

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: May 16, 2022 6:24 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #122 (“Third-Party Delivery of Alcohol Beverages”)</p> <p>Petitioner: Christopher Fine</p> <p>v.</p> <p>Respondents: Steven Ward and Levi Mendyk and</p> <p>Title Board: Theresa Conley, David Powell, and Julie Pelegrin</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Petitioner:</p> <p>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</p>	<p>Case Number: 2022SA149</p>
<p>PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #122 (“THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES”)</p>	

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:

It contains 3,486 words.

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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

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 the Title Board lacked jurisdiction over Initiative #122 because, 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.

STATEMENT OF THE CASE

A. Statement of Facts

Steven Ward and Levi Mendyk (“Proponents”) proposed Initiative 2021-2022 #122 (“Initiative #122” or the “Initiative”). Through this Initiative, Proponents seek to create an expansive new framework for alcohol delivery in Colorado. Initiative #122 repeals the current law on alcohol deliveries, which is limited to certain licensees (e.g. retail liquor stores) and takeout and which is conducted by the licensee itself through its own employees, subject to a limit of obtaining no more than 50% of the licensee’s gross revenue from deliveries. The Initiative allows delivery by not only any retail liquor licensee but also by unlicensed, third-parties who may make deliveries instead of licensees. All that is required is for a licensee or third-party to make deliveries is to obtain a delivery “permit.” (Initiative #122, sec. 2, proposed C.R.S. § 44-3-911.5) Permittees are not limited in the types of alcohol they can deliver on behalf of a licensee; a permittee can, instead, deliver any and all types of alcohol beverages—beer, wine, and spirits. (*Id.*)

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 #122 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 #122 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 #122:

Shall there be a change to the Colorado Revised Statutes concerning authorization for the third-party delivery of alcohol beverages, and, in connection therewith, allowing retail establishments licensed to sell alcohol beverages for on-site or off-site consumption to deliver all types of alcohol beverages to a person twenty-one years of age or older through a third-party delivery service that obtains a delivery service permit; prohibiting the delivery of alcohol beverages to a person who is under 21 years of age, is intoxicated, or fails to provide proof of identification; removing the limit on the percentage of gross sales revenues a licensee may receive from alcohol beverage deliveries; and allowing a technology services company, without obtaining a third-party delivery service permit, to provide software or a digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages?

SUMMARY OF ARGUMENT

In existing law, there is an identification of “separate and distinct” interests (the regulation of beer and other alcohol beverages) that Initiative #122 leaves in

place. As determined by the General Assembly, and agreed to by Proponents, the regulation of beer and other alcohol beverages is “separate and distinct . . . at the retail level.” In other words, the regulation of, and thus any expanded access to, the retail offering of these alcohol products must be treated under the law as separate subjects.

Initiative #122 does not do that. Instead, the measure blesses the combination of regulation of all types of alcohol regardless of type while leaving intact the “separate and distinct” natures of retail sales of beer and other alcohol beverages. This violates the constitutional single subject rule by combining subjects (beer and other alcohol beverages) into one measure that, as a matter of law, are to be treated separately. The Board had no authority to ignore the General Assembly’s determination that these are separate purposes, which deprives it of jurisdiction.

This Court has never addressed this question before. It is unlikely to do so again, given the sparse use of a legislative finding that two subjects are separate and distinct. But confronted with a clear statute and a singular test for determining whether an initiative contains one subject or multiple subjects, the Court must apply the statute in question as it is written. It could not be clearer.

Accordingly, the Court should vacate the titles set by the Board and return the measure to the Board to dismiss for lack of jurisdiction.

LEGAL ARGUMENT

- I. Initiative #122 alters the regulatory landscape for both beer and other alcohol beverages, which violates that single subject rule because the regulation of beer is “separate and distinct” from other alcohol beverages as a matter of law.**

- 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).

