

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 OPENING 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 1,620 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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PETER G. BAUMANN, #51620

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

(1) Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #121 contains a single subject.<sup>1</sup>

## **STATEMENT OF THE CASE**

Proponents Steven Ward and Levi Mendyk seek to circulate #121 to obtain the requisite number of signatures to place a measure on the ballot to amend Colorado law to establish a new fermented malt beverage and wine retailer license for off-site consumption. Record filed May 6, 2022 (“Record”) at 2–12. The new license would allow grocery stores, convenience stores, and other business establishments licensed to sell beer for off-site consumption to also sell wine. *Id.*

A majority of the Board concluded that the measure contains a single subject at its April 20, 2021, meeting, and the Board proceeded to

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<sup>1</sup> The Petition for Review states in general terms that “the title set by the Board violate[s] the ‘clear ballot title’ requirement by omitting critical elements of the measure and will mislead voters.” Pet. at 2–3. However, in the Petition’s “advisory list of issues to be addressed,” Petitioners only pursue single subject challenges to the Board’s jurisdiction.

set title. *Id.* at 19–20. Petitioner Christopher Fine filed a timely motion for rehearing asserting #121 contains multiple subjects and that the title set by the Board violated the clear title requirement. *Id.* at 14. On rehearing on April 29, 2022, the Board made edits to the title, but otherwise denied the motions. *Id.* at 13.

### SUMMARY OF ARGUMENT

The Board’s actions in setting #121 should be affirmed. The single subject of #121 is expanding the retail sale of alcohol beverages. Specifically establishing a new off-site consumption license that would enable grocery stores and similar retailers to sell both beer and wine. All aspects of the measure expand the retail sale of alcohol beverages, and none of the measure’s provisions are surreptitiously hidden within the initiative’s text. Thus, #121 presents neither of the evils the single subject requirement aims to avoid. The Board should be affirmed.

## ARGUMENT

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

#### A. Standard of review and preservation.

When this Court reviews the Board's single subject decision, "[it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 8 (quotation omitted). The Title Board agrees that Petitioner preserved the single subject issue by raising it in their motion for rehearing. Record at 16–18.

#### B. The single subject requirement is met.

The single subject of #121 is expanding the retail sale of alcohol beverages. Number 121 establishes a new retail license that would enable grocery stores and other similar retailers to sell wine in addition to beer. Each of its provisions is directly connected to that purpose. Petitioners mount two challenges to the Board's single subject determination: (1) that an existing declaration in the Colorado Beer

Code establishes that the sale of wine at retail is a separate subject than the retail sale of beer, and (2) that the initiative surreptitiously alters current law governing conflicting ballot measures. Pet. for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #121 (“Sales of Alcohol Beverages”) (“Pet.”) at 3.

Each of these arguments is without merit, and the Board’s single subject determination should be affirmed.

**1. The regulation of wine and beer at the retail level are not separate subjects.**

Petitioner argues that an existing declaration in the Colorado Revised statutes establishes that regulation of wine and beer and the retail level are separate subjects. Pet at 3. That declaration, which is found in the Colorado Beer Code, “recognizes” that beer is “separate and distinct” from wine and spirits and has a “unique regulatory history in relation to” those other forms of alcohol. § 44-4-102(2). It also notes, however, that “maintaining a separate regulatory framework and



licensing structure” for beer and wine “is no longer necessary except at the retail level.” *Id.*

Petitioner cites this language as evidence of separate subjects, theorizing that because the measure addresses retail level regulation of beer and wine, it must necessarily encompass multiple subjects. But the legislative declaration at § 44-4-102(2) actually establishes the interconnectivity of #121’s treatment of alcohol sales.

The relevant passage in § 44-4-102(2) was added to the Colorado Revised Statutes in 2019. *See* SB 19-011.<sup>2</sup> In that legislation, the Colorado General Assembly revised the Colorado Beer Code to convert existing fermented malt beverage manufacturer, wholesaler, and importer licenses into corresponding malt liquor licenses. In effect, the bill eliminated the regulatory distinction between beer and wine as to manufacturing, wholesaling, or importing, while maintaining the distinction for retail purposes.

