. Liquor licensee civil liability is still based on "willfully and knowingly" selling or serving "any

alcoholic beverage" to a person "under the age of twenty-one years…." C.R.S. § 12-47-801(3)(a)(I).

Nevertheless, the courts below and the Respondents fail to give content to those textual changes. However, the "legislative choice of language may be concluded to be a deliberate one calculated to obtain the result dictated by the plain meaning of the words." *Hendricks v. People*, 10 P.3d 1231, 1238 (Colo. 2000) (quoting *City & Cty. of Denver v. Gallegos*, 916 P.2d 509, 512 (Colo. 1996)).

Consequently, "[w]hen the General Assembly includes a provision in one section of a statute, but excludes the same provision from another section, we presume that the General Assembly did so purposefully." *Well Augmentation Subdistrict of Cent. Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 419 (Colo. 2009); *accord United States v. Pauler*, 857 F.3d 1073, 1076 (10th Cir. 2017) (where the legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion" (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983))). Therefore, the 2005 Amendments control over the cases relied upon by the Respondents and courts below.

II.
The party venue was knowingly and blindly opened to underage guests where alcohol knowingly was served in an open "buffet" style.

Respondent Davis asserted that the "court of appeals affirmed summary judgment because it found the record did not establish that persons 'of any age' were welcome to attend." Davis Answer Brief at p. 15. To the contrary, the court of appeals concluded that "[a]ccess to the party was unrestricted." Slip op. at 6, ¶ 34. The "kegger" party was open to anyone of any age as detailed in Przekurat's Opening Brief. *See* Opening Brief at p. 9, ¶ 8; p. 10, ¶¶ 9-12; p. 13, ¶¶ 21-22; p. 14-15, ¶¶ 25, 28.

For example, Peter Stimson testified that his underage housemate and brother Samuel "was at liberty as a member of the household to invite whomever he wanted." CF, 900, depo. p. 28:12-15 [**Appendix 1**].

Samuel Stimson testified that he invited to the party his high school friend, Mr. Maury. Samuel testified that they were both 20 years of age they both drank alcohol and smoked marijuana at the party. CF, 912, depo. p. 25:5-25 (drinking); CF, 911, depo. p. 22:9 -13; and CF, 913, depo. p. 45:9 -16 (smoking marijuana) [**Appendix 2**].

Mr. Fix, the fifth co-host, who did not reside in the house but was a close friend of the other hosts (and who settled and was dismissed before appeal), testified that he was not told that he could invite underage guests, but also testified:

"I was *not* told that I *could not* invite people that were under age." CF, 888, depo. p. 64:7-20 (italics added) [**Appendix 3**].

Mr. Fix also testified: "And I definitely think that some of the people I invited were under age at the time." CF, 888, depo. p. 64:19-21 [**Appendix 3**].

As described in Przekurat's Opening Brief at p. 15, ¶ 29, Respondents have never contested that they did nothing whatsoever to limit entry to their party venue by any underage guest.

Peter Stimson testified that he "was not aware that there was going to be anyone under 21" there, but admitted that during the party he never did anything to "determine" or "detect" if people at the party were under 21. CF, 902, depo. p. 29:18 – 30:18 [**Appendix 4**].

The court of appeals concluded that the "hosts did not ask party attendees their age or take any other steps to ensure that underage drinking would not take place at the party." Slip op. at 6, ¶ 34. Of significance, Respondent Torres welcomed the Sieck- Przekurat group into the party because Torres knew and was a friend of Victor Mejia, who was underage. CF, 930, Mejia depo. p. 21:12-25, p. 22:1-22; CF, 940, p. 120: 6-25; CF, 941, p. 121:1-8, CF, p. 941, p. 122:7-25; CF, 941, p. 123:1 – 124:4 [**Appendix 5**].

Respondents have never disputed that 16 underage guests entered the party venue freely and indiscriminately consumed alcohol set out in a "buffet" style for

any guest to consume, including underage guests. *See* Opening Brief at p. 16 ¶ 32. Accordingly, the subject "kegger" party falls squarely within the liability loophole as delineated by the holding in *Forrest v. Lorrigan*, 833 P.2d 873, 875 (Colo. App. 1992), which the 2005 Amendments were expressly intended to close.

III.

