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<tr><td>SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203</td><td rowspan="3">DATE FILED: May 16, 2022 6:20 PM

▲COURT USE ONLY▲</td></tr>
<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>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</td></tr>
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<tr><td colspan="2">PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #121 (“SALES OF ALCOHOL BEVERAGES”)</td></tr>
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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 4,256 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
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INTRODUCTION

Proponents filed a rash of measures addressing comprehensively or separately wine sales in food stores and delivery of all alcohol beverages. Behind these measures is a coalition attempting to achieve distinct ends. Part of the coalition is seeking yet again to authorize the sale of wine in grocery stores, while another part is seeking to expand the "gig economy" to include third-party delivery of alcohol beverages. With their separate, substantive aims, there is little surprise that Proponents have had difficulty settling on one version of their measure.

The Title Board waded through no fewer than 20 of these measures, five of which are now pending before the Court (as well as several others, including a nearly identical alcohol delivery measure, filed by other proponents). Each of these measures violates the single subject requirement by either combining wine sales and delivery in one measure; comingling regulation of beer and other alcohol beverages, which are legally separate and distinct at the retail level; and/or through the measure's "repeal and reenact" clauses. And as to some measures, the titles set by the Title Board violate the clear title requirement by either misleadingly describing the measure's single subject or omitting key elements of the measure from the titles.

Given the significant overlap among the various versions of the initiatives—and consistent errors raised on appeal—briefing in these matters is necessarily

duplicative. The following chart clarifies across the different initiatives the issues presented for the Court's consideration:

Single Subject	#67	#115	#121	#122	#128	#139
Wine sale & Delivery	✓	✓			✓	
Separate & Distinct		✓	✓	✓	✓	✓
Repeal & Reenact		✓	✓			
Clear Title						
Single Subject Statement	✓	✓				
Technology Providers		✓				
On-premises / Off premises consumption	✓					

ISSUES PRESENTED

1. Whether Initiative #121 violated the constitutional single subject requirement because:

   a. Under existing Colorado statute, the regulation of beer at the retail level is "separate and distinct" from regulation of wine at the retail level, meaning this measure contains "separate and distinct" purposes and therefore violates the constitutional requirement that initiatives be comprised of only one subject; and

b. The Initiative's "repeal and reenact" clauses function to in effect alter the generally applicable procedure for resolving conflicts among statutory provisions and ballot measures, and is separate from the substantive changes the Initiative makes to Colorado liquor law in violation of the single subject rule.

STATEMENT OF THE CASE

A. Statement of Facts

Steven Ward and Levi Mendyk ("Proponents") proposed Initiative 2021-2022 #121 ("Initiative #121" or the "Initiative"). Through this Initiative, Proponents seek to authorize the sale of wine (or "vinous liquors") at food stores such as grocery stores and convenience stores.

They accomplish their objective by modifying the privileges of licensees under the Colorado Beer Code, C.R.S. §§ 44-4-101 *et seq.*, to include the authority to sell wine in addition to beer—what the measure calls a "fermented malt beverage and wine retailer's license." Proponents thus propose regulatory changes at the retail level that concern beer and wine. Proponents modify the legislative declaration for the Beer Code but leave in place the General Assembly's direction that beer and wine are separate and distinct regulatory subjects at the retail level:

> (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; however, maintaining a separate regulatory framework and licensing structure for fermented malt beverages AND FERMENTED MALT BEVERAGES AND WINE under this article 4 is no longer necessary ***except at the retail level***.

(Initiative #121, sec. 7, proposed C.R.S. § 44-4-102(2) (emphasis added).) Proponents further sought to preempt any legislation passed by the General Assembly in 2022 or other ballot measures on the 2022 general election ballot that address aspects of their measure through the Initiative's "repeal and reenact" clauses.

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

A review and comment hearing was held before the Offices of Legislative Council and Legislative Legal Services. Proponents then filed a final version of Initiative #121 with the Secretary of State for submission to the Title Board.

A Title Board hearing was held on April 20, 2022, at which time the Board set titles for the Initiative. On April 27, 2022, Petitioner Christopher Fine ("Petitioner") filed a Motion for Rehearing, alleging that the Board lacked jurisdiction because Initiative #121 violated the single subject requirement, contrary to Colo. Const. art. V, sec. 1(5.5), and that the Title Board set titles which are misleading and incomplete as they do not fairly communicate the true intent and meaning of the measure and will mislead voters. A rehearing was held on April 29,

2022, during which the Board granted the Motion only to the extent that it made changes to the titles. The Board fixed the following titles for Initiative #121:

> Shall there be a change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, establishing a new fermented malt beverage and wine retailer license for off-site consumption to allow grocery stores, convenience stores, and other business establishments licensed to sell fermented malt beverages, such as beer, for off-site consumption to also sell wine; automatically converting such a fermented malt beverage retailer license to the new license; and allowing fermented malt beverage and wine retailer licensees to conduct tastings if approved by the local licensing authority?

