SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 23, 2022 5:31 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 #128 ("Sales and Delivery of Alcohol Beverages") Petitioner: Christopher Fine v. Respondents: Steven Ward and Levi Mendyk and Title Board: Theresa Conley, David Powell, and Jeremiah Barry	**▲COURT USE ONLY▲**
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PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #128 ("SALES AND 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:

The brief complies with C.A.R. 28(g).

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s/ Mark G. Grueskin
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INTRODUCTION

Initiative #128 is a twist on the other alcohol-related measures pending at the Court. Yes, it seeks to put wine in grocery stores as well as authorizing third-party delivery services for all forms of alcohol. But this measure would put this new authority into the Colorado Constitution. In a new Article XXII, there would be two subsections, one dealing with "Wine and Beer," and another addressing "Home Delivery." The supposedly unifying theme of the new Article XXII is "Intoxicating Liquors."

Even though the placement of these two unrelated concepts is different, its flaws are the same. There is no necessary connection between changing what one retailer (food stores) can carry by expanding its product offering by a single item (wine) and the ability of all retailers to use a means of outreach to sell all forms of alcohol beverages to consumers.

By only a 2-1 margin, the Title Board agreed to accept this measure as a single subject. It is not enough, as Respondents and the Title Board suggest, that the two subjects "point in the same direction." The question the Board had to answer was whether these subjects are interrelated. The separation of these subjects in their constitutional amendment and in the real world shows that the Board erred in deciding they are.

The Board's decision was particularly erroneous since it ran contrary to the clear policy that alcohol beverages of varying potency deserve to be treated as discrete topics. Unlike its statutory cousins, Initiative #128 does not reenact with amendment the existing statute that declares retail beer and wine regulation to be "separate and distinct." But neither does it declare that legislative policy to be without merit or affirmatively change it. This is a policy that has been embraced both by the General Assembly and this Court.

The Court should return Initiative #128 to the Board with instructions that it be returned to the Respondents for failure to satisfy the single subject requirement.

LEGAL ARGUMENT

I. The Initiative violates the single subject requirement.

A. Allowing food stores to sell wine and authorizing third-party delivery of all forms of alcohol to consumers are two separate subjects.

Respondents and the Title Board ("Board") insist that authorizing the sale of one product (wine) at one additional type of licensee (food store) is the same subject as authorizing third party delivery of all alcohol products from all retail licensees. Resp. Op.Br. at 5-7; Board Op.Br. at 5-7. Both suggest that this combination of changes—one fairly limited in scope and the other entirely unlimited—does not combine inconsistent interests.

1. Wine sales in food stores and limitless alcohol deliveries from all retail outlets reflect different, even conflicting, interests and are not the same subject.

The Court has encapsulated the single subject concern in terms that are pertinent here.

> [T]he single subject requirement now embodied in Article V, Section 1(5.5), would prevent proponents from engaging in "log rolling" or "Christmas tree" tactics…. [T]he single subject requirement **precludes the joining together of multiple subjects** into a single initiative in the hope of attracting support from **various factions which may have different** or even conflicting **interests**.

In re Title, Ballot Title & Submission Clause, and Summary for Initiative "Public Rights in Water II," 898 P.2d 1076, 1079 (Colo. 1995). The single subject requirement prevents proponents from seeking "to attract voters who might oppose one of these two subjects if it were standing alone." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76,* 2014 CO 52, ¶35, 333 P.3d 76, 86.

Respondents admitted they split their sales/delivery measure into a sales measure and a delivery measure because of the "different interests," *id*., their coalition seeks to appease. "When proponents bring things forward, they make policy choices. In this particular case, we have a large coalition. ***Some of their interests are in one place, and some of their interests are in another***." Pet. Op.Br.

at 11, citing Apr. 29, 2022, Title Bd. Hr'g at 11:30 to 12:45 (arising in discussion of Initiative #122) (emphasis added).[1]

Respondents may argue now they didn't mean these were incompatible interests, but the Court should trust the original statement to the Board.[2] The some-interests-in-one-place vs. some-interests-in-another conundrum, lumping both groups into one ballot initiative, is the precise scenario the single subject requirement sought to avoid. Translated, Respondents' remark means grocery stores want to expand into the wine market while third party-delivery services (and their retail sources) may not want wine sales to be diverted to supermarkets (because it would cut into their sales), but they really want home delivery to customers who will complete transactions using smartphones rather than an in-person visit to a retail establishment.

