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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #139 ("Third-Party Delivery of Alcohol Beverages") **Petitioners:** Christopher Fine, Steven Ward, and Levi Mendyk **v.** **Respondents:** Robert Schraeder and Joel Allen Cathey **and** **Title Board:** Theresa Conley, David Powell, and Julie Pelegrin	**▲COURT USE ONLY▲**
Attorney for Petitioner Christopher Fine: Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com	Case Number: 2022SA129

PETITIONER CHRISTOPHER FINE'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #139 ("THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES")

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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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s/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

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LEGAL ARGUMENT

I. The Title Board failed to give effect to the "separate and distinct" treatment of retail beer and wine regulation and the proponents' affirmative decision not to change it.

Respondents and the Board both question the impact of a legislative declaration's impact, the former arguing a legislative declaration is not binding on the Court and the latter just not conceding that a legislative declaration is necessarily binding. Resp. Op.Br. at 8; Title Board Op.Br. at 7-8.

Petitioner pointed out that, even if not binding, a legislative declaration must at least be given "great weight." Pet. Op.Br. at 14, citing *Milheim v. Moffat Tunnel Improv. Dist*., 211 P. 649, 658 (Colo. 1922). Neither Respondent nor the Board acknowledge this treatment of legislative declarations, but they also do not disagree with it. Nor do they suggest that this Court has consistently erred in requiring, as a matter of law, that a legislative declaration be given great weight.

The case cited for the proposition that legislative declarations are not binding, *Walgreen Co. v. Charnes*, 819 P.2d 1039 (Colo. 1991), states the important role can still play. It, too, observes that legislative declarations deserve great weight and are substantial considerations in applying the underlying statute. *Id.* at 1045, n.11.

The Title Board is not an independent administrative agency but is treated as an informal entity serving a specialized statutory function. *In re Proposed Initiative*

Entitled W.A.T.E.R., 831 P.2d 1301, 1306 (Colo. 1992). In that capacity, the Board is no less obligated to give credence to a legislative declaration than are the courts. And no rationale has yet been advanced for why the Title Board should be permitted to ignore existing law and the terms of a proposed initiative – the former containing, and the latter preserving, an express finding about the separate and distinct nature of retail beer and wine regulation.

In fact, in drawing the Court's attention to SB19-11,[1] recent legislation that modified but preserved the separate treatment of retail beer and wine, Respondents and the Board highlight the inconsistency of their position. That legislation allowed for a unified treatment of beer and wine in the manufacturing, wholesaling, and importing of such alcohol beverages. Resp. Op.Br. at 8-9; Title Board Op.Br. at 7-8. But it replaced those provisions with specific statutory language about the "separate and distinct" subject matter of beer and wine regulation "***at the retail level***," C.R.S. § 44-4-102(2), which is precisely the regulatory level Respondents' Initiative concerns.

That subsection was changed to allow for certain administrative efficiencies, but it enacted the exception that is at issue here, one that established the need for a

[1] https://leg.colorado.gov/sites/default/files/2019a_011_signed.pdf at 2 (last viewed May 15, 2022).

"separate regulatory framework and licensing structure… at the retail level." SB19-11's precise change in Section 2 of the enacted bill reads as follows

> (2) The general assembly further recognizes that fermented malt beverages and malt liquors are separate and distinct from, and have a unique regulatory history in relation to, vinous and spirituous liquors; ~~and as such require the retention of a separate and distinct regulatory framework under this article 44~~ HOWEVER, MAINTAINING **A SEPARATE REGULATORY FRAMEWORK AND LICENSING STRUCTURE** FOR FERMENTED MALT BEVERAGES UNDER THIS ARTICLE 4 IS **NO LONGER NECESSARY EXCEPT AT THE RETAIL LEVEL**. FURTHERMORE, to aid administrative efficiency, ~~however,~~ article 3 of this title 44 applies to the regulation of fermented malt beverages, except when otherwise expressly provided for in this ~~article 44~~ ARTICLE 4.

(Emphasis added.)

In Initiative #139, Proponents neither changed nor repealed the capitalized language from SB19-11. As such, they preserved SB19-11's requirement for the separate regulation of beer and wine at retail.