Closing the *Forrest v. Lorrigan* venue loophole was the purpose of the 2005 amendments which conditioned liability upon providing any underage guest "a place to consume an alcoholic beverage" rather than actually serving a specific underage guest alcohol.

The liability loophole in *Forrest* rested on the fact that a parent opened the house to underage guests where alcohol was provided without direct service to the underage guests by the parent. To close the venue loophole, the 2005 Amendments imposed liability for knowingly providing any underage guest "*a place to consume an alcohol beverage*…." (Emphasis added).

Control over the service of the alcohol is not the basis for the new venue-based liability as had been the case with the existing service-based liability provision. Instead, providing any underage guest "a place to consume" is the basis for imposing liability under the venue provision. Therefore, *actual* knowledge of the presence and age of a specific underage guest is not required to impose venue-based liability.

Rather, venue-based liability has been "uncoupled" from knowingly serving a specific underage guest. The text of the 2005 Amendments and the legislative history reveal that H.B. 05-1183:

> …would create a civil liability for those who provide a place for minors to consume alcohol, not just in the home or but it could also be if you are having a bonfire or if you are going through an abandoned building and you are providing a space and a place for minors to consume, you could be sued.

CF, p. 1219 (emphasis added) (comments from the Bill's sponsor Representative Paccione).

Nothing in the legislative history or the text of the 2005 Amendments indicates that closure of the *Forrest* loophole required any knowledge of each *individual* underage guest's age. *See* Przekurat's Opening Brief at pp. 22-28. Only some knowledge that "a place" or venue opened for a social party would likely be used by any underage guest to consume alcohol will give full effect to the duty imposed by H.B. 05-1183. *See* H.B. 05-1183, section 6.

However, if this Court reads the text and legislative history of H.B. 05-1183 differently and requires that a social host have some level of knowledge of a specific guest's age and presence at a party, even under the venue-based liability provision, then Przekurat contends constructive knowledge would be sufficient. That would be especially true here for five reasons:

1. under the venue provision, only provision of "a place to consume" is required to impose liability, rather than direct service of alcohol;

2. direct service has been "uncoupled" from liability;

3. the alcohol at the subject "kegger" was provided and set out in a "buffet" style [so control over the alcohol was ceded to the underage guests present];

4. entry to the party venue was wide open to underage guests; and

5. the word "willfully" was deleted from the phrase "willfully and knowingly"—in the service-based liability provision and only the word "knowingly" was used in drafting the new venue-based liability provision.

The Respondent social hosts allowed underage guests, whether known or unknow to the hosts, to enter the venue freely and drink indiscriminately. Thus, the party was opened blindly by the social hosts at two levels. Both the *venue* was wide open as was the *provision* of the alcohol because the social hosts set out the beer "buffet" style.

When a social host cedes all control over the alcohol to the underage guests themselves by serving the alcohol in a "buffet" style, the hosts have effectively and constructively served the guests directly themselves.[1] Such circumstances distinguish this doubly, wide-open, *social host* "kegger" style party from any fact pattern in the context of a bar or liquor licensee—where the point of entry to the venue and point of service of the alcohol are both subject to the licensee's strict

[1] Accordingly, Respondents also are exposed to liability under the service-based liability provision because the 2005 Amendments deleted the word "willfully".

control. In any event, the liquor licensee cases relied upon Respondents are not controlling for the several reasons discussed below.

IV.
This Court's "actual knowledge" language in *Build-It* is non-precedential dictum.

Respondents cite *Build It and They Will Drink v. Strauch*, 253 P.3d 302 (Colo. 2011), for the proposition that subsection 12-47-801(4)(a)(I) should not include constructive knowledge. *Build It* considered the phrase "willfully and knowingly" in the liquor licensee context—where those venues such as bars are not wide open to minors and alcohol is not served "buffet" style so patrons cannot take control of the access to the alcohol. Here, the subject "kegger" was open at two levels being held in an open venue and where the alcohol was served "buffet" style.

In any event, the cited language from *Build It* has no precedential effect because it is dictum in and of itself. Language in a prior Colorado supreme court case that "was not necessary to the disposition of the issues presented" in the case is "dictum without precedential effect" for this Court's subsequent cases. *People in Interest of Clinton*, 762 P.2d 1381, 1385 (Colo. 1988). *Accord Town of Eagle v. Scheibe*, 10 P.3d 648, 651 (Colo. 2000) (language from this court's cases which "was not necessary to the decisions in those cases … was dicta that does not

control" subsequent cases). *See also Main Electric v. Printz Services*, 980 P.2d 522, 526 n. 2 (Colo. 1999) (dictum "is not controlling precedent").