SUMMARY OF ARGUMENT

Initiative #121 presents the challenges for voters that the single subject requirement is intended to prevent. It purports to give voters a straightforward question: should food stores be able to sell wine? But layered within the initiative are separate subjects that will not be readily apparent to voters. The Initiative packages in one measure topics (beer and other alcohol beverages) that the General Assembly has determined are "separate and distinct" as a matter of state regulatory policy at the retail level—a separateness which Proponents' measure leaves in place. It also includes a novel procedural mechanism (repeal and reenact) to preempt competing legislation from the General Assembly or another ballot measure—even if those measures do not conflict with Initiative #121's substantive aims.

LEGAL ARGUMENT

I. Initiative #121 contains multiple separate and distinct subjects, which deprives the Title Board of jurisdiction to set titles.

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).

Petitioner raised this issue in his Motion for Rehearing, and during the hearing on Proponents' initiatives, and, therefore, preserved the issue for review. (*See* Pet.'s Mot. for Reh'g on Initiative 2021-2022 #121 at 1-3.)

B. Initiative #121's multiple subjects.

Proponents' measure contains multiple subjects in violation of the single subject rule: (1) altering the regulatory scheme for beer ***and*** other types of alcohol, which, as a matter of law, are "separate and distinct" regulatory concerns at the retail level; and (2) preempting any bill passed by the General Assembly in 2022 or other 2022 ballot measures that addresses certain provisions of Initiative #121—regardless of what those other bills concern or how many votes another successful initiative receives—through the Initiative's "repeal and reenact" clauses.

1. Initiative #121's first single subject violation: comingling retail regulation of beer and other alcohol beverages.

The General Assembly has previously decided that different types of alcohol are, as a matter of law, to be treated separately at the retail level. 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. *See* C.R.S. §§ 44-4-101 *et seq*. The Beer Code affirmatively declares that the regulation of beer at the retail level is "separate and distinct" from other alcohol beverages:

> 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," *see* C.R.S. § 44-3-102(1), 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. Indeed, far from repealing the declaration, Proponents endorse it in their measure:

> 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 AND FERMENTED MALT BEVERAGES AND WINE 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 AND FERMENTED MALT BEVERAGES AND WINE, except when otherwise expressly provided for in this article 4.

(Initiative #121, sec. 7, C.R.S. § 44-4-102(2) (emphasis added).) Under Proponents' revisions, the provision says that a separate regulatory framework for beer and wine is unnecessary "***except at retail***."

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").

The General Assembly's determination that beer and more potent alcohol beverages such as wine 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 it with authority to make its own legislative determinations or to change or deviate from those made by the General Assembly—or in this case, from the Proponents themselves. 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).

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, both in current statute and in this Initiative. The Title Board could not ignore a legislative finding of separateness by the General Assembly that Proponents themselves endorse.

For example, the General Assembly's use of a safety clause, a legislative declaration 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.

The legislature's declaration that Proponents endorse in this Initiative relates directly to the single subject standard that is this Court's central inquiry, i.e., identifying a separate and distinct 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 did not evaluate how much weight to give this legislative declaration; the Board just ignored it.

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." As such, under specialized facts unique to this statutory scheme, the Court should hold the Board erred in finding it had jurisdiction.

2. Initiative #121's second single subject violation: repeal and reenact.

Proponents included in two sections of their Initiative "repeal and reenact" clauses. The purpose of these clauses, as Proponents' counsel admitted during the April 20 title hearing, was to prevent any amendments to these sections made by the General Assembly in 2022 or another 2022 ballot measure from being effective:

> 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.[1]) This provision raises several single subject concerns.

Proponents seek to side step the usual procedures for determining whether a conflict between ballot initiatives exists, and, if so, determining which provision prevails through their "repeal and reenact" clauses. These clauses seek to declare preemptively that Initiative #121 prevails over legislation that was passed by the General Assembly in the 2022 session, at a special session if that is called before this measure is adopted, or through another ballot measure that is adopted at the 2022 election. Proponents seek to prevail ***regardless*** of whether there is an irreconcilable conflict between the provisions and without any attempt to harmonize the provisions as the courts usually do, and ***regardless***, in the case of ballot measure, of which measure receives the most votes.

