SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 10, 2022 3:48 PM
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-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 OPENING 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).

Choose one:

X It contains 3,622 words.

☐ It does not exceed 30 pages.

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

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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

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INTRODUCTION

Generally, the Title Board and the Court are left to determine whether a proposed ballot measure violates the constitutional single subject requirement. The standard that is typically applied is whether the initiative addresses "separate and distinct" purposes. Then, at the Board and before this Court, the parties call upon common knowledge, precedent, and presumed political messaging to argue that a measure does—or doesn't—address purposes that are "separate and distinct."

But that approach is not required here. In perhaps the only instance in which it has identified "separate and distinct" purposes as a matter of regulatory policy and consumer impact, the General Assembly already has determined that, at the retail level, the regulation of beer is "separate and distinct" from that of other alcohol beverages such as wine and hard liquor. Proponents of Initiative #139 know this, having drafted a comprehensive measure affecting all alcohol beverages but leaving the legislature's "separate and distinct" finding untouched. Thus, even if their measure was adopted, the "separate and distinct" standard would still apply to the regulation of one, as a matter of law, standing apart from the regulation of the other.

Proponents change the regulation of both beer and other alcohol beverages in their measure. They do so by creating under the umbrella of a single measure a new third-party delivery scheme that applies to *all* types of alcohol—beer, wine, and hard

liquor. This, however, violates the constitutional single subject rule by combining into one initiative issues that are separate as a matter of law.

The Board was not free to disregard the legislature's determination, but it did exactly that in finding it had jurisdiction and then setting a title for an initiative that both embodies and ignores the "separate and distinct" standard for regulation of retail sale of the specified alcohol beverages. Accordingly, the Court should vacate the titles and return the measure to the Board to dismiss for lack of jurisdiction.

ISSUES PRESENTED

Whether the Title Board lacked jurisdiction because, under existing Colorado law, the regulation of beer at the retail level is, as a matter of law, "separate and distinct" from regulation of wine and spirits at the retail level, meaning that this measure contains "separate and distinct" purposes in violation of the single subject rule.

STATEMENT OF THE CASE

A. Statement of Facts.

Robert Schraeder and Joel Allen Cathey proposed Initiative 2021-2022 #139 ("Third-Party Delivery of Alcohol Beverages") ("Initiative #139" or the "Initiative"). The Initiative adds a new authority to Colorado's liquor law concerning the delivery of alcohol beverages. Under this Initiative, retail licensees may contract with third-party services to provide delivery of alcohol, whether sold for on-premises

consumption or off-premises consumption, to their customers. (Initiative #139, sec. 2, proposed C.R.S. § 44-3-911.5(1).) These third-party delivery services are not required to be Colorado corporations or citizens or to obtain a liquor license. (*Id.*, proposed C.R.S. § 44-3-911.5(1) and (2).) Rather, the third-party services need only obtain a *pro forma* delivery "permit," which is issued, effectively, as of-right (i.e. without investigation or discretion by state or local licensing authorities) so long as an applicant meets minimal requirements. (*Id.*, proposed C.R.S. § 44-3-911.5 (3).)

There is no limit on the types of alcohol beverages a delivery permittee may deliver. (*See id.*, § 44-3-911.5(1).) Rather, Initiative #139 states that a permittee may deliver "alcohol beverages from an off-premises retailer or an on and off premises retailer licensed" under the Colorado Liquor or Beer Codes. (*Id.*) "Alcohol beverage" is a defined term under Colorado liquor law, which includes beer, wine, and spirits or hard liquor. C.R.S. § 44-3-103(2) (defining "alcohol beverage"). The Initiative thus applies to ***both*** beer and all other types of alcohol beverages—wine and spirits or hard liquor—as well as alcohol beverages sold by the drink (e.g. mixed drinks from a restaurant).

B. Nature of the Case, Course of Proceedings, and Disposition Below.

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted final versions of the Proposed Initiative to the Secretary of State for submission to the Title Board.

A Title Board hearing was held on April 20, 2022, at which time titles were set for Initiative #139. On April 27, 2020, Petitioner Christopher Fine ("Objector") filed a Motion for Rehearing, alleging that the Title Board erred in fixing titles because the Initiative violated the constitutional single subject requirement and the titles set by the Board were inaccurate, incomplete and misleading to voters. A rehearing was held on April 28, 2022. The Board granted Objector's Motion only to the extent that it made changes to the titles. The Board set the following title:

> Shall there be a change to the Colorado Revised Statutes concerning authorization for third-party delivery of alcohol beverages from retailers licensed to sell alcohol, and, in connection therewith, establishing a third-party delivery service permit that authorizes an individual or business entity to deliver alcohol beverages sold by licensed alcohol beverage retailers for consumption off the licensed premises; establishing the requirements for obtaining a delivery service permit, including requirements to carry insurance and to provide insurance, health-care benefits or stipend, and reimbursement for fuel costs to employees and independent contractors; requiring persons delivering and receiving alcohol beverages to be at least 21 years of age; removing the limit on the percentage of revenue received from sales of alcohol beverages for delivery; and allowing a technology services company, without obtaining a third-party delivery service

permit, to provide software or a digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages?