Respondents said at rehearing, *id*., and may restate in their answer brief, that they were just covering their bases if the legislature adopted a third-party delivery

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[1] Petitioner's Opening Brief mistakenly attributed this rehearing to Initiative #112 when it occurred during a rehearing of Initiative #122. However, the time stamps are accurately stated.

[2] *Cf. United States v. Miner*, 2021 U.S. Dist. LEXIS 130547 (E.D. N.Y 2021) ("When someone shows you who they are, believe them, the first time") (citing Maya Angelou, American poet).

bill in the last 10 days of the session. This was not a realistic assessment; the last time this concept was considered, there was rare bipartisan cooperation—to kill the bill with only one legislator voting for it. *See* Pet. Op.Br. at 12.

Regardless, the issue here is not the Respondents' motivation but the text of their measure. The ease with which two subjects were severed to produce two discrete initiatives establishes that combined measure comprised "two distinct and separate purposes which are not dependent upon or connected with each other." *In re Proposed Initiative for 1997-1998 #64*, 960 P.2d 1192, 1196 (Colo. 1998).

This coalition's support for one part of the measure but not the other reflect voter concerns. Some voters will favor a one-stop shop for baby food and sauvignon blanc.[3] This is about convenience.[4] But those voters may not back delivery of tequila and bourbon to whatever 21-year-old answers the door.

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[3] "[V]oters are likely to see a ballot initiative this November ending the restriction on wine sales at supermarkets…. Now is the time to prepare because this time next year, buying wine at the grocery store will seem as normal as buying beef, bread, a custom cake, or prescription pills." Kafer, K., "Don't postpone repeal of the last Prohibition-style laws just to save the liquor stores," *The Denver Post* (Ex. A to Pet.'s Mot. for Rehr'g on Initiative 2021-2022 #128; R. at 10).

[4] "Colorado food shoppers should be given the opportunity and convenience of selecting table wines at the same time and in the same store in which meals are planned and purchased." *See* Legislative Council of the Colo. Gen. Assembly, *An Analysis of 1982 Ballot Proposals* at 35; https://www.coloradosos.gov/pubs/elections/Results/BlueBooks/1982BlueBook.pdf (Blue Book argument in favor of Amendment No. 7 at 1982 election).

Conversely, there will be voters who oppose the expanded presence of alcoholic beverages where their families shop for bread and milk. They oppose the idea of more alcohol in food stores.[5] But those same voters may accept delivered orders for liquor because those deliveries do not invade a largely alcohol-free domain, their local supermarket.

Because this measure addresses both issues, neither group can choose the form of increased liquor availability it favors. Instead, voters in each group must decide if getting something they want and swallowing something else they oppose is worth it.

With great candor, the Board states at one point that the measure's single subject is "expanding the **sale and delivery** of alcohol." Board Op.Br. at 5 (emphasis added). In other words, the Board acknowledges the two free-standing objectives of this measure, sale ***and*** delivery. Respondents did the same, stating in multiple versions of their measures (some pending before the Court, others withdrawn) the two goals linked only through "and" in Section 1. *See, e.g.,* Initiatives 2021-2022 #

[5] "Many Coloradans are offended by the continuous efforts to expand the availability of alcoholic beverages or to allow the sale of wine or liquor in grocery stores." *Id.* at 36 (Blue Book argument against Amendment No. 7 at 1982 election).

66-67 and 112-119.[6] This measure isn't just about beer and wine at grocery stores or just about third-party delivery of all alcohol. It encompasses both changes, and the Board and Respondents do not dispute the separate major objectives of the Initiative.

In support of their argument, Respondent and the Board cite a test for single subjects: do the measure's provisions "point in the same direction"? Resp. Op.Br. at 9, 11; Board Op.Br. at 6. But neither Respondent nor the Board cites the full test the Court used when it first developed this construct to assess a single subject. The Court asked whether a measure's topics "are **interrelated and** point in the same direction." *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶14, 395 P.3d 318, 322 (emphasis added).

No argument is made that grocery stores' wine sales and third-party delivery for all retailers of all alcohol are actually "interrelated" matters. The two address a different range of products as well as a different range of commercial interests to provide them. An initiative's purposes "must be interrelated to avoid violating the single-subject requirement." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010). If pointing in the same direction is

[6] The measures are available on the Title Board website, https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html.

all that is required for a single subject, the Court will cast aside its precedent that a broad, general label is not a single subject. *See In re Title for Initiative 2013-2014 #76, supra*, 2014 CO 52, ¶34 ("attempts to characterize the initiative under an overarching theme cannot save it").

