

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p style="text-align: right;">DATE FILED: May 16, 2022 6:29 PM</p> <p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></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 #128 (“Sales and Delivery of Alcohol Beverages”)</p> <p>Petitioner: Christopher Fine</p> <p>v.</p> <p>Respondents: Steven Ward and Levi Mendyk</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell, and Jeremiah Barry</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) <a href="mailto:mark@rklawpc.com">mark@rklawpc.com</a></p>	<p>Case Number: 2022SA155</p>
<p style="text-align: center;"><b>PETITIONER’S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #128 (“SALES AND DELIVERY OF ALCOHOL BEVERAGES”)</b></p>	

## CERTIFICATE OF COMPLIANCE

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

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

Choose one:

It contains 5,778 words.

It does not exceed 30 pages.

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For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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*s/ Mark G. Grueskin*

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## INTRODUCTION

Proponents made a startling admission before the Title Board. They took their multi-subject alcohol expansion measure and just “cut” one subject (third-party alcohol delivery) from the other (wine in grocery stores). Where there was only one measure before, suddenly there were two. And where Proponents had argued the broad single subject of “expansion of retail alcohol sales,” suddenly that label only applied to their wine-in-food-stores measures because the single subject of their other measure was “authorization for the third-party delivery of alcohol beverages.”

Taking a step back, at the end of the period for qualifying an initiative for the 2022 ballot, Proponents filed a rash of measures addressing comprehensively or separately wine sales in food stores and delivery of all alcohol beverages. Behind these measures is a coalition attempting to achieve distinct ends. Part of the coalition is seeking yet again to authorize the sale of wine in grocery stores, while another part is seeking to expand the “gig economy” to include third-party delivery of alcohol beverages. With their separate, substantive aims, there is little surprise that Proponents have had difficulty settling on one version of their measure.

The Title Board waded through no fewer than 20 of these measures, five of which are now pending before the Court (as well as several others, including a nearly identical alcohol delivery measure, filed by other proponents). Each of these

measures violates the single subject requirement by either combining wine sales and delivery in one measure; comingling regulation of beer and other alcohol beverages, which are legally separate and distinct at the retail level; and/or through the measure’s “repeal and reenact” clauses. And as to some measures, the titles set by the Title Board violate the clear title requirement by either misleadingly describing the measure’s single subject or omitting key elements of the measure from the titles.

Given the significant overlap among the various versions of the initiatives—and consistent errors raised on appeal—briefing in these matters is necessarily duplicative. The following chart clarifies across the different initiatives the issues presented for the Court’s consideration:

<b>Single Subject</b>	#67	#115	#121	#122	#128	#139
Wine sale & Delivery	✓	✓			✓	
Separate & Distinct		✓	✓	✓	✓	✓
Repeal & Reenact		✓	✓			
<b>Clear Title</b>						
Single Subject Statement	✓	✓				
Technology Providers		✓				
On-premises / Off premises consumption	✓					

## **ISSUES PRESENTED**

1. Whether Initiative #128 violated the constitutional single subject requirement because:

- a. It includes both (a) an expansion of permitted sales of a single type of alcohol beverage (wine) at a single category of retail sellers (food stores) and (b) authorization for third-party delivery of all types of alcohol beverages (including wine, beer, and spirits) from virtually all licensed sellers of alcohol beverages; and
- b. Under existing Colorado statute, the regulation of beer at the retail level is “separate and distinct” from regulation of wine at the retail level, meaning this measure contains “separate and distinct” purposes and therefore violates the constitutional requirement that initiatives be comprised of only one subject.

## **STATEMENT OF THE CASE**

### **A. Statement of Facts**

Steven Ward and Levi Mendyk (“Proponents”) proposed Initiative 2021-2022 #128 (“Initiative #128” or the “Initiative”). In this Initiative, Proponents seek to amend the Colorado Constitution to create a constitutional right:

- To sell wine if you are licensed to sell beer; and,



- For home delivery of alcohol beverages through third-parties.

Beyond creating these new substantive entitlements, the measure leaves implementing procedures and matters to, presumably, the General Assembly to address through future legislation.

**B. Nature of the Case, Course of Proceedings, and Disposition Below**

A review and comment hearing was held before the Offices of Legislative Council and Legislative Legal Services. Proponents then filed a final version of Initiative #128 with the Secretary of State for submission to the Title Board.