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<sup>2</sup> Available at <https://tinyurl.com/ycyck4jy>.

The General Assembly’s choice to establish a single regulatory scheme for beer and wine at the wholesale level (as one example) did not violate the single subject requirement in 2019. Nor does #121’s decision to establish a single regulatory scheme for grocery stores and other similar retailers. Even if the General Assembly could make a binding declaration that certain topics violate the single subject requirement—which the Board does not concede—the Colorado Beer Code’s legislative declaration does not purport to do so. It only notes that beer and wine have historically been treated separately, but that such disparate treatment is no longer necessary at several regulatory levels. Proponents disagree with this legislative judgment, but that disagreement is not evidence of multiple subjects.

Moreover, the initiative presents “neither of the evils that the single-subject requirement aims to prevent.” *Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1224 (Colo. 2021). The risk of “logrolling” is minimal because revising the scheme to eliminate regulatory distinctions between beer and wine does not “seek to garner support from various factions” with “different or

conflicting goals,” *id.* (quotations and citations omitted). The entire measure points in the direction of liberalizing existing regulations governing the sale of alcohol.

The measure also plainly states in its declaration that it will permit the “sale of wine in grocery and convenience stores that are licensed to sell beer.” Record at 2. Thus, there is no concern that voters will be surprised that the new license established by the measure enables the sale of both beer and wine.

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

Petitioner next alleges that #121’s “repeal and reenact” clause establishes a second subject by “alter[ing] the generally applicable ballot initiative procedure for resolving conflicts among ballot initiatives.” Pet. at 3. But on its face, #121 does not address conflicts between initiatives. And the idea that its repeal and reenact clause would alter application of relevant legal principles in that scenario is both unlikely and a legal effect of the measure irrelevant to the Board’s (and this Court’s) single subject analysis.

When voters approve of multiple measures with conflicting provisions, “the one that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict.” § 1-40-123(2). This is current law, and nothing in #121 purports to address § 1-40-123(2), let alone change it for this or any other provision.

Number 121 does accomplish its changes to Colorado alcohol laws by repealing the laws it addresses, and reenacting those laws with the relevant adjustments. *See, e.g.*, Record at 2 (noting that the proposed initiative would “repeal and reenact, with amendments,” § 44-3-301(12)). On its face, the effect of these “repeal and reenact” provisions would be to repeal any legislative changes made to the relevant sections between when the measure was drafted and the adoption of #121.

It does not, however, address changes made to those sections as a result of conflicting initiatives. In the event another initiative is adopted by the people, and that initiative conflicts with #121, there is nothing in #121 that would affect the operation of current law as codified at § 1-40-123(2). The measure receiving the greatest number of votes would prevail.

A hypothetical is instructive. Imagine a “repeal and reenact” measure to make the larkspur the state flower of Colorado. *See* § 24-80-905 (establishing the white and lavender columbine as the Colorado state flower). If a competing measure to coronate the bluebell also passes, but receives more votes, there would be no question that this flower, not the larkspur, would usurp the Colorado columbine. The former’s “repeal and reenact” clause would not change the analysis under § 1-40-123(2).

To be sure, the more complicated scenario arises when two measures conflict in some provisions but not others. But in such cases, “in all particulars as to which there is a conflict” the measure receiving more votes will prevail. § 1-40-123(2). Including, presumably, where that conflict occurs by operation of the repeal and reenact clause.

Moreover, any argument otherwise relies on speculation as to the legal effect of the measure. And such conjecture as to an initiative’s legal effects is not proper in this limited proceeding. *See, e.g., Blake v. King*, 185 P.3d 142, 145 (Colo. 2008) (“At this stage, we do not address the merits of a proposed measure, interpret it, or construe its future

legal effects. Instead, these are matters for judicial determination in a proper case should the voters approve the initiative.”) (citations and quotations omitted). Number 121 does not address conflict between approved measures, and nothing in it suggests that it would change the operation of current law in such cases.

The Court should affirm the Board’s single subject determination and conclude the Board had jurisdiction to set title on the measure.

### CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 16th 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 OPENING BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 16th day of May, 2022.

*s/ Peter G. Baumann*

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Peter G. Baumann