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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 #121 ("Sales of Alcohol Beverages") Petitioner: Christopher Fine v. Respondents: Steven Ward and Levi Mendyk and Title Board: Theresa Conley, David Powell, and Jeremiah Barry	**▲COURT USE ONLY▲**
Attorney for Petitioner: 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: 2022SA148

PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #121 ("SALES 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
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INTRODUCTION

In tough winters, Colorado is avalanche country. In 2022, snow was sparse, but the state still saw an avalanche—of alcohol sale and delivery expansion initiatives. Twenty-five went to the Title Board, and ten of those are still pending before this Court. Some authorize supermarkets to sell wine; others authorize third party delivery services to bring any type of alcohol to your door; some do both. Some are statutory; others are constitutional.

Initiative #121 is the statutory, wine-in-grocery store variation on this theme. But the fact that its proponents carved off one of their two subjects doesn't mean the Board shouldn't have engaged in a thorough level of single subject scrutiny.

Here, the measure's proponents tweaked an existing statute in Section 7 of Initiative #121 that literally says their measure's regulation of beer at the retail level is a "separate and distinct" matter from their measure's regulation of wine at the retail level. Of course, this Court has been clear that initiative subjects that are "separate and distinct" violate the Constitution's single subject requirement. The Board should have taken this acknowledgement that the Initiative meets this Court's test for single subject violations to heart. But it didn't.

Further, the proponents used a drafting device—"repeal and reenact" language—that they admitted before the Board was intended to displace any

legislative or citizen-initiated act that addresses the same statutory sections as are addressed in Initiative #121. This isn't an "effect" of the initiative that the Board could just ignore. It's the true intent and meaning of the measure according to the Respondents' very clear, very specific explanation during title setting. To the extent the single subject requirement is to be an effective barrier against surreptitious lawmaking, the Title Board needed to have found that this manner of displacing other measures was a single subject violation. Because it didn't, this Court should do so, providing clear instructions so that future initiative proponents do not use indirect means to lull voters into falsely thinking they are only adopting the measure before them when they are really repealing other laws.

The Title Board's decision should be reversed.

LEGAL ARGUMENT

I. The Initiative violates the single subject requirement.

A. The Initiative preserves the "separate and distinct" subjects of regulation–the central issue of this measure–of beer and wine sold at retail and thus violates the single subject requirement.

Petitioner raised the issue of the "separate and distinct" treatment of beer and wine and its effect on the "distinct and separate" subject analysis this Court requires as its single subject standard. Pet. Op.Br. at 7-14.

1. The Court and the General Assembly have embraced "separate and distinct" as it relates to regulation of different forms of alcohol.

In their legal argument on this point, Respondents state that "nowhere in the liquor code does the term infer or denote that the licenses cannot be subject to the same regulations." Resp. Op.Br. at 9. Two responses are warranted here.

First, the General Assembly adopted just such a restriction in the Beer Code, and specifically the statute in question here, C.R.S. § 44-4-102(2). The legislature was clear that the regulation of beer should be separate, at the retail level, from the regulation of wine and spirts.

Second, this Court has expressly approved differential regulatory treatment for various types of alcohol for more than 50 years. Recent statutory amendments in 2016 incorporated this distinction, and the General Assembly has never repudiated it as a line in the sand. In effect, this Court's interpretation of the Beer Code is incorporated by reference into current statute. Thus, the statute both infers and denotes that certain "licenses cannot be subject to the same regulations."

As background, for many years, full strength beer and 3.2% alcohol beer were treated as "separate and distinct" for regulatory purposes. The latter was available in stores where minors shopped, such as supermarkets. Selling full strength alcohol beverages in the same retail location was seen as a public danger.

In *Woods v. People*, 397 P.2d 871 (Colo. 1964), the Court noted, regarding these two types of alcohol, "[o]ur General Assembly treated [each of them], as a **separate subject of regulation**." *Id.* Fermented malt beverages, containing 3.2% alcohol, were governed in one statute, and full strength beer, also known as "malt liquor," "was regulated in another and distinctive manner." *Id.*, (citations omitted).

The legislature's designation of separate treatment of the two types of alcohol was of upmost importance to the Court. "The General Assembly thus legislatively recognized two kinds of malt drinks, **dealt with them separately and differently**, and **made it clear** that they are cognate but **disjoined subjects of legislation**." *Id*. (citation omitted) (emphasis added).