A Title Board hearing was held on April 20, 2022, at which time the Board set titles for the Initiative. On April 27, 2022, Petitioner Christopher Fine (“Petitioner”) filed a Motion for Rehearing, alleging that the Board lacked jurisdiction because Initiative #128 violated the single subject requirement, contrary to Colo. Const. art. V, sec. 1(5.5), and that the Title Board set titles which are misleading and incomplete as they do not fairly communicate the true intent and meaning of the measure and will mislead voters. A rehearing was held on April 29, 2022, during which the Board granted the Motion only to the extent that it made changes to the titles.

The single subject decision was determined on a 2-1 vote. The dissenting member, representing the Office of Legislative Legal Services (responsible for

drafting state legislation and affixing single subjects to bills), agreed with Petitioner that the Initiative contained multiple subjects—specifically, wine sales in food stores and delivery:

I am thinking there may very well be people who don't have a problem with adding wine to grocery stores and convenience stores but have a bigger concern when all types of hard liquor could be expanded and delivered in the manner that's proposed by Proponents.

(Apr. 6, 2022, Title Bd. Hr'g, Comments of J. Barry at 2:39:30 to 2:40:01, incorporated by the Board to apply to Initiative #128.<sup>1</sup>) Mr. Barry explained further in voting that the Board lacked jurisdiction<sup>2</sup>:

No for the grounds that I believe that adding wine to the fermented malt beverage license and in the same measure authorizing delivery of any kind of [alcohol] from any kind of license, alcohol or licensee, constitutes two subjects.

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<sup>1</sup> Many of the comments quoted above were made in connection with the Board's consideration of Proponents' Initiative #66, which was an earlier version of the Initiative. The Board and parties incorporated the arguments and discussion from other versions of the initiative, including Initiative #66. (See Apr. 20, 2022, Title Bd. Hr'g, 3:38:39 to 3:38:50; Apr. 29, 2022, Title Bd. Hr'g at 4:11:36 to 4:13:04.) Thus, the discussion regarding Initiative #66 applies to Initiative #128.

The recording of the April 6, 20, and 29 Title Board hearings can be found at [https://www.sos.state.co.us/pubs/info\\_center/audioBroadcasts.html](https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html).

<sup>2</sup> Mr. Barry made this comment during the discussion regarding Initiative #113, which he incorporated to apply to Initiative #128. (Apr. 29, 2022, Title Bd. Hr'g at 4:17:34 to 4:17:38.)

(Apr. 29, 2022, Title Bd. Hr’g at 2:19:45 to 2:20:10.) The other members of the Board recognized the Initiative raised single subject concerns (Apr. 6, 2022, Title Bd. Hr’g, Comments of T. Conley at 2:37:39 and D. Powell at 2:38:10 (recognizing it is a “good argument”).) The Board’s chair agreed that voters could see wine sales and delivery very differently:

I do think you’re right. People may say ok its fine wine is being sold in a liquor store [sic.] but I don’t know if I want cases of alcohol of whatever nature to be delivered.

. . .

I am not concerned about adding delivery of wine as a single subject. But I am chewing a little bit on the idea that your, one part of the measure is expanding being able to buy wine at the grocery store but the other measure isn’t just delivering that same wine it’s also delivering alcohol, spirits, and things of that nature. . . .

The Board chair validated those concerns, saying “I do see those (delivery and supermarket wine access) as being two things” that not all voters could support in a single measure. (*Id.*, Comments of T. Conley, 2:43:09 to 2:43:20, 2:46:31 to 2:46:52, 2:49:12 to 2:49:26.)

Despite the single subject concerns expressed over Proponents’ distinct subjects, the Board voted it had jurisdiction by a single vote. The Board fixed the following titles for Initiative #128:

Shall there be an amendment to the Colorado constitution concerning the expansion of retail sale of alcohol beverages, and, in connection

therewith, authorizing a person licensed to sell beer at retail to also sell wine at retail and authorizing home delivery of all alcohol beverages through third-party home delivery service providers that use employees or independent contractors to make deliveries so long as the delivery person and the recipient are both at least 21 years of age?

