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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
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 #115 ("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▲**
Attorney for Petitioner: 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	Case Number: 2022SA142

PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #115 ("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

The Title Board is not required to set perfect ballot titles. But this leeway isn't license to set initiative titles where proponents admit their measure constitutes multiple subjects, either textually (e.g., treating covered rights as "separate privileges") or procedurally (halving an initiative to please discrete, inconsistent coalition members). That's what happened here.

Similarly, the Board ignored Respondents' admissions about the "true intent and meaning" of their "repeal and reenact" device which seeks to displace other legal requirements for licensees, whether adopted by the legislature or the voters. This repeal has nothing to do with the single subject ascribed to this measure and is electoral "sticker shock" that voters will appreciate only weeks or months after they mark their ballots.

The Board's legal errors require that its decision be vacated.

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 6-9; Board Op.Br. at 9-12. 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 13-14, 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 of ***all*** alcohol forms (beer, wine, spirits) to customers who will complete transactions using smartphones rather than in-person visits to retailers.

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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).

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 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 15.

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 #115; R. at 27).

[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

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 7 (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

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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).

[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).

two goals linked only through "and" in Section 1. *See, e.g.,* Initiatives 2021-2022 # 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 11; Board Op.Br. at 7. 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 beer, wine, and spirts 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*

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

Clause for 2009-2010 #45, 234 P.3d 642, 646 (Colo. 2010). If pointing in the same direction is 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").

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 of beer, wine, and spirits cannot be interrelated if they effortlessly stand alone. Interrelated provisions minimize logrolling and 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 8. 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 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 sold at retail and thus violates the single subject requirement.

Petitioners raised the issue of the "separate and distinct" treatment of beer and wine and its effect on the "distinct and separate" subject analysis this Court requires as its single subject standard. Pet. Op.Br. at 23-30.

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 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 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—are "disjoined"[7] and comprise discrete "subjects of legislation." The legislature has statutorily formalized this

[7] "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).

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 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 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]

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.

[8] 2019 Sess. Laws, ch. 1, p. 1, §1.

[9] 2020 Sess. Laws, ch. 67, p. 270, § 3.

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 "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 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.*

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 are also effectively unified and part of the same subject. Board Op.Br. 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 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 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.

C. The repeal and reenact clauses violate the single subject rule.

Petitioner argued that the "repeal and reenact" clauses in Initiative #115 create single subject violations by (1) creating a unique procedure mechanism to preempt other ballot measures or General Assembly legislation and (2) repealing and replacing with Petitioner's provisions unknown and potentially unrelated provisions of the law. Neither the Board's nor Respondents' arguments support a different conclusion.

1. The intent and purpose of the repeal and reenact clause is to preempt competing legislation and ballot measures.

In defense of the repeal and reenact clauses, Respondents say the clauses will not do what Petitioner contends. But that is as far as they go. They do not offer any

explanation for what the clauses are or what they are intended to do. (*See* Resp. Op.Br. at 11.)

The "repeal and reenact" clauses must have a purpose. Not all of Respondents' 20 initiative drafts included this provision. During the initial ballot title hearing (prior to Petitioner's motion for rehearing), Respondents were clear that they intended to fence out any other ballot measures as well as any legislation adopted by the General Assembly before the 2022 election:

> Board Chair: If there is pending legislation right now that passes this session . . . it would then repeal . . . any changes made before Nov. 8, 2022.
>
> S. Taheri: Or it would potentially conflict with another measure that were to pass at the same time.

(Apr. 20, 2022, Title Bd. Hr'g, 1:32:51 to 1:33:16[10]; *see also* Apr. 29, 2022, Title Bd. Hr'g, 2:09:27 to 2:09:44 ("This was to try and protect against us truly getting to be the last enacted. So we would repeal and reenact the section so that it would come back the way we drafted it.") Because the purpose of a ballot title is to reflect "the true intent and meaning" of an initiative, C.R.S. 1-40-106(3)(b), and Respondents were candid about what they intended and meant, the Board needed to accept that

[10] This discussion occurred in the context of Initiative #113, which was the first version of Proponents' measure the Title Board considered with the "repeal and reenact" provisions.

acknowledgement that this is an "end-around" as to other lawmaking that might take the place of their amended statutory sections.

