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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 #115 ("Sales and Delivery of Alcohol Beverages") **Petitioners**: Christopher Fine **v.** **Respondents**: Steven Ward and Levi Mendyk **and** **Title Board**: Theresa Conley, David Powell, and Jeremiah Barry.	▲ **COURT USE ONLY** ▲ Case No. 2022SA142
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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 3,711 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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In recent years, Colorado legislators and voters have slowly, but steadily, amended liquor laws to repeal prohibition-era restrictions on the sale of alcohol. *See, e.g.*, S.B. 18-243, (implementing sale of full-strength beer in grocery stores)[1]; S.B. 16-197 (repealing, gradually, prohibition on full-strength beer in grocery stores and allowing some grocery stores with pharmacies to sell beer, wine, and spirits)[2], S.B. 08-082, (repealing law prohibiting sale of alcohol on Sundays)[3]. Proposed initiative #115 fits into this established pattern. It would enable grocery stores and similar retailers to sell wine, as well as beer, and would allow existing alcohol retailers to deliver those beverages to consumers.

Some may question the wisdom of Colorado's march to liberalize its alcohol laws. But resolution of that question falls on the voters and their representatives. At an initial hearing and on rehearing, after significant debate and consideration, the Title Board concluded that #115 addresses a single subject, expanding the retail sale of alcohol

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[1] Available at, https://tinyurl.com/a2yxxfxj.

[2] Available at, https://tinyurl.com/3a98sh6z.

[3] Available at, https://tinyurl.com/5b4fypmf.

beverages, and drafted a clear title informing voters of #115's central features. The Board's actions fell well within the bounds of its considerable discretion, and should be affirmed.

ARGUMENT

I. Number 115 satisfies the constitutional single subject requirement.

"[E]mploy[ing] all legitimate presumptions in favor of the propriety of the Board's actions," reversal of the Board's single subject determination is appropriate only in a "clear case," *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (citations and quotations omitted). So long as a proposed initiative's provisions are not "disconnected or incongruous," the Board's decision that it encompasses a single subject should not be disturbed. *Id.* ¶ 13.

Petitioner raises three challenges to the Board's single subject determination, none of which establish any error, let alone that the Board's decision was outside the considerable deference to which it is entitled. The Court should affirm.

A. Both of #115's central provisions relate to the single subject of expanding the retail sale of alcohol beverages.

Petitioner first argues that #115's provision regarding delivery of alcohol creates a second subject separate and apart from its provision enabling the sale of wine in grocery stores. Pet'r's Opening Br. on Proposed Initiative 2021-2022 #115 ("Sales and Delivery of Alcohol Beverages") ("Pet'r's Opening Br.") at 11–22 (May 16, 2022). But both of these provisions relate to the proposed initiative's single subject of expanding the sale of alcohol beverages.

In his Opening Brief, Petitioner describes the choices made by #115's Proponents to submit multiple versions of this measure—including some that disaggregated wine in grocery stores from alcohol delivery. *Id.* at 13–18. In Petitioner's telling, these decisions establish #115's separate subjects, because "[n]either is necessary to address the other." *Id.* at 17. *See also id.* at 18 ("Two subjects, so easily severed from one another, represent the epitome of a measure that violates the single subject requirement."); *id.* at 18 (arguing that wine in grocery stores

and alcohol delivery are separate subjects because "one can exist without the other").

But nothing in the constitutional single subject requirement, or this Court's jurisprudence, suggests that a measure's single subject determination is based on whether its provisions could conceivably be run as separate measures. Instead, many of the measures upheld as having single subjects by both the Board and this Court could, conceivably, have been split into multiple initiatives.

For example, in 2017 the Court considered a measure intended to limit housing growth in Colorado. *In re Title, Ballot Title and Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 10. That measure included several provisions to accomplish its aim, including one that limited housing growth to one percent annually in certain jurisdictions, one that empowered local voters to enact or repeal housing regulations, and one that prohibited permits for new residential units in those same jurisdictions. *Id.* ¶¶ 10–11. Each of these could have stood on its own; the proponents could have submitted one measure to establish a one percent cap, one measure to empower local voters, and one measure to

prohibit the issuance of new permits. Nonetheless, the Court affirmed the Board's assessment that each provision was encompassed within the measure's single subject. *Id.* ¶¶ 10–14.