### **SUMMARY OF ARGUMENT**

Initiative #128 presents the challenges for voters that the single subject requirement is intended to prevent. It combines different substantive aims (wine sales and delivery) that bear no necessary or logical relationship to each other. It packages in one measure topics (beer and other alcohol beverages) that the General Assembly has determined are “separate and distinct” as a matter of state regulatory policy at the retail level. Given these single subject violations, the Board erred by finding that it had jurisdiction over Initiative #128.

### **LEGAL ARGUMENT**

**I. Initiative #128 contains multiple separate and distinct subjects, which deprives the Title Board of jurisdiction to set titles.**

**A. Standard of review; preservation of issue below.**

The Colorado Constitution requires that any initiative must comprise a single subject. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board’s analysis and this Court’s review is a limited one, addressing the meaning of an initiative to identify its subject or subjects. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-*

2000 No. 172, No. 173, No. 174, and No. 175, 987 P.2d 243, 245 (Colo. 1999). To find that a measure addresses only one subject, the Court must determine that an initiative's topics are "necessarily and properly" related to the general single subject, rather than "disconnected or incongruous" with that subject. *In re Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 P.2d 798, 802 (Colo. 1996).

Petitioner raised this issue in his Motion for Rehearing, and during the hearing on Proponents' initiatives, and, therefore, preserved the issue for review. (*See* Pet.'s Mot. for Reh'g on Initiative 2021-2022 #128 at 1-3.)

**B. Initiative #128's multiple subjects.**

Proponents' measure contains multiple subjects in violation of the single subject rule: (1) permitting wine sales (*one* type of alcohol) in food stores (*one* type of licensee); (2) allowing the delivery of *any type* of alcohol beverage (beer, wine, hard liquor, etc.) from *any type* of retail licensee by *anyone* so long as they hold a delivery permit (distinguished from a liquor license); and (3) altering the regulatory scheme for beer *and* other types of alcohol, which, as a matter of law, are "separate and distinct" regulatory concerns at the retail level.

**1. Initiative #128's first subject: wine sales at food stores.**

Colorado traditionally has circumscribed the sale of alcohol beverages, including restrictions governing the types of alcohol different licensees can sell. In particular, Colorado limited what food stores such as grocery stores could sell to low-alcohol beer (so-called 3.2 beer). That approach changed when the General Assembly passed Senate Bill 16-197, which, among other changes, allowed food stores to begin selling full strength beer. *See generally* Colo. Liquor Enforcement Div., “Senate Bill 16-197,” <https://sbg.colorado.gov/senate-bill-16-197> (providing background on SB 16-197).

Senate Bill 16-197 did not remove all of the limits on what food stores could sell. Notably, it did not authorize food stores to sell wine or hard liquor. The retail sale of those types of alcohol beverages for off-premises consumption (i.e. not consumed at an establishment such as a restaurant) remained limited to certain licensees (e.g. retail liquor store licensees).

Initiative #128 is, therefore, a significant change to existing law that permits the purchase of more and qualitatively different alcoholic beverages in food stores. In order to achieve this purpose, Proponents need only make targeted changes to Colorado's liquor law, which they accomplish by providing that “a person licensed to sell beer at retail may sell wine at retail from a premises that is licensed to sell

beer at retail.” (Initiative #128, sec. 1, proposed Colo. Const. art. XXII sec. 1.) Proponents do not need to change the privileges or authorizations applicable to *other* types of licensees or the delivery of *other* types of alcohol beverages to achieve their objective of wine sales in food stores.

But to achieve this aim, Proponents know they need more than a measure that simply proposes allowing wine sales at grocery stores. For more than 40 years, grocery store owners have tried to win this authority. *See, e.g., In re Title, Ballot Title & Submission Clause, and Summary Pertaining to the Sale of Table Wine in Grocery Stores Initiative*, 646 P.2d 916 (Colo. 1982). They were soundly defeated when they proposed Amendment 7 on the 1982 ballot<sup>3</sup>—it received only 35% of the vote.<sup>4</sup> And since then, they haven’t yet succeeded to do so with legislators or voters.

## **2. Initiative #128’s second subject: alcohol delivery.**

Aware of their past challenges in getting popular or legislative support for the concept of wine sales in grocery stores, Proponents created a new coalition and

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<sup>3</sup> Legislative Council of the Colo. Gen. Assembly, *An Analysis of 1982 Ballot Proposals* at 33-36, available at <https://www.coloradosos.gov/pubs/elections/Results/BlueBooks/1982BlueBook.pdf> (last viewed May 3, 2022).