2. *The Title Board improperly ignored Respondents' intent, but even if the Board's interpretation is correct, the clauses still violate the single subject rule.*

The Board acknowledges that, at the least, the repeal and reenact clauses would "repeal any legislative changes made to the relevant sections." (Board Op.Br. at 13.) The Board discounts the impact of this language on competing ballot measures, suggesting any argument to that effect is impermissibly speculative. (*Id.* at 14.)

The Board simply ignores Respondents' stated intent, however. As explained *supra*, Respondents' purpose behind the clauses is to preempt any conflict with 2022 legislation or ballot measures adopted in November of this year so as to "truly get[] to be the last enacted." (Apr. 29, 2022, Title Bd. Hr'g, 2:09:27 to 2:09:44.) Respondents' position on the subject of a measure should be accorded deference. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25*, 974 P.2d 458, 465 (Colo. 1999) ("the Board must give deference to the intent of the proposal as expressed by its proponent").

Even if the Board's narrower interpretation of the repeal and reenact clauses is right, it still violates the single subject rule. Voters wouldn't know they are

adopting language that displaces the standard approach for resolving potential statutory conflict. Generally, courts avoid interpreting statutory provisions in a manner that creates a conflict and, instead, seek to give all statutory provisions effect. *See, e.g.*, *M.S. v. People*, 812 P.2d 632, 637 (Colo. 1991). It is only where there is an irreconcilable or manifest conflict that courts resort to a statutory construction that nullifies a provision. *See, e.g.*, *People v. James*, 404, 497 P.2d 1256 (Colo. 1972).

Initiative #115 replaces the standard approach for reconciling statutes with its repeal and reenact gambit. It doesn't matter if there actually is a conflict between Initiative #115 and a bill by the General Assembly. Nor does it matter if a conflict is irreconcilable or provisions can be harmonized. The "last in time," "specific over general," or any other principles of construction that would apply fall by the wayside. *See* Part 2 of Art. 4 of Title 2, C.R.S. (establishing principles of statutory construction).

Initiative #115 simply says that it replaces any statutory provision it amends. Thus, anything that voters adopt through another initiative or that legislators have adopted through the legislative process disappears in favor of the Initiative's language. Displacing the standard approach for how courts construe and apply the very statutes that voters may be considering stands separate and apart from the

substance of what Initiative #115 seeks to change. *See In re Title, Ballot Title and Submission Clause, and Summary for Initiative 2001-2002 #43,* 46 P.3d 438, 447 (Colo. 2002) (measure violated single subject requirement by changing certain petitioning procedures but also, through "an obscure line in the initiative," insulated TABOR from repeal by voters).

Given this measure's hidden way of eliminating other laws, voters cannot know what it will really do and therefore decide whether to support it. This provision is one that is "coiled up in the folds of a complex proposal." *In re Title for Initiative 2013-2014 #76, supra*, 2014 CO 52, ¶32. The repeal and reenact clause is the ultimate November surprise and thus violates the single subject requirement.

II. The Titles set by the Board violate the clear title requirement.

1. If the Title Board and Respondents cannot describe the measure's subject without expressly identifying "delivery," then the titles' single subject should describe the measure as including "delivery."

Petitioner explained that an average voter would not understand the single subject statement fixed by the Board ("the expansion of retail sale of alcohol beverages") includes authorizing a new third-party alcohol delivery scheme. This stems from the fact that a "sale" and "delivery" are different components of a retail transaction that voters understand and experience differently. Pet.'s Op.Br. at 13-22. The Board counters that voters would not draw a distinct line between sales and

delivery, because both are part of expanding retail alcohol sales. Board Op.Br. at 16-17. Respondents do not address this argument at all, saying only that the titles are clear and accurately describe the measure. Resp. Op.Br. at 13.