More importantly, Respondents proved the two subjects are not interrelated by taking the measure that achieves both ends and neatly splitting it into two. The wine-in-food-stores and third-party delivery concepts cannot be interrelated if they effortlessly stand alone. Interrelated provisions minimize the potential of logrolling or voter surprise. *Id*. Because this initiative lacks that nexus, the Court should reverse the Board's single subject decision.

2. Other statutory citations about product sale/delivery are not analogous to this supermarket wine/all alcohol delivery initiative.

The Board indicates that unrelated statutes allow for delivery and sale so this measure must be a single subject. Board Op.Br. at 7. The Board admits its citations of other statutes is not binding: "many statutes cover both sale and delivery, strongly **suggesting** that sale and delivery of a product **may** constitute a single subject." *Id.*

As an initial matter, the Board's argument misapplies the single subject rule. The Constitution does not prohibit statutes from addressing multiple subjects if they are amended in different bills or years. The single subject rule prohibits the

combination of subjects into ***one*** legislative measure (bill or initiative); it does not prohibit separate measures or bills from addressing specific subjects that happen to end up in the same statute. Thus, the fact that statutes ultimately address both sales and delivery is not highly relevant to the inquiry now before the Court.

Moreover, none of these statutes do what the Initiative seeks to do: authorize a single product's sale and also other products' delivery, limited only by the independent choices of retailer and customer. Instead, in these other statutes, the same item that is addressed for sale is also addressed as a matter of delivery. Whether it's cigarettes, drug paraphernalia, adulterated foods or drug items, or retail deliveries, the sale and delivery portions of those statutes are equally weighted and equally applicable. *See* C.R.S. §§ 39-28-101(1.3); 18-18-429; 25-5-403(1)(a), (d); and 43-4-218(2)(e). The boundaries that apply to one apply to the other.

The Board's argument might be convincing if this measure only authorized wine sale in food stores and third-party delivery of wine. But very different authorizations (food stores vs. all liquor retailers) are to be enacted for very different ranges of products (wine vs. all forms of beer, wine, and spirits).

This measure thus recreates the single subject problem of last year's "animal cruelty" measure, changing the regulation of treatment of livestock but also changing animal cruelty laws that applied to all animals, regardless of species. That initiative

"r[a]n the risk of surprising voters with a surreptitious change because voters may focus on one change and overlook the other." *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶41 489 P.3d 1217, 1225 (citations and internal quotation marks omitted).

That same risk of voters being motivated because of one change and unknowing about the other exists here. *See* Kafer, K., *supra*, R. at 26 (focusing only on wine in supermarkets to advocate passage of initiative). Accordingly, the Board's decision should be reversed.

B. The Initiative preserves the "separate and distinct" subjects of regulation–the central issue of this measure–of beer and wine or spirits sold at retail and thus violates the single subject requirement.

Petitioner raised the issue of the "separate and distinct" treatment of beer and wine or spirits and its effect on the "distinct and separate" subject analysis this Court requires as its single subject standard. Pet. Op.Br. at 19-26.

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 "[t]he term in the liquor code does not denote that the licenses cannot be subject to the same regulations." Resp. Op.Br. at 10. Two responses are warranted here.

First, the General Assembly adopted just such a restriction in the Beer Code, and specifically the statute in question 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"[7] and

[7] "Disjoin" means "to bring an end to the joining of: SEPARATE, DISUNITE, PART, SUNDER . . .: to become detached: SEPARATE, PART." *Freeman v.*

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[8] to clarify that the "separate" nature of regulating beer and wine or spirits was limited to "the retail level," thus 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.[9]

Gerber Prods. Co., 357 F. Supp. 2d 1290, 1296 (D.Kan. 2005), citing Webster's International Dictionary 651 (1993) (capitalization in original).

[8] 2019 Sess. Laws, ch. 1, p. 1, §1.

[9] 2020 Sess. Laws, ch. 67, p. 270, § 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.**

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 "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 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 wine 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 wine sold at retail remains meaningful, despite legislative changes to other sectors of the industry.

In briefing on other alcohol initiatives before the Court, but not in this opening brief, the Board has argued that 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 are also effectively unified and part of the same subject. *See, e.g.*, Board Op.Br. in Appeal of Initiative 2021-2022 #115 (Case No. 2022SA142) at 10-11. The Board's all-or-nothing argument can be reduced to this: when the legislature expressly said retail beer and wine 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 ***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 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 #128 ("SALES AND DELIVERY OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 23rd, 2022, to the following:

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