<sup>4</sup> Colorado Secretary of State, *1982 Abstract of Vote* at 186-87, available at <https://www.coloradosos.gov/pubs/elections/Results/Abstract/pdf/1900-1999/1982AbstractBook.pdf> (last viewed May 3, 2022).

combined a second subject to their Initiative by creating a broad authorization for home alcohol delivery. As Proponents' counsel described it:

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.*** And then there are things that happen at the legislature.

(Apr. 29, 2022, Title Bd. Hr'g at 11:30 to 12:45 (arising in discussion of Initiative #112)). Rarely are proponents so candid that they have melded inconsistent interests in order to produce a single initiative. If their interests behind this Initiative are in two separate camps, there is no reason to think that the voters would share concerns that the aforementioned interests do not share. Of course, they won't. Voters will be appealed to separately to create a coalition to pass two distinct concepts that could not each pass separately.

Furthermore, if these two subjects are essentially the same thing, the split measures should have the same single subject description. They don't. The Title Board used the subject of "expansion of retail alcohol sales" to describe the wine-in-food-stores only measures.<sup>5</sup> They didn't use this same single subject to describe the delivery only measures. Instead, the single subject of those initiatives was

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<sup>5</sup> See, e.g., *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #121*, Case No. 2022SA000148; Record at 13.



“authorization for the third-party delivery of alcohol beverages.”<sup>6</sup> If these two proposals are essential, constituent parts of the same subject, how are their “clear” single subject descriptions so different and disconnected?

That is because the new constitutional right to third-party delivery of alcohol bears no logical or necessary relationship to allowing food stores to sell wine; it is unnecessary to allow delivery of alcohol (all types) in order to permit food stores to add wine on their shelves. Initiative #128 thus includes a second subject to legislate to achieve an entirely unrelated objective. Like wine sales in grocery stores, third-party alcohol delivery hasn’t exactly generated a significant amount of support on its own. When a bill for third-party delivery of just beer was considered by the General Assembly in 2021 (SB21-086), it got exactly one (1) vote—in committee—and died there.<sup>7</sup>

Initiative #128 creates a broad authorization for alcohol delivery that extends beyond licensees to gig services as well as delivery conglomerates such as Amazon. The measure provides simply that third-party delivery of alcohol to homes is permitted by delivery persons over 21 years of age so long as the recipient is over

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<sup>6</sup> See, e.g., *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #122*, Case No. 2022SA000149; Record at 7.

<sup>7</sup> See Exhibit A, attached hereto, at 3 (bill history for SB21-086) (available at <http://leg.colorado.gov/bills/sb21-086>).

21 years of age and has identification. Thus, under this authority, not only can any on-premises (e.g., restaurant) or off-premises (e.g., liquor store) licensee deliver alcohol from its inventory through its employees to its customers, so too can any other person or business. Unlike Proponents' other measures, Initiative #128 does not even require third-party delivery companies to clear the low-hurdle of obtaining a delivery permit.

Under Initiative #128, then, a company that operates like Uber Eats or Grubhub could start delivering alcohol from any liquor licensee to a consumer (an example of this type of company is Drizly, <https://drizly.com/>). And the Initiative does not impose any limits on the revenue that can be generated from delivery, which means that delivery could be the *entire* business venture (as opposed to a limited component of a licensees' business).

Delivery, however, has no logical or necessary relationship to the Initiative's first purpose, wine sales in food stores. Proponents can authorize wine sales in food stores without changing Colorado's law with respect to alcohol delivery. Similarly, Proponents could have authorized alcohol delivery without allowing wine sales in grocery stores. Neither is necessary to address the other, a fact made plain by Proponents filing other initiatives on these subjects that separates them.

Proponents filed multiple standalone initiatives that address either wine sales in food stores *or* alcohol delivery after Petitioner had objected to the single subject of their first measures, Initiatives #66 and #67, which combined both subjects. *Compare, e.g.,* Initiatives 2021-2022 #122-125 (third party delivery of alcohol), *with* Initiatives 2021-2022 #120, 121, 129 (wine sales in food stores).<sup>8</sup> As the division of Initiative #128’s subjects into those initiatives demonstrates, Proponents can achieve one objective without addressing the other—in other words, the objectives are logically and legally independent of each other.