In *Build It*, this Court granted certiorari "to determine if reasonable foreseeability … is an element of liability under section 12-47-801." 253 P.3d at 303. *Accord id*. at 307 ("the question we address today is whether liability under section 12-47-801 requires proof that injury was a foreseeable consequence of the sale or service of alcohol").[2]

Build It "conclude[d] that the plain language of section 12-47-801 "does not include foreseeability." 253 P.3d at 304. In reaching that conclusion, this Court first recounted the history of dram-shop liability in Colorado. 253 P.3d at 305-06. Then this Court analyzed the statutory language. *Id*. at 306-07. The Court held that the statute replaced common-law foreseeability with proximate cause in this sense: the statute made the nightclub liable if the plaintiff was injured by an intoxicated patron who was either underage or visibly intoxicated, and the nightclub had "willfully and knowingly" served alcohol to that patron. That is, "proximate cause and liability require only willful, knowing service to a visibly

[2] The subsection at issue was 12-47-801(3)(a)(I), which allows an injured person to sue a liquor licensee for an injury "suffered because of the intoxication of any person due to the sale or service of any alcohol beverage to such person" if "[i]t is proven that the licensee willfully and knowingly sold or served any alcohol beverage to such person who was under the age of twenty-one years or who was visibly intoxicated." In *Build It* the alcohol was served to a visibly-intoxicated adult rather than a minor.

intoxicated [or underage] person[,] and a plaintiff who is injured because of the intoxication." *Id*. at 307-08. "[S]o long as there is willful service and injury resulting from intoxication, there is no requirement that the injury be a foreseeable consequence of the sale or service of alcohol." *Id*. at 308. *Build It* therefore affirmed the denial of the nightclub's motion for summary judgment under section 12-47-801.

Having reached its holding on the question raised by the case, *Build It* then briefly addressed the nightclub's contention that the statute would become one of "strict liability" if the statute had no foreseeability element. *See* 253 P.3d at 304. Without conducting a legal analysis or citing legal authority, *Build It* stated that the absence of a foreseeability element would not transform the statute into one of strict liability, because the statute's mental state of "willfully and knowingly" meant the nightclub had "actual knowledge of the patron's intoxicated state" but "willfully serv[ed] alcohol to the person anyway." *Id*. at 308. "It would not be enough that the [nightclub] 'should have known' that the person was visibly intoxicated." *Id*. at 308. This language just quoted from page 308 of *Build It* is the language on which respondents rely.

Build It's "actual knowledge" discussion is non-precedential dictum for four reasons. First, the discussion was not necessary for disposition of the issue resolved in *Build It—i.e.*, whether foreseeability is an element of section 12-47-

801. (*Build It* did not discuss the actual knowledge point until *after* the opinion had already resolved the foreseeability question.) Second, *Build It's* short discussion about "actual knowledge" lacked legal analysis or legal citation, meaning the point was not fully debated.[3] Third, *Build It's* short discussion about "actual knowledge" supported liability against the bar, which is the opposite of how Respondents here seek to use the discussion. And fourth, *Build It* itself declined to follow a statement in this Court's earlier case of *Sigman v. Seafood Ltd*, 817 P.2d 527, 531-32 (Colo. 1991), because "[t]he statement in question, however, was dicta." 253 P.3d at 308 n. 4 (underlining added). Accordingly, *Build It's* conclusory "actual knowledge" discussion is dictum, which has no precedential value.

Moreover, for several more reasons the *Build It* dictum should not be adopted as a holding here. First, as discussed above, the 2005 Amendments do not require any knowledge of each individual underage guest's age, because venue-based liability has been uncoupled from knowingly serving a specific underage guest.

Second, as discussed below this Court should construe "knowingly" to include constructive knowledge as well as actual knowledge. Constructive

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[3] *See Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) ("we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated").

knowledge is necessary in order to implement, in a reasonably balanced way, the public policy upon which the alcohol-regulation statutes (and the 2005 Amendments in particular) are based.