Beer and wine are "cognate" to the extent they are both alcoholic beverages, but that general grouping is as far as it goes. They have discrete licenses and privileges, not to mention responsibilities due to different alcoholic content, and thus they are different subjects. For instance, "cognate subjects" are "related but different activities" which means "the legislature plainly and unequivocally has treated [the two] as **separate and distinct pursuits**," subject to different licenses and held to different standards. *See Purcell v. Poor Sisters of St. Francis Seraph*, 364 P.2d 184, 184-185 (Colo. 1961) (addressing separate subjects in the medical field) (emphasis added.)

Discrete forms of alcohol are "dealt with… separately and differently" as disjoined subjects. Any alcohol beverages that are declared as a matter of law to be distinct from each other—as are beer and wine—are "disjoined"[1] and comprise discrete "subjects of legislation." The legislature has statutorily formalized this separation, *see* C.R.S. § 44-4-102(2), which the Board needed to apply in its single subject decision-making.

Since *Woods, supra,* was decided, the alcohol statutes have been amended numerous times in light of this judicial precedent. Because beer and wine regulation at retail are separate and distinct subjects in existing law, the General Assembly is deemed to have adopted this Court's judicial determination in *Woods*. "If a re-enacted statute has been construed, the force and effect of such construction remains an integral part of the re-enacted statute." *Creacy v. Industrial Comm'n*, 366 P.2d 384, 387 (Colo. 1961).

In 2019, C.R.S. § 44-4-102(2) was amended[2] to clarify that the "separate" nature of regulating beer and wine was limited to "the retail level," thus applying the

[1] "Disjoin" means "to bring an end to the joining of: SEPARATE, DISUNITE, PART, SUNDER . . .: to become detached: SEPARATE, PART." *Freeman v. Gerber Prods. Co*., 357 F. Supp. 2d 1290, 1296 (D.Kan. 2005), citing Webster's International Dictionary 651 (1993) (capitalization in original).

[2] 2019 Sess. Laws, ch. 1, p. 1, §1.

Woods rationale and making clear the legislature's intentionality behind this line in the sand. The 2020 amendments to article 4 of Title 44 did not change anything in C.R.S. § 44-4-102.[3]

For more than 70 years, the Court has justified treating different forms of alcohol as separate legislative subjects due to consumers' ***access*** at the retail level. Certain stores are frequented by persons who are legally prohibited from purchasing more potent forms of alcohol. In a license denial due to a distance limitation from schools that applied to one class of liquor license but not another, the Court held that differential treatment between alcohol types served an important public purpose:

> [S]tudents both above and below eighteen years of age attend the school, which is located only 176 feet from applicant's store and which they frequent for the purchase of paper and ice cream. Under the statute, 3.2% beer may legally be sold to those students who are eighteen years of age and may legally be consumed on the premises, and under the testimony of applicant himself, he proposed to keep his beer in the same cooler with the milk and pop where customers served themselves. **There would thus be the most wide open invitation for the purchase of beer by the eighteen-year-old students, and the temptation also for them to procure it for the use of younger students who might visit the store with them.**

[3] 2020 Sess. Laws, ch. 67, p. 270, § 3.

MacArthur v. Sierota, 221 P.2d 346, 350 (Colo. 1950) (emphasis added). While the statutes in question in *Sierota* have changed, the public policy concern revolving around certain consumers' access to these beverages remains.

Respondents seek to put wine in grocery stores and convenience stores. The Court may take notice of the fact that those stores' customers are both under and over the legal age for purchasing wine. It is as likely today as it was in 1950 that consumers would see wines being placed "in the same cooler with the milk and pop." *Id*. Or, at a minimum, a purchaser of legal age may be motivated to buy wine for a classmate or other person who is underage "who might visit the store with them." *Id.* Treating different forms of alcohol as separate legislative subjects revolves around customer access; certain licensees' consumers, based on their age, are prohibited from purchasing more potent alcohol.

That separation was consistent with, and in furtherance of, the state's police power. *See id.* at 349. The Board's failure to acknowledge, much less adhere to, this line of separation was error.

Thus, Respondents wrongly contend that alcohol laws do not "infer or denote" a separation in regulation, given the express wording of the statute (which their measure leaves in place) and the presumption that the legislature incorporated the judicially recognized basis for such separations. Respondents' and the Board's

suggestion that C.R.S. § 44-4-102(2) is a statute without meaning—or without relevance even though it uses the very standard that is at the core of this Court's single subject analysis—is incorrect.