SUMMARY OF ARGUMENT

In existing law, there is an identification of "separate and distinct" interests (the regulation of beer and other alcohol beverages) that Initiative #139 nonetheless leaves in place. As determined by the General Assembly, and tacitly agreed to by Proponents, the regulation of beer and other alcohol beverages is "separate and distinct . . . at the retail level." In other words, the regulation of, and thus any expanded access to, the retail offering of these alcohol products must be treated under the law as separate subjects.

Initiative #139 does not do that. Instead, the measure blesses the combination of regulation of all types of alcohol regardless of type while leaving intact the "separate and distinct" natures of retail sales of beer and other alcohol beverages. This violates the constitutional single subject rule by combining subjects (beer and other alcohol beverages) into one measure that, as a matter of law, are to be treated separately. The Board had no authority to ignore the General Assembly's determination that these are separate purposes, which deprives it of jurisdiction.

This Court has never addressed this question before. It is unlikely to do so again, given the sparse use of a legislative finding that two subjects are separate and

distinct. But confronted with a clear statute and a singular test for determining whether an initiative contains one subject or multiple subjects, the Court must apply the statute in question as it is written. It could not be clearer.

Accordingly, the Court should vacate the titles set by the Board and return the measure to the Board to dismiss for lack of jurisdiction.

LEGAL ARGUMENT

I. Initiative #139 alters the regulatory landscape for both beer and other alcohol beverages, which violates that single subject rule because the regulation of beer is "separate and distinct" from other alcohol beverages as a matter of law.

A. Standard of review; preservation of issue below.

The Colorado Constitution requires that any initiative must comprise a single subject. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board's analysis and this Court's review is a limited one, addressing the meaning of an initiative to identify its subject or subjects. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999).

To find that a measure addresses only one subject, the Court must determine that an initiative's topics are "necessarily and properly" related to the general single subject, rather than "disconnected or incongruous" with that subject. *In re Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-*

17), 920 P.2d 798, 802 (Colo. 1996). The Court has summarized the required internal nexus and its rational in the following manner. "An initiative violates the single subject requirement when it has at least ***two distinct and separate purposes*** which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997-1998 #64*, 960 P.2d 1192, 1196 (Colo. 1998) (citation and internal quotation marks omitted) (emphasis added). That there is some common thread between separate and distinct topics is of no legal moment. "Where two provisions advance ***separate and distinct purposes***, the fact that they both relate to a ***broad concept or subject*** is ***insufficient to satisfy the single subject requirement***." *Id.* (emphasis added.)

Petitioner raised this issue in his Motion for Rehearing, and during the hearing on his Motion, and, therefore, preserved the issue for review. (*See* Pet.'s Mot. for Reh'g on Initiative 2021-2022 #139 at 2-3; Apr. 28, 2022 Title Bd. Hr'g at 9:45:15 to 9:47:23.[1])

[1] The recording of the Title Board's hearing is available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.

B. The Title Board erred by knowingly declaring matters that are clearly "separate and distinct" purposes to be titled as a single subject.

1. The General Assembly has established the regulation of beer is "separate and distinct" from other alcohol beverages, and Initiative #139 does not repeal that statutory direction.

The General Assembly has enacted a comprehensive scheme to regulate alcohol beverages as "an exercise of the police powers of the state for the protection of the economic and social welfare and the health, peace, and morals of the people of this state." C.R.S. § 44-3-102(1). As this Court has explained, the General Assembly's "detailed descriptions of the licensing process and specific directions to licensing authorities concerning the exercise of regulatory power, further indicates a thorough legislative consideration of all aspects of the licensing process[.]" *People v. Bagby*, 734 P.2d 1059, 1062 (Colo. 1987).

As part of creating this "comprehensive regulatory program," the legislature determined that different types of alcohol beverages merit different regulatory approaches and should be dealt with independently. The General Assembly concluded that beer presents different and lesser public health and safety concerns than wine and spirits or hard liquor. The so-called "Beer Code" creates a separate regulatory framework for the retail sale of beer (what are called fermented malt beverages). *See* C.R.S. §§ 44-4-101 *et seq*. The Beer Code not only creates a less

demanding regulatory scheme for those covered licensees that just sell beer, it also affirmatively declares that the regulation of beer at the retail level is "separate and distinct" from other alcohol beverages. The General Assembly declared:

> 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; 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, article 3 of this title 44 applies to the regulation of fermented malt beverages, except when otherwise expressly provided for in this article 4.