Third, for the reasons discussed below regarding *Full Moon Saloon v. City of Loveland,* 111 P.3d 568 (Colo. App. 2005), the bar's "strict liability" argument (to which the *Build It* dictum responded) is sufficiently redressed by a constructive knowledge standard under which only reasonable – not extraordinary – effort is required.

And fourth, as previously discussed the 2005 Amendments deleted the word "willfully" from the social host liability provisions. *Compare Build It* dictum in 253 P.3d at 308 ("willfully and knowingly" means that the establishment knew the patron was drunk but "willfully" served him more alcohol "anyway").

V.
In construing the 2005 amendments, this Court should be guided by *Full Moon Saloon v. Loveland* rather than *Dickman v. Jackalope*.

Respondents (and CDLA amicus) contend that the opening brief's analysis of the 2005 Amendments is largely incorrect because the court of appeals' decision in *Dickman v. Jackalope, Inc.*, 870 P.2d 1261 (Colo. App. 1994), requires actual knowledge that a drinker is underage. The contention overlooks the court of appeals' decision in *Full Moon, Saloon v. Loveland*, 111 P.3d 568 (Colo. App. 2005), which only requires constructive knowledge that a drinker is underage. For

the reasons described next, this Court should follow *Full Moon* and reject *Dickman*.

A. *Dickman*.

In *Dickman*, a bar served alcohol to two patrons – an adult and a minor. No bar employee asked the patrons for identification. However, for reasons not explained in *Dickman*, bar employees believed both patrons were 21. The two patrons left the bar together, with the underage patron driving. The underage patron crashed the car and injured the older patron. The older patron sued the bar under what is now subsection 12-47-801(3)(a)(I). 870 P.2d at 1262. As applicable here, the statute immunizes a liquor licensee from civil liability except when the licensee "willfully and knowingly sold or served" alcohol to the person who caused the injury, and "such person … was under the age of twenty-one years…."

As most pertinent to the answer briefs, *Dickman* held that the server must have actual knowledge that the person served is underage. 870 P.2d at 1263. *Dickman* reasoned that actual knowledge is required because otherwise the statute would impose strict liability against servers. *Id*., at 1263, & again at 1264. *Dickman* therefore affirmed the district court's grant of summary judgment for the bar on the ground that the bar employees lacked actual knowledge that the underage patron was underage. *Id*. at 1263.

B. *Full Moon*.

In *Full Moon*, a bar served alcohol to two adult patrons and an underage patron. No bar employee asked the patrons for identification. The three patrons left the bar together, and the police pulled their car over for a traffic violation. Upon smelling alcohol, the police learned that the car's occupants had been drinking at the bar. The bar's liquor license was later suspended for serving a minor, under what is now subsection 12-47-901(1)(a.5)(I). 111 P.3d at 569-70. The statute prohibits anyone from providing an alcoholic beverage to "any person under the age of twenty-one years."[4]

As most pertinent to the answer briefs, *Full Moon* affirmed suspension of the bar's license because constructive knowledge that a drinker is underage is sufficient to violate the proscription in that subsection. 111 P.3d at 570. *Full Moon* defined constructive knowledge as knowledge attributable to someone exercising reasonable care or diligence (reasonable inquiry). *Id*.[5] *Full Moon* supported its holding by observing that the word "permit" in the statute "connotes

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[4] In full, subsection 12-47-901(1)(a.5)(I) states that it is unlawful for any person "[t]o sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of any alcohol beverage to or for any person under the age of twenty-one years." The subsection does not contain the phrase "knew or should have known".

[5] *Accord Morris-Schindler v. Denver*, 251 P.3d 1076, 1083 (Colo. App. 2010) (citing *Full Moon* when stating that "[c]onstructive knowledge is knowledge that one exercising reasonable diligence should have").

affirmative or knowing conduct"—meaning actual knowledge acquired through the commission of an affirmative act or constructive knowledge acquired by permitting proscribed conduct to occur. *Id*.

Full Moon reasoned that a standard which includes constructive knowledge as well as actual knowledge is better than one limited to just actual knowledge, because the latter standard would allow the bar to "ignor[e] activities occurring in the establishment." *Id*. In the instant case, Respondents ignored their own conduct and the activities occurring at their party venue.