In fact, Proponents explained their first wine-in-food-stores only measure (Initiative #120) in a telling way. Explaining how it was different from the initiatives that combined this subject with third-party delivery, the Proponents stated about Initiative #120: “It is only adding wine to the beer license; [Proponents] just cut all the delivery out of the question.” Two subjects, so easily severed from one another, represent the epitome of a measure that violates the single subject mandate.

What Proponents have done is to take a single change to one subject (wine sales in food stores) and used it as a way to add votes to a broad proposal that, itself,

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<sup>8</sup> After Petitioner filed for review in this Court, Proponents withdrew Initiatives 120, 123-25, and 129. All of the measures are available on the Secretary of State’s website at <https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/index.html>.

has faced stiff political winds (third-party delivery). The second subject here violates the underlying concern behind the single subject requirement that a subject pass on its own merits and without comingling of support for another subject. *See In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶11, 274 P.3d 562, 566 (Colo. 2012) (single subject rule prevents “combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions . . . could lead to the enactment of measures that would fail on their own merits”). The Court has specifically, and recently, rejected essentially what Proponents attempt to do.

The case concerned an initiative to amend the state’s animal cruelty laws. *In re Title, Ballot Title and Submission Clause for 2021-2022 #16 (In re # 16)*, 2021 CO 55, 489 P.3d 1217. The purpose of the measure was to extend the state’s animal cruelty laws to livestock. 2021 CO 55, ¶¶ 2, 21-22. The proponents added a second subject: a redefinition of “sexual act with an animal” that applied to *all* animals. *Id.* ¶ 2. The Court held that this was impermissible, explaining: “Initiative 16 fails to satisfy the single-subject requirement because expanding the definition of ‘sexual act with an animal’ isn’t necessarily and properly connected to the measure’s central focus of incorporating livestock into the animal cruelty statutes.” *Id.* ¶ 41. The same conclusion holds true here. Expanding delivery of all types of alcohol by licensees

and non-licensees is not “necessarily and property connected” to the Initiative’s “central focus” of allowing wine sales at food stores.

Before the Board, Proponents attempted to avoid this straightforward application of *In re # 16* by describing the single subject of the Initiative expansively as amending Colorado liquor laws. However, describing the single subject in broad terms does not avoid a single subject violation, as the Court explained in *In re # 16*. The proponents and the Board there framed the initiative’s subject as “animal cruelty.” *Id.*, ¶ 20. The Court explained that initiative proponents cannot avoid single subject issues through the use of a general subject. “Animal cruelty” was “the type of overly broad theme that we’ve rejected” for single-subject analysis. *Id.* ¶ 22. The Court reiterated that “vague subjects” are impermissible because they allow “incongruous and disconnected provisions [to] be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated.” *Id.* ¶ 22 (quoting *In re The Title, Ballot Title And Submission Clause, And Summary For 1997-1998 # 64*, 960 P.2d 1192, 1200 (Colo. 1998)).

Proponents’ subject in Initiative #128 is, as in *In re # 16*, impermissibly vague or overly general. Although Initiative #128 involves alcohol and Colorado’s liquor laws, its aim is a multi-faceted remake of the current limits on food store sales of alcohol beverages as well as a whole new authorization for delivery agents who

operate apart from heavily regulated, licensed liquor sales operations. Proponents cannot obscure the distinct goals they seek to advance in a generic single subject.

An initiative that groups fundamentally separate subjects in one measure presents “the logrolling dilemma that the voters intended to avoid when they adopted the single subject requirements of article V, section 1(5.5) of the Colorado Constitution.” *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 31, 274 P.3d 562, 571. Other voters may not even understand that they are authorizing fundamentally different—or surreptitious—activities. Combining different subjects creates the “risk of surprising voters with a ‘surreptitious’ change,” because voters may focus on one change and overlook the other.” *In re # 16*, 2021 CO 55, ¶ 41 (internal citation omitted).