C.R.S. § 44-4-102(2) (emphasis added). In other words, the General Assembly has directed, as an exercise of its police powers, that retail offerings of beer and other alcohol beverages are to be dealt with as separate regulatory matters.

The General Assembly has long been responsible for the regulation of liquor, and it has created an intricate framework to control the distribution and sale of alcohol beverages. These policies stem from a long history of careful, targeted regulatory treatment of various types of alcohol which triggers different levels of state-directed oversight. It is no surprise, then, that the regulation of all types of alcohol is a matter of statewide concern. *See, e.g., Kelly v. City of Fort Collins*, 431 P.2d 785, 787 (Colo. 1967).

The legislature's decision to treat beer differently and declare its regulation as "separate and distinct" at retail from other alcohol beverages was a consequential

legislative choice that neither the courts nor the Title Board should displace in the absence of the repeal of such a declaration. It is incumbent upon this Court "to ascertain and give effect to the General Assembly's intent," *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, and 69 ["2011-2012 Nos. 67, 68, and 69"]*, 2013 CO 1, ¶ 12, 293 P.3d 551, and the Title Board has no greater latitude than this Court would have to bypass clear statutory pronouncements. *Cf. Price v. Mills*, 728 P.2d 715, 720 (Colo. 1986) (no deference due to administrative interpretation of a statute that "contravenes . . . legislative . . . policies").

2. The "separate and distinct" determination by the legislature parallels the inquiry this Court uses when the Title Board assesses initiatives for a single subject.

The General Assembly's determination that beer and more potent alcohol beverages are separate and distinct should guide the application of the single subject rule here. As the Court has recognized, the General Assembly plays an important role in implementing the Constitution's provisions governing ballot initiatives. For instance, the General Assembly created the Title Board and assigned to it the constitutional responsibilities for setting ballot titles. *See, e.g.*, *2011-2012 Nos. 67, 68, and 69*, *supra*, 2013 CO 1, ¶ 14. The General Assembly has further delineated the procedures and timelines for the ballot title setting process, which this Court has

held it must apply as intended by the legislature. *See, e.g.*, *In re Title, Ballot Title and Submission Clause for 2019-2020 #74 and In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #75*, 2020 CO 5, 455 P.3d 759.

In fact, the Court has recognized the authority of the General Assembly to implement and enforce the single subject requirement itself. As the Court explained, in passing C.R.S. § 1-40-106.5, the General Assembly described through a legislative declaration the concerns behind the single subject rule, and it "***directed*** that the single subject and title requirements for initiatives be liberally construed, 'so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.'" *In re Title, Ballot Title and Submission Clause, and Summary with regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25)*, 900 P.2d 121, 124-25 (Colo. 1995) (quoting C.R.S. § 1-40-106.5) (emphasis added). This Court has relied on that legislative declaration from the time immediately following its enactment, *see id*., and it remains a source of consistent direction for this Court as well as the Title Board. *See, e.g.*, *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶¶ 12-14, 500 P.3d 363, 365.

Although the General Assembly has authorized the Board to fix titles and enforce the single subject requirement, *see* C.R.S. §§ 1-40-106 and -106.5, the legislature has not endowed the Board with authority to make its own legislative determinations or to change or deviate from those made by the General Assembly. Rather, the Board must act within the limits prescribed by the General Assembly, which includes the "substantive requirements" of state statute as they affect the title setting process. *See 2011-2012 Nos. 67, 68, and 69, supra*, 2013 CO 1, ¶ 16 (holding Board lacked authority to deviate from a "substantive" requirement of Title 1, Article 40, the mandatory attendance by both designated representatives at all hearings on their measure). And that is the situation here. The General Assembly has already pronounced, as an exercise of its police powers, that the regulation of beer and other alcohol beverages (i.e. wine and spirits) is "separate and distinct" at the "retail level." C.R.S. § 44-4-102(2).

Initiative #139 proposes an expansive new delivery scheme that operates at the retail level to deliver any and all alcohol beverages from licensees to consumers—beer, wine, hard liquor, as well as alcohol beverages by the drink. It does so under the guise of a delivery permit which triggers little real regulation of the companies that will provide this service. This is precisely the mixing of the regulation of beer with other alcohol beverages—substances of different potency

and therefore different impact on consumers—that C.R.S. § 44-4-102(2) dictates should not generally occur.