Such studied ignorance is antithetical to the "strong public interest" in addressing the "threat to public health and welfare" posed by alcohol consumption. *Id*. *Full Moon* also reasoned that a constructive knowledge standard would not unduly burden bar employees, because the standard only requires the exercise of reasonable care, not "extraordinary vigilance." *Id*.

C. Applying *Dickman* and *Full Moon* here.

As pertinent here, subsection 12-47-801(4)(a)(I) immunizes a social host from civil liability except when the host "knowingly provided" the underage guests with "a place to consume an alcoholic beverage." As argued by Respondents, the question is whether "knowingly" in this statute is limited to actual knowledge as in *Dickman*, or whether it includes constructive knowledge as in *Full Moon*. The

answer is that it includes constructive knowledge based upon both an analysis of the cases themselves and the text of the 2005 Amendents.[6]

Dickman was wrongly decided. In derogation of the strong public interest in minimizing the public health threat posed by alcohol consumption, *Dickman* immunized the bar from statutory liability for an injury that would not have occurred if a bar employee had used a measure of reasonable care such as simply checking the underage patron's identification. *Dickman* excused the bar for failing to perform that easy task on the unexplained ground that bar employees believed the patron was 21, and therefore the bar had no "actual knowledge" that the patron was underage. But the statute is effectively evaded if all a bar has to do to avoid statutory liability is have its employee's later claim they believed the patron was 21 without having checked the patron's identification. By contrast, the constructive knowledge standard gives reasonable life to the statute and its purpose, because under that standard a bar must either check a patron's identification or assume the statutory risk of serving an underage patron.

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[6] Respondents argue that constructive knowledge is limited to just subsection 12-47-901(1)(d), because that subsection includes the phrase "should have known." *Full Moon* shows this argument is incorrect, because *Full Moon* explicitly held that constructive knowledge ("should have known") applied to subsection 12-47-901(1)(a.5)(I), which lacked that express language. That is, the inclusion of the phrase "shown have known" in subsection 12-47-901(1)(d) does not exclude constructive knowledge from all other parts of this statutory scheme. And deletion of the word "willfully" from the social host civil liability provisions "reduces" the culpability standard down to include constructive knowledge.

Dickman excused the bar from the easy task of checking identification on the ground that the bar would be strictly liable unless knowledge is limited to actual knowledge. This reasoning was wrong, because constructive knowledge does not impose strict liability. As noted, constructive knowledge requires only the exercise of reasonable care such as inquiry, not extraordinary vigilance. Thus a bar likely would be statutorily immune if a bar employee requested identification from an underage patron and the patron produced an authentic-looking false identification. But condoning a bar's failure to request identification is no different from "ignoring activities occurring in the establishment," as stated in *Full Moon*.[7] The bar turned a blind eye to its statutory duty, just the Respondents did in this case.

Unlike *Dickman*, *Full Moon* promotes the important public safety purpose supporting all of the alcohol-regulation statutes by reasonably balancing the competing interests involved. A constructive knowledge standard for social hosts imposes no undue burden on such hosts, because again that standard only requires reasonable—not extraordinary—care. Social hosts need only take reasonable steps under the circumstances to avoid "knowingly provid[ing]" a venue open to underage guests "to consume an alcoholic beverage."

[7] *See* Opening Brief pp. 25-6 (discussing self-induced or willful ignorance).

Usually the fact-finder should determine what reasonable steps a social host should take. However, as set forth in the opening brief and recapped above in this brief (with record citations in both briefs), the record shows that *no* reasonable steps were taken by the Respondents in this case. What should not be allowed is precisely what the Respondents did here: host a party at a house rented by college students (one of whom was himself underage) in a college-student neighborhood; purchase *and* provide alcohol "buffet" style to anyone who entered the premises; and impose no access restrictions to the premises—with the result that at least 16 underage attendees (including the person who injured petitioner) indiscriminately consumed alcohol within the party venue. Based upon this undisputed record, constructive knowledge of underage guests drinking should be attributed to the hosts.[8]

Although *Full Moon* is a liquor-license suspension case rather than a private civil liability case, the suspension affirmed there was based upon the violation of subsection 12-47-901(1)(a) (regarding sale, service, delivery, etc., of alcohol to minors or drunkards or permitting such conduct). That subsection later was amended as part of H.B. 05-1183 and codified as subsection 12-47-901(1)(a.5)(I)

[8] The Stimson answer brief contends that requiring even reasonable care would impermissibly re-instate a common law negligence claim. But construing the statutory word "knowingly" to include constructive knowledge does not re-institute negligence; rather, it construes the word in a way which implements the statutory purpose.