The Court's decision there was was consistent with treatment of other, similar, measures. For example, in 2016 the Court found single subject satisfied in reviewing a proposed initiative that would have made several significant changes to state law concerning recall elections, even though many (if not all) of those provisions could have been run as stand-alone proposals. *In re Title, Ballot Title and Submission Clause for 2015–2016*, 2016 CO 52, ¶¶ 19–20.

Whether a measure can be separated into multiple initiatives is irrelevant to whether its provisions violate the single subject requirement. Where, as here, multiple provisions that could be run as separate measures still "tend[] to effect or carry out one general objective or purpose," *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 14 (quotations omitted), the single subject requirement is satisfied.

Finally, Petitioner argues that including these two provisions implicates the single subject requirement's anti-logrolling purpose. Pet'r's Opening Br. at 18–22. In doing so, Petitioner compares #115 to 2021-2022 #16, which both extended the animal cruelty laws to cover livestock and amended the statutory definition of "sexual act with an animal" for all types of animals. *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 2. There, drawing on statements from the proponents, the Court held that "incorporating livestock into the animal cruelty statutes" was the "central theme" of the initiative, *id.* ¶ 2, and "criminalizing new conduct, regardless of whether that conduct is directed at livestock or other animals," was an impermissible second subject, *id.* ¶ 39. The Court did not, however, rely on the single subject requirement's anti-logrolling purpose. Rather, the Court held that #16 implicated the *other* purpose behind the single subject requirement, avoidance of voter surprise. *Id.* ¶ 41 (holding that "combining the repeal of the livestock exceptions with the criminalization of new conduct toward all animals runs the risk of surprising voters with a surreptitious change"); *id.* ¶ 2 ("Because these

subjects are not necessarily and properly connected, there is the potential for the very kind of voter surprise against which the single-subject requirement seeks to guard.").

Here, Petitioner does not argue that the two provisions are likely to spring a surprise on Colorado voters. Nor could he. Petitioner acknowledges that both provisions are highlighted in the measure's own declaration. Pet'r's Opening Br. at 15 (quoting Record at 2).

Moreover, as the Board explained in its Title, both provisions would expand retail sale of alcohol. Record at 17. Perhaps a voter might be surprised by a measure which relaxed restrictions on what alcohol could be sold in grocery stores but limited alcohol delivery. Or vice-versa. But here, both provisions point in the direction of liberalizing restrictions on the sale of alcohol. Such directional equity does not implicate the purposes of the single subject requirement.

B. The Beer Code's legislative declaration does not establish that #115 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. 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 S.B. 19-11, 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 and 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 #115 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, are not separate subjects as a matter of statutory law) 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 #115 covers multiple subjects.

C. Number 115's repeal and reenact clause is not a second subject.

Finally, Petitioner argues that #115 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 30–33, and second by potentially repealing sections "that have nothing to do with the substantive aim of" #115, *id.* at 33. Neither is sufficient to establish a second subject.

First, nothing in #115 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 #115 to prevail over conflicting measures—which the Board does not believe to be the case[4]—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 #115 passes with fewer votes than does another conflicting measure, for example one creating a single beer and wine retail license.[5] If those measures conflict, #115's repeal and reenact clause would not automatically lead it to prevail over the other

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[4] As Petitioner notes, counsel for Proponents expressly disclaimed this interpretation at rehearing. Pet'r's Opening Br. at 31–32. 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 #115 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).

[5] For example, Proposed Initiative 2021-2022 #101, currently pending before this Court in 2022SA136.

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, and only then, #115'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 #115.

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 115's "repeal and reenact" clauses do not establish a second subject, and the Court's single subject determination should be affirmed.