The Board saw evidence of just how one subject of this measure could overshadow another in terms of messaging with voters. A well-known op-ed writer wrote a column for *The Denver Post* about how this initiative could help rid the state of outdated liquor laws. She focused entirely about the ease of shopping in one store to meet one’s grocery and wine needs. Other than a passing reference to “internet sales” and “E-commerce” in the third paragraph from the end, the issue of third-party delivery was never mentioned in a piece that argued for support of Initiative #128. (See 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 8-9). If ever the Court had a preview of coming attractions in campaign rhetoric, this column provides concrete insight about what can be expected when voters are urged to cast their votes based on only one of the measure’s two subjects.

In its current form, Initiative #128 forces voters to weigh a trade-off between finding a nice Cabernet in the Gatorade aisle at their neighborhood grocery store against home delivery of every alcohol type by Uber drivers under a law that allows liquor licensees to do 100% of their business via deliveries with *no* in-store sales at all. For some, the former is the priority; for others, the convenience of a broader delivery service is all they want. But to get one, they must accept both—at least under this version of Proponents’ measure.

Proponents want to accomplish two substantive objectives. Both fall within the overly broad umbrella of “alcohol”—wine sales in food stores and delivery—but that’s where their common thread ends. As such, they are different subjects. Accomplishing one of these goals does not require addressing the other. Combining them in one initiative violates the single subject requirement, and the Board lacked jurisdiction to set titles.

**3. Initiative #128's third subject: comingling retail regulation of beer and other alcohol beverages.**

The separateness of Proponents' measure is emphasized by the General Assembly's finding that different types of alcohol are, as a matter of law, to be treated separately at the retail level. The General Assembly concluded that beer presents different and lesser public health and safety concerns than wine and spirits or hard liquor. The so-called "Beer Code" creates a separate regulatory framework for the retail sale of beer. *See* C.R.S. §§ 44-4-101 *et seq.* The Beer Code affirmatively declares that the regulation of beer at the retail level is "separate and distinct" from other alcohol beverages:

The general assembly further recognizes that fermented malt beverages and malt liquors *are separate and distinct from*, and have a unique regulatory history in relation to, vinous and spirituous liquors; however, maintaining a separate regulatory framework and licensing structure for fermented malt beverages under this article 4 is no longer necessary *except at the retail level*. Furthermore, to aid administrative efficiency, article 3 of this title 44 applies to the regulation of fermented malt beverages, except when otherwise expressly provided for in this article 4.

C.R.S. § 44-4-102(2) (emphasis added). In other words, the General Assembly has directed, as an exercise of its "police powers," *see* C.R.S. § 44-3-102(1), that retail offerings of beer and other alcohol beverages are to be dealt with as separate regulatory matters.



The General Assembly has long been responsible for the regulation of liquor, and it has created an intricate framework to control the distribution and sale of alcohol beverages. These policies stem from a long history of careful, targeted regulatory treatment of various types of alcohol which triggers different levels of state-directed oversight. It is no surprise, then, that the regulation of all types of alcohol is a matter of statewide concern. *See, e.g., Kelly v. City of Fort Collins*, 431 P.2d 785, 787 (Colo. 1967).

The legislature’s decision to treat beer differently and declare its regulation as “separate and distinct” at retail from other alcohol beverages was a consequential legislative choice that neither the courts nor the Title Board should displace in the absence of the repeal of such a declaration. It is incumbent upon this Court “to ascertain and give effect to the General Assembly’s intent,” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, and 69* [“2011-2012 Nos. 67, 68, and 69”], 2013 CO 1, ¶ 12, 293 P.3d 551, and the Title Board has no greater latitude than this Court would have to bypass clear statutory pronouncements. *Cf. Price v. Mills*, 728 P.2d 715, 720 (Colo. 1986) (no deference due to administrative interpretation of a statute that “contravenes . . . legislative . . . policies”).

