SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 23, 2022 5:26 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 #122 ("Third-Party Delivery of Alcohol Beverages") Petitioner: Christopher Fine v. Respondents: Steven Ward and Levi Mendyk and Title Board: Theresa Conley, David Powell, and Julie Pelegrin	**▲COURT USE ONLY▲**
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PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #122 ("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:

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s/ Mark G. Grueskin
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INTRODUCTION

Initiative #122 is (another) alcohol expansion measure. It is (another) proposal that leaves untouched the specific legislative finding that retail beer and wine or spirit regulation are "separate and distinct." As discussed below, that separation has much to do with keeping more potent alcohol out of the hands (and gullets) of persons whom the law deems incapable of using such substances wisely.

To the Initiative's proponents ("Respondents") and the Title Board ("Board"), all alcohol is the same and can be regulated as unified subject matter. The General Assembly doesn't agree. And this Initiative does not disturb—and in fact preserves—that differential treatment. Until words don't mean what they say, the Board should have found this measure to comprise "separate and distinct" subjects and declined to set titles.

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 other alcohol beverages sold at retail and thus violates the single subject requirement.

Petitioner raised the issue of the "separate and distinct" treatment of beer and other alcohol beverages and its effect on the "distinct and separate" subject analysis this Court requires as its single subject standard. Pet. Op.Br. at 7-15.

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 which statute applies to the circumstances 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 or spirits 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 or spirits—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 or spirits 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 or spirits was limited to "the retail level," thus

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[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.

applying the *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 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 9-10.

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 other alcohol beverages 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 other alcohol beverages 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 (and presumably spirits) are also effectively unified and part

of the same subject. Board Op.Br. at 6-7.[4] The Board's all-or-nothing argument can be reduced to this: when the legislature expressly said retail beer and wine or spirits 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. They do not suggest that facts unique to this

[4] To be clear, the Initiative's delivery scheme applies to all types of alcohol beverages, not just beer and wine. *See* Board Op.Br. at 7.

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.

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 #122 ("THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 23rd, 2022, to the following:

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