

COLORADO SUPREME COURT  
2 East 14th Avenue  
Denver, CO 80203

Original Proceeding Pursuant to  
§ 1-40-107(2), C.R.S. (2021)  
Appeal from the Ballot Title Board

In re Title, Ballot Title, & Submission  
Clause for Proposed Initiative 2021-2022  
#121 (“Sales of Alcohol Beverages”)

**Petitioners:** Christopher Fine

v.

**Respondents:** Steven Ward and Levi  
Mendyk

**and**

**Title Board:** Theresa Conley, David  
Powell, and Jeremiah Barry.

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Case No. 2022SA148

**THE TITLE BOARD’S RESPONSE BRIEF**

## 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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,723 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

*s/ Peter G. Baumann*

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## ARGUMENT

### **I. The proposed initiative contains a single subject.**

Petitioner lodges two challenges to the Board's single subject determination. First, that the General Assembly has declared that retail-level regulation of beer and wine are separate subjects, and second that #121's "repeal and reenact" clauses establish a second subject. Neither is sufficient to overcome the significant deference owed to the Board's single subject determination.

#### **A. The Beer Code's legislative declaration does not establish that #121 covers multiple subjects.**

In 2019, the General Assembly created a single license to cover the wholesale distribution of beer and wine—as well as their manufacture and import—removing the distinction between those beverages that had previously existed in Colorado law.

Petitioner argues that, in doing so, the General Assembly simultaneously established that some other measures addressing both beer and other spirits contravene the constitutional single subject requirement as a matter of law. Pet'r's Opening Br. on Proposed

Initiative 2021-2022 #121 (“Sales of Alcohol Beverages”) (“Pet’r’s Opening Br.”) at 23–30. Not only would such a declaration contradict the General Assembly’s own homogenous treatment of beer and wine licenses in 2019, but it would also lack the binding effect Petitioner hopes to establish here.

**First**, the legislative declaration at § 44-4-102(2), does not address the single subject requirement. Nothing in it purports to impose a single-subject determination on the General Assembly, the Title Board, or any other body. Instead, it expresses a legislative judgment that separate licensing regimes are no longer necessary for the manufacture, wholesale, or import of beer and wine, but are still beneficial at the retail level. That judgment expresses no opinion on whether the regulation of beer and wine are so separate and distinct as to create two separate subjects for purposes of the constitutional single-subject requirement.

This declaration expresses three separate judgments of the General Assembly: (1) that beer and wine are, and have historically been treated as, “separate and distinct,” (2) that despite such

distinction, beer and wine should be subject to a single regulatory framework in most instances, and (3) that a separate framework is still beneficial at the retail level. Petitioner asks the Court to apply the first judgment—that beer and wine are “separate and distinct”—to the final step, despite the General Assembly’s choice not to apply it to the intermediary. But that would be an inaccurate interpretation of the plain language of the statute. If the General Assembly’s determination that beer and wine are “separate and distinct” creates a single subject problem at the retail level, then so does it at the wholesale, manufacture, and import level. Through its passage of SB19-11, the General Assembly expressly rejected that conclusion.

**Second**, the single subject requirement is a constitutional obligation that cannot be usurped by legislative declaration. Colo. Const. art. V, § 1(5.5) (“No measure shall be proposed by petition containing more than one subject.”). If the General Assembly were to pass a law declaring two subjects separate for constitutional purposes—which it did not here—the Title Board would still need to apply the

constitutional single subject requirement notwithstanding the legislative declaration.

Consider, for example, a legislative declaration that the establishment of a tax credit and the adjustment of procedural requirements for future tax-related initiatives share a single subject of “revenue changes.” *But see In re Title, Ballot Title & Submission Clause*, 900 P.2d 121, 125 (Colo. 1995) (concluding that these are separate subjects in violation of Article V, § 1(5.5)). This Court’s decision holding otherwise, not the legislative declaration, would be binding on the Title Board. *See also* § 1-40-106.5(3) (requiring Title Board to “apply judicial decisions construing the constitutional single-subject requirement for bills”). So too if the General Assembly declared that “expand[ing] preschool programs and penaliz[ing] local policymakers who ban any form of tobacco or nicotine” are separate subjects. *But see In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 18 (concluding that these are not separate subjects). Here, again, the Title Board would be forced to reject the legislative declaration.



And this would be the case even where this Court has not yet weighed-in; the General Assembly could not declare food safety and outdoor recreation a single subject and expect the Title Board to adhere to that determination. Or, for that matter, that the regulation of beer brewed by New Belgium Brewing Company is separate and distinct from regulation of beer brewed at Denver Beer Co. Article V, section 1(5.5) imposes upon the Board an obligation to independently assess whether an initiative satisfies the single-subject requirement.

Moreover, even the General Assembly's single subject determinations are subject to judicial review. *See* Colo. Const. art. V, § 21 (prohibiting passage of non-appropriations bills containing more than one subject); *People v. Montgomery*, 2014 COA 166, ¶ 14–17 (considering whether enactment of General Assembly satisfied single subject requirement).