3. The Title Board was required to give effect to this legislative declaration, particularly where such implementation coincides with the constitutional single subject requirement.

Even if the distinction seems outmoded to consumers, as far as the General Assembly is concerned, beer must be considered and regulated at retail separately from other alcohol beverages, a separation which Initiative #139 does not repeal or modify but instead leaves in place. The Title Board was not free to disregard this direction from the General Assembly in deciding whether the Initiative violated the single subject requirement put in place to protect the law-making process of ballot initiatives to be exercised by the electorate.

For example, the General Assembly's use of a safety clause, declaring that a law is necessary for the immediate preservation of the public peace, health, or safety—and thus beyond the referendum power of voters—"is conclusive upon all departments of government" and is determinative of whether the right of referendum may be exercised regarding that legislation. *Van Kleeck v. Ramer*, 156 P. 1106, 1109 (Colo. 1916). As a general matter, when it considers an initiative for title setting, the Title Board does not have "authority that the General Assembly withheld." *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 2014 CO 61, ¶ 18,

328 P.3d 127, 131. Thus, the Board could not ignore the clear legislative assessment of beer and wine at the retail level to be a separate subject for this purpose.

Where "[t]here is nothing in the record to show that this legislative declaration was arbitrary or unfounded in reason" (and there is nothing to suggest such lack of thought by the General Assembly here), that declaration "is conclusive" on the parties to which it applies, and the Court "is bound by" it. *Milheim v. Moffat Tunnel Improv. Dist*., 211 P. 649, 658 (Colo. 1922); *see also Slack v. City of Colorado Springs*, 655 P.2d 376, 379 (Colo. 1982). This principle has not been limited in this Court's application to safety clauses. A legislative determination dealing with more routine matters can still be "conclusive" as a matter of law. *Milheim, supra,* 211 P. at 658 (giving effect to legislative declaration that assessments did not exceed the benefits of a publicly financed improvement project as "conclusive" on the courts). Even a legislative declaration that is not deemed to be conclusive is "entitled to great weight." *Id*. at 657. Here, the Title Board just ignored it.

As noted above, Proponents drafted their measure without disturbing or materially limiting that legislative finding. The provision they did not change relates directly to the single subject standard that is this Court's central inquiry, i.e., identifying a separate and distinct purpose.

The Title Board's willingness to look away from this legislative determination, if accepted by this Court, produces a slippery slope. If the legislature's distinction regarding agency regulation of wine and beer is deemed to be of no consequence, such a decision would also erase the underpinnings for differential levels of regulation (depending on the alcohol beverages at issue and their alcoholic content) and, as importantly, differential levels of taxation as determined by the taxing governmental entity. *See Springston v. City of Ft. Collins*, 518 P.2d 939, 940 (Colo. 1974) (upholding district court finding that different categories of license were "separate and distinct" from one another and therefore there was a rational basis for different levels of taxation on the two types of products sold under these liquor licenses).

So long as the retail level regulation of beer and other alcohol beverages is legally categorized as "separate and distinct," a measure that ignores this delineation and authorizes the same treatment of them at the retail level necessarily violates the single subject requirement. An initiative cannot have a single subject if it involves two matters that the law mandates are "separate and distinct." The legislature's determination of the "separate and distinct" character of these products at the retail level should have been acknowledged by the Board. Proponents' evident awareness of this legislative decision and willingness to craft their measure despite it should

have prevented a finding of a single subject. It didn't, and this Court, under specialized facts unique to this statutory scheme, must correct the Board's failure.

CONCLUSION

This Court has been clear: separate and distinct purposes within an initiative violate the single subject rule. The Colorado General Assembly has been equally clear that regulation of beer at the retail level is "separate and distinct" from regulation of other alcohol beverages. A proposed initiative therefore cannot revamp retail operations of both categories of regulated activity without resolving the single subject inconsistency that flows from existing law. Initiative #139 did not do so. In fact, the Proponents amended existing statute without tweaking a word in this portion of the statute. This failure is determinative in the single subject analysis.

Accordingly, the Court should vacate the titles set by the Board and direct the Board to return the measure to Proponents for lack of jurisdiction.

Respectfully submitted this 10th day of May, 2022.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com
ATTORNEY FOR PETITIONER CHRISTOPHER FINE

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER CHRISTOPHER FINE'S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #139 ("THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 10, 2022, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Counsel for the Designated Representatives:
Martha Tierney
Tierney Lawrence LLC
225 E. 16th St., Ste. 350
Denver, CO 80203

Counsel for Ward-Mendyk Petitioners:
Suzanne Taheri
Maven Law Group
1800 Glenarm, Ste. 950
Denver, CO 80202

/s Erin Holweger