The Board's and Respondents' briefs prove Petitioner's argument. Neither can describe the "single subject" of Initiative #115 without expressly identifying both of the measure's substantive aims of wine sales and delivery.

- "The single subject of #115 is expanding the retail sale of alcohol beverages. Specifically establishing a new off-site consumption license that would enable grocery stores and similar retailers to sell both beer and wine, and enabling delivery of alcohol beverages." (Board Op.Br. at 2.)

- "As to the former, the risk of 'logrolling' is minimal because allowing grocery stores to sell wine and allowing third party delivery of alcohol products both 'point in the same direction' of expanding the sale and delivery of alcohol." (*Id.* at 7.)

- "Number 115 proposes to liberalize existing alcohol laws by allowing the sale of wine in grocery stores and similar retailers and authorizing delivery of alcohol beverages." (*Id.* at 15.)

- "Respondents filed Initiative #115 concerning the sales and delivery of alcohol with the Secretary of State on April 8, 2022. Initiative #115 would expand the ability of retail outlets to sell alcohol by allowing wine to be sold in grocery stores that sell beer and allow for the delivery of alcohol." (Resp. Op.Br. at 1.)

- "Initiative #115 addresses the expansion of retail sale of alcohol beverages by expanding the authority of food stores to carry wine in addition to beer and allowing for the home delivery of alcohol." (*Id.* at 3.)

- "Initiative #115 allows the sale of wine at grocery stores which currently are licensed to sell beer. It also authorizes licensed sellers of alcohol beverages, including grocery stores and retailers of all types of alcohol beverages, to deliver their products through third parties." (*Id.* at 5.)

Neither the Board nor Respondents describe the subject of the measure with the single subject statement fixed by the Board ("expansion of retail sale of alcohol beverages"). This inability is understandable given the measure's two distinct ends (wine in grocery stores and third-party delivery). If the parties can only describe the subject(s) of the measure to the Court by specifically calling out ***each*** of the two legal changes which aren't necessarily related to each other, the measure's single subject is not "clearly stated" in the titles. Colo. Const., art. V, sec. 1(5.5). Thus, the title does not meet the requirements of law and should be recast by the Board.

2. The Board's titles erroneously omitted that technology companies need neither a license or a permit to consumers to retail outlets.

The Board and Respondents argue that it was within the Board's discretion to omit from the titles the lack of licensure or a permit requirement for technology companies that facilitate alcohol delivery. Board Op.Br. at 17-18; Resp. Op.Br. at 13-14. The nub of their argument is that introducing technology companies to this transaction isn't a central feature.

That position overlooks the expansive role that technology companies play in a highly regulated industry under the state's police power through licensing or not

licensing retailers. Although they do not transfer possession of alcohol themselves (*see* Resp. Op.Br. at 13), they can, under the measure, provide the chief or even sole communication vehicle for consumers, one that will be the most significant presence to consumers, even more than the actual retailer. Initiative #115 is not just silent as to the role of technology companies; rather, it ***expressly exempts*** technology companies from the standard regulatory tool (licensure) that is familiar to voters.

This exemption is so significant that the Board included it in titles for the initiatives addressing only delivery. For instance, the titles for Initiative #122 state the measure "allow[s] a technology services company, without obtaining a third-party delivery service permit, to provide software or digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages."[11] If two measures contain exactly the same provision, how can it be a central feature of one and not the other?

The Board contends that Initiative #115 is long and makes numerous different changes, while Respondents urge that the Board discussed this issue at length.

[11] For example, see Initiatives 122 and 139, which measures are pending before this Court and are available on the Title Board's website at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html.

(Board Op.Br. at 18; Resp. Op.Br. at 14.) While that all may be true, neither is an excuse to omit a critical feature from a measure's title.

A matter either is or is not important for voter understanding. Having conceded that this issue is necessary as to one measure, the Board abused its discretion by omitting it in this title.

CONCLUSION

The Board erred. Its titles should be vacated.

Respectfully submitted this 23rd 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 ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #115 ("SALES AND DELIVERY OF ALCOHOL BEVERAGES")** was sent electronically via CCEF this day, May 23, 2022, to the following:

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