Thus, even if the General Assembly had declared #121 to encompass multiple subjects, which it did not, that declaration would be subject to this Court's review. And that review would be hard-pressed to distinguish between the regulation of beer and wine at the wholesale

level (which, according to Petitioner, the General Assembly does not think are separate subjects) and their regulation at retail (which are). Instead, the more accurate interpretation of § 44-4-102(2) is that the General Assembly believed in 2019 that separate retail regulatory regimes was beneficial, not that retail regulation of beer and wine are two separate subjects for constitutional purposes.

Finally, although the Board must follow “substantive requirements” for the initiative process established by state statute, that does not enable the General Assembly to dictate the outcome of the Board’s single-subject analysis. The General Assembly may establish procedures to which the Board must adhere. *Hayes v. Ottke*, 2013 CO 1, ¶ 28. But nothing in statute or law suggests that the General Assembly may tie the Board’s hands as to its independent constitutional obligation to ensure proposed initiatives encompass a single subject. In 2019, the General Assembly eliminated regulatory distinctions between beer and other alcohol beverages except, in some instances, at the retail level. Proponents here make a different decision, and want to put that question to the voters. That is a proper use of the initiative

process, and is not evidence that #121 covers multiple subjects. The single subject requirement is met.

**B. Number 121’s “Repeal and Reenact” provision is not a second subject.**

Finally, Petitioner argues that #121 violates the single subject because it “repeals and reenacts” certain of the sections it seeks to amend. Petitioner suggests first that these provisions would amend Colorado law as to conflicting ballot measures, Pet’r’s Opening Br. at 14–17, and second by potentially repealing sections “that have nothing to do with the substantive aim of” #121, *id.* at 17. Neither is sufficient to establish a second subject.

*First*, nothing in #121 addresses or amends the law governing conflicting ballot provisions. *See* § 1-40-123(2) (establishing that when two conflicting ballot measures both are enacted, “the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict”). Even if the Proponents believed the repeal and reenact clauses might enable #121 to prevail over conflicting

measures—which the Board does not believe to be the case<sup>1</sup>—that would be not only inaccurate, but irrelevant. The “motivations of initiative proponents” are not “within the scope” of the Court’s single subject review. *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 200A*, 992 P.2d 27, 31 (Colo. 2000).

Imagine that #121 passes with fewer votes than does another conflicting measure, for example one creating a single beer and wine retail license.<sup>2</sup> If those measures conflict, #121’s repeal and reenact clause would not automatically lead it to prevail over the other measure. Temporally, first § 1-40-123(2) would operate to enact the second measure as to all provisions in which there is a conflict. Then,

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<sup>1</sup> As Petitioner notes, counsel for Proponents expressly disclaimed this interpretation at rehearing. Pet’r’s Opening Br. at 15–16. Moreover, it is unclear from the text of the measure how this purported adjustment of current law would operate. The measure leaves in place § 1-40-123(2), which means that “in all particulars as to which there is a conflict” between #121 and another measure, the measure receiving more votes prevails. If counsel for Proponents wanted to alter this analysis, presumably such alterations would have involved amending § 1-40-123(2).

<sup>2</sup> For example, Proposed Initiative 2021-2022 #101, currently pending before this Court in 2022SA136.

and only then, #121's non-conflicting provisions would be enacted. If, at this second stage, the "repeal and reenact" clause would operate to repeal a provision inserted as a result of the second measure, that operation would establish a conflict. Which would be adjudicated pursuant to § 1-40-123(2), leading the second measure to again prevail.

In sum, existing law governing conflicts between passed measures is untouched by #121.

**Second**, the idea that the repeal and reenact clauses might eventually create a single subject problem is insufficient to deprive the Board of jurisdiction to set title on the measure. Petitioner's argument is that the General Assembly *might* pass an amendment to these sections, the repeal of which *might* create a second subject.

But such speculation is not limited to "repeal and reenact" measures. Hypotheticals abound as to language the General Assembly could possibly add to Colorado law that would operate to create a second subject for a pending initiative. For example, consider an initiative requiring all Colorado schooldays to last until 7:00 PM. If, in the interim, the General Assembly requires all institutions with mandatory

employment hours to offer certain employment benefits, it arguably adds a second subject to the initiative: new employee benefits for school employees. That such a hypothetical is possible is not a second subject.

Just as neither the Court nor the Board will speculate as to the future legal effects of proposed initiatives, *In re Title, Ballot Title & Submission Clause for 2013–2014 #89*, 2014 CO 66, ¶ 24, nor should they speculate as to hypothetical second subjects that might be introduced as a result of later-enacted legislation. Number 121’s “repeal and reenact” clauses do not establish a second subject, and the Court’s single subject determination should be affirmed.

## **CONCLUSION**

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 23rd day of May, 2022.

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## **CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S RESPONSE BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 23rd day of May, 2022.

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