

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p>DATE FILED: May 23, 2022 5:37 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #67 (“Sales and Delivery of Alcohol Beverages”)</p> <p>Petitioner: Christopher Fine</p> <p>v.</p> <p>Respondents: Steven Ward and Levi Mendyk and</p> <p>Title Board: Theresa Conley, David Powell, and Jeremiah Barry</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Petitioner:</p> <p>Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com</p>	<p>Case Number: 2022SA101</p>
<p>PETITIONER’S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #67 (“SALES AND DELIVERY OF ALCOHOL BEVERAGES”)</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin _____

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TABLE OF CONTENTS

INTRODUCTION1

LEGAL ARGUMENT2

 I. The Initiative violates the single subject requirement.....2

 A. Allowing food stores to sell wine and authorizing third-party delivery of all forms of alcohol to consumers are two separate subjects.2

 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.....2

 2. Other statutory citations about product sale/delivery are not analogous to this supermarket wine/all alcohol delivery initiative.8

 II. The Titles set by the Board violate the clear title requirement.10

 A. 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.”10

 B. Accurately describing the scope of alcohol that can be delivered is critical to a voters’ ability to understand Initiative #67.....12

CONCLUSION14

TABLE OF AUTHORITIES

Cases

<i>In re Proposed Initiative for 1997-1998 #64</i> , 960 P.2d 1192, 1196 (Colo. 1998)....	4
<i>In re Title, Ballot Title & Submission Clause for 2017-2018 #4</i> , 2017 CO 57, ¶14, 395 P.3d 318, 322	7
<i>In re Title, Ballot Title & Submission Clause for 2021-2022 #16</i> , 2021 CO 55, ¶41 489 P.3d 1217, 1225	10
<i>In re Title, Ballot Title & Submission Clause, and Summary for Initiative “Public Rights in Water II,”</i> 898 P.2d 1076, 1079 (Colo. 1995).....	2
<i>In re Title, Ballot Title and Submission Clause for 2009-2010 #45</i> , 234 P.3d 642, 646 (Colo. 2010).....	8
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52, ¶35, 333 P.3d 76, 86	3, 8
<i>United States v. Miner</i> , 2021 U.S. Dist. LEXIS 130547 (E.D. N.Y 2021)	3

Statutes

C.R.S. § 39-28-101(1.3).....	9
C.R.S. § 18-18-429	9
C.R.S. § 25-5-403(1)(a), (d).....	9
C.R.S. § 43-4-218(2)(e)	9
C.R.S. § 44-4-102(2).....	6

Other Authorities

Bill history for SB21-086, available at http://leg.colorado.gov/bills/sb21-086	4
Kafer, K., “Don’t postpone repeal of the last Prohibition-style laws just to save the liquor stores,” <i>The Denver Post</i>	5, 10
Legislative Council of the Colo. Gen. Assembly, <i>An Analysis of 1982 Ballot Proposals</i> at 35; https://www.coloradosos.gov/pubs/elections/Results/BlueBooks/1982BlueBook.pdf	5
Title Board Hearing Recordings, available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html	3

INTRODUCTION

Initiative 2021-2022 #67 kicked off a flood of alcohol-related expansion ballot measures. The Title Board accepted jurisdiction to set titles—but just barely. One of the three Board members, the designee of the Director of the Office of Legislative Legal Services, noted over and over again that combining third-party delivery of all alcohol products (beer, wine, and spirits) was not the same legislative subject as allowing supermarkets to sell wine. There is nothing “interrelated” about these topics. But these two goals draw upon different segments of the electorate with different policy priorities. Making each proposal stand on its own merits was exactly why the single subject requirements was adopted.

This Court should hold true to purposes underlying that voter-approved limit on the initiative process, find that the Board erred here, return this measure to the Board, and allow Respondents to run these measures separately which—based on the 2022 ballot title review docket—they are clearly prepared to do.

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 5-9; Board Op.Br. at 5-6. 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.***” 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

¹ Recordings of the hearing are available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html and are arranged by date and initiative number.

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).

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.

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 (SB-21-086), there was rare bipartisan cooperation—to kill the bill with only one legislator voting for it.³

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).

³ See Exhibit A, attached hereto, and the bill history for SB21-086 is available at <http://leg.colorado.gov/bills/sb21-086>.