(focusing just on the sale, service, delivery, etc., of alcohol to minors or permitting such conduct), which constitutes a class 2 misdemeanor. *See* H.B. 05-1183 sections 2 and 4.

Accordingly, subsection 12-47-901(1)(a.5)(I) is a sister provision to the social host venue-based civil liability provision subsection 12-47-801(4)(a)(I). Both subsections are subject to the same public policy declarations of H.B. 05-1183 seeking to abate "deaths related to underage binge drinking…." *See* H.B. 05-1183 sections 1, 2, and 6.

Full Moon addressed suspension of a liquor license, and such a suspension only prevents future violations. Private civil liability, however, is necessary to remedy past violations upon satisfaction of the statutory criteria. With particular regard to social hosts who provide venues open for underage drinking, statutory private civil liability is the only regulatory mechanism available, because such hosts have no liquor license for the government to suspend.

D. *Full Moon* should be followed over *Dickman* because *Full Moon* is consistent with the 2005 Amendments.

The obvious purpose of the 2005 Amendments is to expand private civil liability against social hosts. In *Forrest v. Lorrigan*, the court of appeals held that "willfully and knowingly serving" alcohol under subsection 12-47-801(4)(a)(I) (as it read at that time) did not create liability for a social host who merely provided a place where minors could consume alcohol—without more conduct associated

with the provision and service of the alcohol.[9] 833 P.2d at 875. The 2005 Amendments deleted the word "willfully," and added language prohibiting a social host from "knowingly provid[ing] the person under the age of twenty-one a place to consume an alcoholic beverage."

The 2005 Amendments thus impose civil liability on social hosts who knowingly provide "a place" for underage drinking, separate from and in addition to whether the host also "has control over or takes an active part in supplying a minor with alcohol," which was the only social host liability in existence when *Forrest* was announced. *See* 833 P.2d at 875.

Because some college students are 21, but many college students are underage, hosts of a doubly wide-open "kegger" party like the one here[10] need not have actual knowledge that any specific underage guest was present. The presence of underage people in such a setting is a certainty, as established by the record here that the hosts and their friends invited guests without regard to age, and that underage guests entered the venue without restriction and then consumed alcohol indiscriminately within the venue. Hence, the 2005 Amendments impose constructive knowledge for providing a venue for underage drinking under these circumstances.

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[9] Here the record establishes that the hosts were collectively involved in the purchase, party set up, and provision of the beer in an open "buffet" style within the venue. *See* Przekurat's opening brief at p. 8, ¶ 3.

[10] As explained above, both the venue and availability of alcohol were open.

This reading of the 2005 Amendments supports the strong public safety interest in regulating alcohol consumption—particularly the reduction of ongoing death and serious injury caused by underage drinking which the amendments were intended to redress (and which is discussed in the CTLA amicus brief). Because the 2005 Amendments are consistent with the statutory purposes of alcohol regulation as discussed in *Full Moon*, but *Dickman* undercuts those purposes, *Full Moon* should be followed over *Dickman*, and "knowingly" in subsection 12-47-801(4)(a)(I) should be construed to include constructive knowledge as well as actual knowledge.[11]

As described above, *Full Moon* partly reasoned that the word "permit" connoted both actual and constructive knowledge, because by allowing statutorily proscribed events to occur the defendant constructively possessed the requisite knowledge of those events even if the defendant had not acquired actual knowledge by personally committing an affirmative act. Similarly, the 2005 Amendments proscribes a social host from "provid[ing]" minors with a place to drink alcohol. Like the word "permit," the word "provide" connotes constructive

[11] The Torres answer brief contends the 2005 Amendments intended to limit the statutory word "knowingly" to actual knowledge. But, Torres cites no authority for the contention. The legislature did not define "knowingly," and the word can include constructive as well as actual knowledge. Also, as already discussed, the legislature removed the word "willfully" in order to reasonably increase the liability of social hosts as opposed to liquor licensees.

knowledge as well as actual knowledge, because a social host can provide minors with a drinking venue by permissive allowance even if the social host does not provide the venue by means of an affirmative act. Thus, the 2005 amendment's language at issue in this case favors application of *Full Moon*.