II. The title set by the Board is not misleading.

The Board has "broad discretion" in drafting titles, and this Court grants "great deference" to the decisions it makes in doing so. *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23. Particularly to those choices it makes to resolve "interrelated problems of length, complexity, and clarity in designating a title and

ballot title." *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 26. This deference reflects the "straits" the Board must navigate "between brevity and unambiguously stating the central features of the provision sought to be added, amended, or repealed." *Id.* Accordingly, the Board's Title should only be rejected if it is "clearly misleading." *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23.

Petitioner challenges the Board's title on two grounds, neither of which approaches the type of "material and significant omission, misstatement, or misrepresentation" necessary to justify reversal. *See In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 27.

A. The title for #115 accurately describes the measure.

First, Petitioner argues that the Board erred by describing the purpose of the measure as concerning "the expansion of retail sale of alcohol." Pet'r's Op. Br. at 37–39. Petitioner's argument is that #115's delivery provisions are not encompassed in this description.

But this argument fails for the same reasons that #115's delivery provisions do not establish a second subject. An average voter would consider formation of an additional channel for alcohol purchases (through delivery services) as an expansion of the sale of alcohol. Here, again, Petitioner draws formalistic distinctions between different means of acquiring alcohol beverages; although such distinctions may be meaningful from a historical regulatory perspective, that is not the case for the average voter.

As importantly, the title explicitly mentions #115's delivery provisions. Record at 17 ("A change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol, and, in connection therewith, . . . allowing retail establishments, including restaurants and liquor stores, to deliver any alcohol beverages, they are licensed to sell."). By clearly expressing its delivery provisions, #115 mitigates any (unlikely) confusion that might arise from its introductory clause.

The authorities cited by Petitioner do not suggest otherwise. In *In re Title, Ballot Title, & Submission Clause Approved February 2, 1994, Respecting the Proposed Initiated Constitutional Amendment*

Concerning Limited Gaming in the City of Antonito (Limited Gaming IV), 873 P.2d 733, 736 (Colo. 1994), the Court considered a measure with "two distinct parts." The Court disapproved of the title drafted by the Board because it intermingled the descriptions of those parts, "bur[ying]" provisions related to one between references to the other. *Id.* It held that "to correctly and fairly express the true intent and meaning of the Initiative, all provisions solely concerning [the first part] must be grouped together, and not separated and placed like bookends at both the beginning and the end of the title and submission clause." *Id.*

That is exactly what the Board did here. If, as Petitioner argues, #115 "works two, equally important changes to Colorado law," Pet'r's Opening Br. at 39, then those changes must not be intermingled in the title. Instead, as it did here, the Board should fully describe the measure's provisions related to retail establishments, and then its provisions related to delivery.

B. The licensing regime for third party delivery services is not a "central feature" of the measure.

Finally, Petitioner argues that the Court should reject the title because the Board failed to explain the licensing regime the measure sets up to govern third-party alcohol delivery service providers. Pet'r's Opening Br. at 40–42. But the Board "must balance the requirement of brevity against the requirement that the title unambiguously set forth the measure's central features." *In re Title, Ballot Title and Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 31. Including all individual details of an alleged measure, including the licensing details Petitioner cites here, can "result in a lengthy and complex title, and this would be contrary to the Board's statutory charge." *Id.*

The Board did exercise its discretion to include a description of the licensing regime in other titles it set this year. But those measures are distinguishable from #115. For example, the Board included a licensing description in its title for proposed initiative 2021-2022 #122.[6] But

[6] A Petition related to this measure is currently pending before this court, case number 2022SA149.

unlike #115, #122 *only* addresses third-party alcohol delivery. *See* No. 2022SA149, Record at 2–5 (May 6, 2022). In total, the measure covers less than half as many pages as #115. *Id.* It is no surprise that the Board could include details related to the licensing scheme there without violating its statutory charge. *See* § 1-40-106(3)(b) ("Ballot titles shall be brief[.]").

Whether a given detail would render a title "unnecessarily long and potentially confusing," *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 32, is dependent on a measure's other central features. Where, as here, one measure contains more provisions and adjustments than another, the Board is not obligated to include all details from the latter title in describing the former.

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.

s/ Peter G. Baumann
Peter G. Baumann