Where "the legislature had the opportunity to amend these statutes but did not elect to do so," the unchanged wording of that statute must be given effect. *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997). Here, the Respondents, asking voters to act as legislators, do not seek to change or withdraw this standard from Colorado statute. Where a bill amends part of a statute and preserves or builds upon the rest, the legislative body "intended to retain" that earlier provision of law. *Estes Park Bank v. Shanks,* 794 P.2d 1108, 1110 (Colo. App. 1990); *see* C.R.S. § 2-4-208 ("A

statute which is reenacted, revised, or amended is intended to be a continuation of the prior statute and not a new enactment, insofar as it is the same as the prior statute.").

As is pertinent here, then, a subsequent amendment of the existing statute that does not alter the "separate" nature of regulation of retail wine and beer is presumed to embrace that provision. At a minimum, it certainly leaves that provision intact. The proponents of this measure could have repealed that portion of the statute, but they didn't. That choice could not have been inadvertent and is not meaningless.

This scenario is akin to cases where initiative proponents present measures for title setting even though this Court has already ruled that a comparable measure, containing the same primary provisions, violated the single subject requirement. The Board is required to adhere to that determination of "separate and distinct" subjects. *See, e.g., In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007) (prior finding that a water-related measure was multiple subjects controlled when the Court considered an "initiative [that] improperly pair[ed] the creation of a new environmental department with the [same] separate and discrete subject of the creation of a public trust standard"); *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #29*. 972 P.2d 257, 263 (Colo. 1999) (second attempt to join changes to judicial

branch to changes in judicial performance commission violated the single subject requirement "for the reasons stated in our prior opinions controlling this case").

The reasoning for the Court's adherence to precedent is a compelling argument for why the Title Board should have taken into account the existing statute, unchanged by this initiative. Prior decisions may no longer be binding where the Court must "take into account changes in statutory or constitutional law and… be willing to depart from a prior ruling **if the legislature or the people employing their legislative power have chosen to clarify or alter prior law**." *Id.* at 262 (emphasis added). Here, the legislative direction that, at the retail level, regulation of beer and regulation of wine are separate and distinct has been neither clarified nor altered. Initiative #139 preserves that line in the sand.

Once a subject is found as a matter of law to be separate and distinct from purportedly related topics, the Title Board should give effect to that determination. And when it acts without reference to this clear single subject standard, its decision should be reversed. Therefore, the Board's single subject decision and title should be invalidated, and the initiative should be returned to Respondents.

II. Under the initiative, third-party delivery is solely an act that occurs at retail, subjecting it to the "separate and distinct" finding of the General Assembly.

Respondents argue that this measure is different from existing law because it "authorizes third-party delivery of alcohol, not retail sales." Resp. Op.Br. at 8.

While the two transactions (sale vs. delivery) are independent of each other and are proposed in other initiatives for the purpose of attracting different swaths of voters, consumer sales and consumer delivery both take place only in the retail sector. Grub Hub and Uber Eats won't be delivering alcohol from distillers or brewers to warehouses or from warehouses to retailers. It isn't what they do, and it is outside of the scope of what the measure authorizes.

The measure allows only for a third-party deliver service permittee to "transport and deliver alcohol beverages from an off-premises retailer or an on and off premises retailer" as such retailers are licensed under state law. Proposed Section 44-3-911.5(1); R. at 2. Under the law, these types of licensees sell alcohol beverages for "consumption," in other words for consumers. *See, e.g.*, C.R.S. § 44-3-103(48) (retail liquor store sells alcohol beverages "in sealed containers for consumption off the premises"); *id.* 44-3-413(1) ("a hotel and restaurant license shall be issued to persons selling alcohol beverages in the place where the alcohol beverages are to be consumed").

Thus, sales and delivery share one thing: the "separate and distinct" regulation of retail beer and wine applies to them both. And that is enough for this Court to find that Initiative #139 violates the single subject requirement.

CONCLUSION

The Board's single subject decision was erroneous and should be reversed.

Respectfully submitted this 15th day of May, 2022.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER CHRISTOPHER FINE'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #139 ("THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 15, 2022, to the following:

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