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.⁴ This is about convenience.⁵ But those voters may not back delivery of tequila and bourbon to whatever 21-year-old answers the door.

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.⁶ But those same voters may accept delivered orders for liquor because those deliveries do not invade a largely alcohol-free domain, their local supermarket.

⁴ “[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 #67; R. at 22).

⁵ “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).

⁶ “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).

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.

In the same vein, Section 7 of the Initiative slightly amends current law, C.R.S. § 44-4-102(2), but firmly preserves the “separate and distinct” nature of beer and wine or spirits regulation “at the retail level.” R. at 5. Respondents do not repeal this clear line of separation and do not amend it to eliminate the legislative recognition of “separate and distinct” natures of the regulation of these retail products. This provision is in addition to the Initiative’s delineation that an authorization to provide alcohol deliveries is “a privilege separate from” an authorization to operate a liquor licensed facility. *Id.* at 9 (Section 13). In yet another way, then, Respondents concede that theirs is a measure that is inconsistent with the single subject requirement and thus should never have received a title much less be presented to voters as one measure.

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 6 (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—including this one—the two goals linked only through “and” in Section 1. *See* R at 2 (section 1 (“Declaration”)); *see also* Initiatives 2021-2022 # 66 and 112-119.⁷ 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 10; 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 beer, wine, and spirits 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

⁷ The measures are available on the Title Board website, <https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>.

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 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 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 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.

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

A. 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 24-26.

Neither the Board nor Respondents address this argument, saying instead only that the titles are clear and accurately describe the measure. Resp. Op.Br. at 12; Board Op.Br. at 10.

The Board's and Respondents' briefs prove Petitioner's argument. Neither can describe the "single subject" of Initiative #67 without expressly identifying both of the measure's substantive aims of wine sales and delivery.

- "The single subject of #67 is amending the Colorado Liquor Code to allow the sale of wine in grocery and convenience stores that are licensed to sell beer and to permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers." (Board Op.Br. at 2.)
- "The single subject of #67 is amending the Colorado Liquor Code to allow the sale of wine in grocery and convenience stores that are licensed to sell beer and to permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service providers. In essence, the initiative's single subject is expanding the sale and delivery of alcohol products.." (*Id.* at 5.)
- "A review of the initiative demonstrates that it contains a single unifying subject: expanding the sale and delivery of alcohol products.." (*Id.* at 6.)
- "Respondents filed Initiative #67 concerning the sales and delivery of alcohol with the Secretary of State on April 3, 2022. Initiative #67 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 #67 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 #67 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.

B. Accurately describing the scope of alcohol that can be delivered is critical to a voters’ ability to understand Initiative #67.

Petitioner explained in his opening brief that the measure failed to explain that the delivery authorization applies to alcohol for “on-premises” and “off-premises” consumption. (Pet.’s Op. Br. at 26-28.) What this means is that delivery permittees can deliver both factored sealed and packaged liquor from retail licensees (e.g. liquor stores) and alcohol beverages by the drink such as mixed drinks from a restaurant. Neither the Board nor Respondents address this issue, arguing instead only that the

titles fixed by the Board are sufficient. (Board Op. Br. at 10-11; Resps.' Op. Br. at 12.)

There are, as Petitioner explained, substantial public health and safety differences between the delivery of factory sealed alcohol containers and what are, in effect, open containers. A voter may see little issue in a case of beer being delivered but have a real concern about a margarita in a cup wrapped with plastic—from tampering with the drink to delivery drivers being able to drink it to increased opportunities for diversion to minors. And more fundamentally, this initiative comingles license or permit privileges for on-premises and off-premises in novel ways.

Colorado law currently reflects in its different regulatory schemes separate public policy judgments about each type of licensee and the attendant risks posed by their sale of products that hold a real potential for misuse. Voters should be told when a measure changes that regulatory balance in a material way, which the Initiative does by allowing delivery of alcohol beverages for both on- and off-premises consumption.

To be clear, voters should know that delivery services can bring people in their community more than a factory-sealed container. This initiative allows a mixed drink (or several) to be ferried to a person's door. If this issue was important enough

for Respondents to include in this expanded authority, it is certainly important enough for the Board to relate to voters.

The Board erred when it failed to give voters this information.

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 OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #67 (“SALES AND DELIVERY OF ALCOHOL BEVERAGES”)** was sent electronically via CCEF this day, May 23, 2022, to the following:

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