2. Other statutory references to "separate and distinct" do not render this reference to that standard meaningless.

Respondents recite 141 instances of "separate and distinct" being used in the Colorado Revised Statutes and several instances of that phrase in liquor-related statutes. Resp. Op.Br. at 9.

The specific statutory sections Respondent cites don't use "separate and distinct." *Id.* Besides C.R.S. § 44-4-102(2), the provisions in Title 44 that do refer to "separate and distinct" relate to licenses or facility managers. *See, e.g.,* C.R.S. §§ 44-3-301(3)(a)(I), -406(4), 407(1)(c) (licenses); -413(9), -414(4), -428 (managers). Thus, these statutes support Petitioner's argument that, as a regulatory standard, "separate and distinct" is a critical dividing line in retail alcohol regulation.

3. The separate regulatory treatment of retail beer and wine will not bring the legislature to its knees.

Respondents' concern that "[t]his interpretation would ground (sic) legislation to a halt," *id*., is conjecture. Even if true, it is beside the point. Given a choice between constitutional compliance with specified requirements for lawmaking and preserving a rapid pace of legislating, this Court chooses the former, not the latter.

The Constitution's focus is on "ensuring the integrity of the enactment of bills," and sometimes that means applying constitutional requirements about bill passage that were intended to "afford protection from hasty legislation." *Markwell v. Cooke*, 2021 CO 17, ¶28, 482 P.3d 422 ("reading" requirement for bills is not satisfied if bills are read in an unintelligible manner) (citations omitted). In other words, sometimes a more deliberate process for considering bills is just what the Constitution (including its single subject requirement for legislation) requires.

It is argued that if proponents of legislation or initiatives could just combine their separate concerns, each process would go faster. But Colorado's Constitution prioritizes clarity in legislating, not speed. If one liquor licensing bill has to be split into two bills to comply with the General Assembly's single subject requirement, there are 120 days in a legislative session, and the House and Senate can almost certainly consider them both without breaking.

4. The legislature's preservation of "separate and distinct" treatment of beer and wine sold at retail remains meaningful, despite legislative changes to other sectors of the industry.

The Board argues unification of beer and wine regulation for every stage ***except*** retail sales (i.e., manufacturing, wholesaling, and importing) means retail sales of beer and wine are also effectively unified and part of the same subject. Board Op.Br. at 5-6. The Board's all-or-nothing argument can be reduced to this: when the

legislature expressly said retail beer and wine regulation are "separate and distinct," it didn't mean it. The Board's logic here is inconsistent with how statutes are interpreted. "Courts may not assume a legislative intent which would vary the words used by the General Assembly." *People v. Thomas*, 867 P.2d 880, 885 (Colo. 1994).

Further, this theory would allow the Board to decide that any other pertinent statute does not mean what it says. That would be contrary to the rule of construction that a statute will not be read as if the legislature enacted an empty provision. This Court will "give effect to every word and render none superfluous because we do not presume that the legislature used language idly and with no intent that meaning should be given to its language." *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist*., 109 P.3d 585, 597 (Colo. 2005) (citations and quotation marks omitted). It is impossible to give credence to the Board's argument here ***and*** give effect to the plain statutory language, "except at the retail level."

Neither the Respondents nor the Board offers any other reason why the statute at issue is wrong or can be ignored—indeed, in drafting their measure, Respondents left the provision in place. They do not suggest that facts unique to this Initiative remove it from the policy concerns highlighted by the Court in *Sierota, supra*, which outlined the reason for distinguishing between different types of alcohol sold based

on the consumers who purchase "at the retail level." As such, the Board's decision must be reversed.

B. The repeal and reenact clauses violate the single subject rule.

Petitioner argued that the "repeal and reenact" clauses in Initiative #121 create single subject violations by (1) creating a unique procedure mechanism to preempt other ballot measures or General Assembly legislation and (2) repealing and replacing with Petitioner's provisions unknown and potentially unrelated provisions of the law. Neither the Board's nor Respondents' arguments support a different conclusion.

1. The intent and purpose of the repeal and reenact clause is to preempt competing legislation and ballot measures.

In defense of the repeal and reenact clauses, Respondents say the clauses will not do what Petitioner contends. But that is as far as they go. They do not offer any explanation for what the clauses are or what they are intended to do. (*See* Resp. Op.Br. at 10.)