The Court has summarized the required internal nexus and its rational in the following manner. “An initiative violates the single subject requirement when it has at least *two distinct and separate purposes* which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause, and*

Summary for Initiative 1997-1998 #64, 960 P.2d 1192, 1196 (Colo. 1998) (citation and internal quotation marks omitted) (emphasis added). That there is some common thread between separate and distinct topics is of no legal moment. “Where two provisions advance *separate and distinct purposes*, the fact that they both relate to a *broad concept or subject* is *insufficient to satisfy the single subject requirement*.” *Id.* (emphasis added.)

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 #122 at 1-3.)

B. The Title Board erred by knowingly declaring matters that are clearly “separate and distinct” purposes to be titled as a single subject.

1. *The General Assembly has established the regulation of beer is “separate and distinct” from other alcohol beverages, and Initiative #122 does not repeal that statutory direction.*

The General Assembly has enacted a comprehensive scheme to regulate alcohol beverages as “an exercise of the police powers of the state for the protection of the economic and social welfare and the health, peace, and morals of the people of this state.” C.R.S. § 44-3-102(1). As this Court has explained, the General Assembly’s “detailed descriptions of the licensing process and specific directions to licensing authorities concerning the exercise of regulatory power, further indicates

a thorough legislative consideration of all aspects of the licensing process[.]” *People v. Bagby*, 734 P.2d 1059, 1062 (Colo. 1987).

As part of creating this “comprehensive regulatory program,” the legislature determined that different types of alcohol beverages merit different regulatory approaches and should be dealt with independently. 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 not only creates a less demanding regulatory scheme for those covered licensees that just sell beer, it also affirmatively declares that the regulation of beer at the retail level is “separate and distinct” from other alcohol beverages. The General Assembly declared:

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, 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. 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").

2. *The “separate and distinct” determination by the legislature parallels the inquiry this Court uses when the Title Board assesses initiatives for a single subject.*

The General Assembly’s determination that beer and more potent alcohol beverages 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 the Board with authority to make its own legislative determinations or to change or deviate from those made by the General Assembly. 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).

Initiative #122 proposes an expansive new delivery scheme that operates at the retail level to deliver any and all alcohol beverages from licensees to consumers—beer, wine, hard liquor, as well as alcohol beverages by the drink. It does so under the guise of a delivery permit which triggers little real regulation of the companies that will provide this service. 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.

3. *The Title Board was required to give effect to this legislative declaration, particularly where such implementation coincides with the constitutional single subject requirement.*

Even if the distinction seems outmoded to consumers, as far as the General Assembly is concerned, beer must be considered and regulated at retail separately from other alcohol beverages, a separation which Initiative #122 does not repeal or modify but instead leaves in place. The Title Board was not free to disregard this direction from the General Assembly in deciding whether the Initiative violated the

single subject requirement put in place to protect the law-making process of ballot initiatives to be exercised by the electorate.

For example, the General Assembly’s use of a safety clause, declaring 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.

As noted above, Proponents drafted their measure without disturbing or materially limiting that legislative finding. The provision they did not change 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 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.” The legislature’s determination of the “separate and distinct” character of these products at the retail level should have been acknowledged by the Board. Proponents’ evident awareness of this legislative decision and willingness to craft their measure despite it should have prevented a finding of a single subject. It didn’t, and this Court, under specialized facts unique to this statutory scheme, must correct the Board’s failure.

CONCLUSION

This Court has been clear: separate and distinct purposes within an initiative violate the single subject rule. The Colorado General Assembly has been equally clear that regulation of beer at the retail level is “separate and distinct” from regulation of other alcohol beverages. A proposed initiative therefore cannot revamp retail operations of both categories of regulated activity without resolving the single subject inconsistency that flows from existing law. Initiative #122 did not do so. In

fact, the Proponents amended existing statute without tweaking a word in this portion of the statute. This failure is determinative in the single subject analysis. Accordingly, the Court should vacate the titles set by the Board and direct the Board to return the measure to Proponents for lack of jurisdiction.

Respectfully submitted this 16th day of May, 2022.

s/ Mark G. Grueskin

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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 #122 (“THIRD-PARTY DELIVERY OF ALCOHOL BEVERAGES”)** was sent electronically via CCEF this day, May 16th, 2022, to the following:

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