Paragraph 42 of the court of appeals' opinion in this case distinguishes subsection 12-47-901(1)(a) (the statute in *Full Moon*) from the 2005 Amendments, on the ground that the latter does not impose an "affirmative responsibility" on a social host. But, the 2005 Amendments sought to prevent needless death and serious injury by imposing a new and broader duty on social hosts not to provide an open venue where any underage social guest could consume alcohol.

The duty imposed by H.B. 05-1183 would be negated if it is construed to extend only to a social host who possesses actual knowledge that a specific guest entered the party venue and that the particular guest was actually underage. The court of appeals' opinion eviscerates the duty in this case because any reasonable person knew or should have known that underage guests were invited, were free to enter the venue, and could drink indiscriminately upon entry.

E. The legislative history of any statute is always open for consideration to avoid an absurd construction.

Respondents contend this Court cannot review the legislative history of the 2005 Amendments, because the word "knowingly" in the amendment is unambiguous. But, the amendments do not define "knowingly," and the tension

between *Full Moon* and *Dickman* shows that sometimes knowingly means actual knowledge only, while sometimes it means constructive knowledge too. Thus, the undefined word "knowingly" in subsection 12-47-801(4)(a)(I) is reasonably susceptible to two different interpretations.

The word "knowingly" is also ambiguous for the reasons set forth in Przekurat's Opening Brief at pp. 31-32. As such, the cogent legislative history that Przekurat previously provided to this Court is relevant and should be considered.

Furthermore, this Court can and does cite legislative history when construing statutory language, without first finding that the language is ambiguous. *Build It* itself considered legislative history without discussing whether the statutory language was ambiguous. *Build It*, 253 P.3d at 307 n. 3. And legislative history is always open for consideration to avoid an absurd construction of a statute because an absurd result must be avoided even if one is indicated by the plain language. *See, e.g., RTD v. Lopez*, 916 P.2d 1187, 1192 (Colo. 1996) (although the plain language [may support a party's] proffered construction, we must inquire further of the legislative intent" in order to avoid an absurd result). "We will not adopt a construction that leads to an absurd result." *Leonard v. McMorris*, 63 P.3d 323, 326 (Colo. 2003).

VI.
Conclusion.

The duty created and imposed upon social hosts by H.B. 05-1183, section 6, and codified as § 12-47-801(4)(a)(I), is based upon "knowingly" providing any underage social guest "a place to consume alcohol…." That duty cannot be based upon, limited, or circumscribed by whatever subjective and actual knowledge a social host chooses to possess or ignore about the guests that the host blindly permits to enter the host's party venue and indiscriminately drink alcohol, which the host has openly served in a "buffet" style. Otherwise, no meaningful legal duty exists.

By limiting the statute's application to a host's actual knowledge of the ages and presence of specific guests, the trial court and court of appeals have thwarted the public policy goal of the 2005 Amendments. As construed by those courts and Respondents, the 2005 Amendments fail to protect underage college students (and the public at large), from the grave dangers posed by underage drinking.

The construction of the duty imposed by the 2005 Amendments by the Respondents and the courts below is an assault on the plain text of the amendments and the General Assembly's explicit declaration that:

> (a) The incidents of death related to underage binge drinking have come to the forefront of the concerns of the state of Colorado; and
>
> (b) Colorado has a strong interest in preventing further deaths as a result of underage binge drinking.

H.B. 05-1183, section 1.

Accordingly, the summary judgments entered for the Respondent social hosts should be reversed. The case should be remanded for trial only upon damages because the undisputed record presented here establishes that no question of fact exists that the Respondents violated their duties imposed by the 2005 Amendments. *See Geiger v. Am. Standard Ins. Co. of Wis.*, 192 P.3d 480, 484-85 (Colo. App. 2008) (citing *Pueblo of Santa Ana v. Mt. States Tel. & Tel. Co.,* 734 F.2d 1402, 1408 (10th Cir. 1984)).

The Respondents' abject and overt "willful ignorance" and self-induced ignorance cannot shield them because they chose to throw a wide-open "kegger" style party for the vulnerable population that the legislature deleberately decided needed greater protection as a matter of public policy.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of February 2018, a true and correct copy of the foregoing Petitioner's Reply Brief was filed with this Court and serves to the following on the Colorado Courts E-Filing system:

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