Although Proponents tried to walk back their admission that the repeal and reenact clauses are intended to have this effect, (*see* Apr. 29, 2022, Title Bd. Hr'g 2:09:45 to 2:13:18), the Court should take Proponents, speaking through experienced

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

counsel, at their word when they initially explained their reasoning. Proponents only disclaimed their intent ***after*** Petitioner filed his motion for rehearing raising the issue, and on the substance, the repeal and reenact clauses may only have meaning as to other ballot measures.

Given the flood of alcohol measures in the initiative system in 2022, Proponents are trying to have the last word even if their measure conflicts with another but gets fewer votes than the conflicting initiative. Their intent is to create a unique procedure for resolving conflict between simultaneously enacted laws, and that gambit is a separate and distinct subject from the substantive changes to Colorado's liquor laws that Proponents also seek.

This drafting trick gives new meaning to "coiled in the folds." Voters would never think that two "yes" votes on two ballot measures that seem to affect the regulation of alcohol would actually result in a "yes" vote on one measure that was designed to, and would, cancel their vote on the other. If ever the concern behind the single subject requirement had a poster child, this provision would be it.

The Court has seen this type of measure before. Where a measure appeared to modify petition procedures but then also repealed the single subject requirement itself, the Court held that such a measure struck at the heart of the single subject mandate and violated it. "Obfuscating the repeal of such a fundamental requirement

within the folds of a complex initiative purporting to deal only with the procedural right to petition violates this provision. In fact, it is precisely the type of ploy article V, section 1(5.5) was intended to protect against." *In re Title, Ballot Title And Submission Clause For Proposed Initiative 2001-02 # 43*, 46 P.3d 438, 447 (Colo. 2002).

In the same way, this measure holds unhappy surprises for voters. Either they will not know they are cancelling out their own vote on another measure by approving this Initiative, or they will understand that fact (although the titles do not apprise them of this) and be forced into trade-offs to figure out which measure(s) they can support so that all of their votes have meaning. Ballot initiatives shouldn't put voters in this position.

The repeal and reenact clauses raise an additional single subject problem because they displace specified sections of the statute regardless of their content. Proponents could be repealing provisions of law that have nothing to do with the substantive aim of their Initiative, depending on what is contained within the statutory section being repealed and reenacted. To give an example from one Title Board member:

> If a law was changed between now and when this is on the ballot . . . a new provision [was] put in place that says [inaudible] if you sell diapers, you automatically get a liquor license.

(Apr. 20, 2022, Title Bd. Hr'g at 1:44:43 to 1:45:01.) Such random changes in the substantive law would not be related to Proponents' objective of wine sales in food stores. These "bystander" provisions would simply fall because of Proponents use of the "repeal and reenact" rubric. Just as the Board struggled to understand the consequences of the repeal and reenact provisions, as shown in the quotation above, voters will have no notice as to what law they may be changing by approving the measure. *See In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (measure's failure to define "non-emergency services," which could cover a variety of different welfare and administrative related services, violated single subject rule because the "Initiative fails to inform voters of the services its passage would affect").

Consider, for instance, proposed C.R.S. § 44-3-301(12)(a), which governs distance requirements between retail licensees, and § 44-3-301(12)(c)(I), which concerns how to measure distances. These are generally applicable distance requirements and are not specific to the beer and wine license Initiative #121 concerns (as shown by proposed 44-3-301(12)(a.5), which applies to that license). Repealing and reenacting general distance requirements bears no relation to wine sales in food stores; however, if the General Assembly or another bill modifies those requirements, Proponents' distance requirement would prevail. Or in the Beer Code,

by repealing and reenacting C.R.S 44-4-104(1), Proponents are preempting any changes to various licensing and regulatory matters such as the license application fee (-104(1)(c)(I)(A)), who the retail licensee may purchase product from (-104(c)(I)(B)), and the definition of an "underserved area" (-104(c)(IV)) and what population statistics are used to determine it (-104(c)(V))—all of which have nothing to do with authorizing food stores to sell wine.

Initiative #121 may generally involve alcohol beverages, but layered within its folds are a variety of different subjects that bear no logical or necessary connection to each other. As such, the measure violates the single subject rule, and the Title Board erred by finding it had jurisdiction to set titles.

CONCLUSION

Proponents have a diverse coalition to satisfy. But with the separate interests came distinct subjects for their measure. This separateness is only emphasized by the General Assembly's declaration, left in place by Proponents, that beer and other alcohol beverages are to be treated separately. The single subject rule operates to prevent this piling of interests into one measure to obtain voter approval. As such, the Court should reverse the Title Board or, in the alternative, remand the titles to the Board with directions to revise them to accurately describe the measure.

Respectfully submitted this 16th 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 OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #121 ("SALES OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 16th, 2022, to the following:

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