The "repeal and reenact" clauses must have a purpose. Not all of Respondents' 20 initiative drafts included this provision. During the initial ballot title hearing (prior to Petitioner's motion for rehearing), Respondents were clear that they intended to fence out any other ballot measures as well as any legislation adopted by the General Assembly before the 2022 election:

> Board Chair: If there is pending legislation right now that passes this session . . . it would then repeal . . . any changes made before Nov. 8, 2022.
>
> S. Taheri: Or it would potentially conflict with another measure that were to pass at the same time.

(Apr. 20, 2022, Title Bd. Hr'g, 1:32:51 to 1:33:16[4]; *see also* Apr. 29, 2022, Title Bd. Hr'g, 2:09:27 to 2:09:44 ("This was to try and protect against us truly getting to be the last enacted. So we would repeal and reenact the section so that it would come back the way we drafted it.") Because the purpose of a ballot title is to reflect "the true intent and meaning" of an initiative, C.R.S. 1-40-106(3)(b), and Respondents were candid about what they intended and meant, the Board needed to accept that acknowledgement that this is an "end-around" as to other lawmaking that might take the place of their amended statutory sections.

2. The Title Board improperly ignored Respondents' intent, but even if the Board's interpretation is correct, the clauses still violate the single subject rule.

The Board acknowledges that, at the least, the repeal and reenact clauses would "repeal any legislative changes made to the relevant sections." (Board Op.Br.

[4] This discussion occurred in the context of Initiative #113, which was the first version of Proponents' measure the Title Board considered with the "repeal and reenact" provisions.

at 8.) The Board discounts the impact of this language on competing ballot measures, suggesting any argument to that effect is impermissibly speculative. (*Id.* at 14.)

The Board simply ignores Respondents' stated intent, however. As explained *supra*, Respondents' purpose behind the clauses is to preempt any conflict with 2022 legislation or ballot measures adopted in November of this year so as to "truly get[] to be the last enacted." (Apr. 29, 2022, Title Bd. Hr'g, 2:09:27 to 2:09:44.) Respondents' position on the subject of a measure should be accorded deference. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25*, 974 P.2d 458, 465 (Colo. 1999) ("the Board must give deference to the intent of the proposal as expressed by its proponent").

Even if the Board's narrower interpretation of the repeal and reenact clauses is right, it still violates the single subject rule. Voters wouldn't know they are adopting language that displaces the standard approach for resolving potential statutory conflict. Generally, courts avoid interpreting statutory provisions in a manner that creates a conflict and, instead, seek to give all statutory provisions effect. *See, e.g.*, *M.S. v. People*, 812 P.2d 632, 637 (Colo. 1991). It is only where there is an irreconcilable or manifest conflict that courts resort to a statutory construction that nullifies a provision. *See, e.g.*, *People v. James*, 497 P.2d 1256 (Colo. 1972).

Initiative #121 replaces the standard approach for reconciling statutes with its repeal and reenact gambit. It doesn't matter if there actually is a conflict between Initiative #121 and a bill by the General Assembly. Nor does it matter if a conflict is irreconcilable or provisions can be harmonized. The "last in time," "specific over general," or any other principles of construction that would apply fall by the wayside. *See* Part 2 of Art. 4 of Title 2, C.R.S. (establishing principles of statutory construction).

Initiative #121 simply says that it replaces any statutory provision it amends. Thus, anything that voters adopt through another initiative or that legislators have adopted through the legislative process disappears in favor of the Initiative's language. Displacing the standard approach for how courts construe and apply the very statutes that voters may be considering stands separate and apart from the substance of what Initiative #121 seeks to change. *See In re Title, Ballot Title and Submission Clause, and Summary for Initiative 2001-2002 #43,* 46 P.3d 438, 447 (Colo. 2002) (measure violated single subject requirement by changing certain petitioning procedures but also, through "an obscure line in the initiative," insulated TABOR from repeal by voters).

Given this measure's hidden way of eliminating other laws, voters cannot intelligently know what it will really do and therefore decide whether to support it.

This provision is one that is "coiled up in the folds of a complex proposal." *In re Title for Initiative 2013-2014 #76, supra*, 2014 CO 52, ¶32. The repeal and reenact clause is the ultimate November surprise and thus violates the single subject requirement.

CONCLUSION

The Board erred. Its titles should be vacated.

Respectfully submitted this 23rd 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'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #121 ("SALES OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 23rd, 2022, to the following:

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