The General Assembly’s determination that beer and more potent alcohol beverages are separate and distinct should guide the application of the single subject rule here. As the Court has recognized, the General Assembly plays an important role in implementing the Constitution’s provisions governing ballot initiatives. For instance, the General Assembly created the Title Board and assigned to it the constitutional responsibilities for setting ballot titles. *See, e.g., 2011-2012 Nos. 67, 68, and 69, supra, 2013 CO 1, ¶ 14.* The General Assembly has further delineated the procedures and timelines for the ballot title setting process, which this Court has held it must apply as intended by the legislature. *See, e.g., In re Title, Ballot Title and Submission Clause for 2019-2020 #74 and In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #75, 2020 CO 5, 455 P.3d 759.*

In fact, the Court has recognized the authority of the General Assembly to implement and enforce the single subject requirement itself. As the Court explained, in passing C.R.S. § 1-40-106.5, the General Assembly described through a legislative declaration the concerns behind the single subject rule, and it “*directed* that the single subject and title requirements for initiatives be liberally construed, ‘so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.’” *In re Title, Ballot Title and Submission Clause, and Summary with regard to a Proposed Petition for an*

*Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25)*, 900 P.2d 121, 124-25 (Colo. 1995) (quoting C.R.S. § 1-40-106.5) (emphasis added). This Court has relied on that legislative declaration from the time immediately following its enactment, *see id.*, and it remains a source of consistent direction for this Court as well as the Title Board, *see, e.g., In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶¶ 12-14, 500 P.3d 363, 365.

Although the General Assembly has authorized the Board to fix titles and enforce the single subject requirement, *see* C.R.S. §§ 1-40-106 and -106.5, the legislature has not endowed it with authority to make its own legislative determinations or to change or deviate from those made by the General Assembly. Rather, the Board must act within the limits prescribed by the General Assembly, which includes the “substantive requirements” of state statute as they affect the title setting process. *See 2011-2012 Nos. 67, 68, and 69, supra*, 2013 CO 1, ¶ 16 (holding Board lacked authority to deviate from a “substantive” requirement of Title 1, Article 40, the mandatory attendance by both designated representatives at all hearings on their measure). And that is the situation here. The General Assembly has already pronounced, as an exercise of its police powers, that the regulation of beer

and other alcohol beverages (i.e. wine and spirits) is “separate and distinct” at the “retail level.” C.R.S. § 44-4-102(2).

Initiative #128 effectively bypasses the statutory division of the regulation of wine and beer at retail. It allows for the sale of wine in food stores along with beer, and it also proposes an expansive new delivery scheme that operates at the retail level to deliver any and all alcohol beverages from licensees to consumers—beer, wine, hard liquor, as well as alcohol beverages by the drink. This is precisely the mixing of the regulation of beer with other alcohol beverages—substances of different potency and therefore different impact on consumers—that C.R.S. § 44-4-102(2) dictates should not generally occur, both in current statute and in this Initiative. The Title Board could not ignore a legislative finding of separateness by the General Assembly.

For example, the General Assembly’s use of a safety clause, a legislative declaration that a law is necessary for the immediate preservation of the public peace, health, or safety—and thus beyond the referendum power of voters—“is conclusive upon all departments of government” and is determinative of whether the right of referendum may be exercised regarding that legislation. *Van Kleeck v. Ramer*, 156 P. 1106, 1109 (Colo. 1916). As a general matter, when it considers an initiative for title setting, the Title Board does not have “authority that the General

Assembly withheld.” *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 2014 CO 61, ¶ 18, 328 P.3d 127, 131. Thus, the Board could not ignore the clear legislative assessment of beer and wine at the retail level to be a separate subject for this purpose.

The legislature’s declaration relates directly to the single subject standard that is this Court’s central inquiry, i.e., identifying a separate and distinct purpose. Where “[t]here is nothing in the record to show that this legislative declaration was arbitrary or unfounded in reason” (and there is nothing to suggest such lack of thought by the General Assembly here), that declaration “is conclusive” on the parties to which it applies, and the Court “is bound by” it. *Milheim v. Moffat Tunnel Improv. Dist.*, 211 P. 649, 658 (Colo. 1922); *see also Slack v. City of Colorado Springs*, 655 P.2d 376, 379 (Colo. 1982).

This principle has not been limited in this Court’s application to safety clauses. A legislative determination dealing with more routine matters can still be “conclusive” as a matter of law. *Milheim, supra*, 211 P. at 658 (giving effect to legislative declaration that assessments did not exceed the benefits of a publicly financed improvement project as “conclusive” on the courts). Even a legislative declaration that is not deemed to be conclusive is “entitled to great weight.” *Id.* at

657. Here, the Title Board did not evaluate how much weight to give this legislative declaration; the Board just ignored it.

The Title Board's willingness to look away from this legislative determination, if accepted by this Court, produces a slippery slope. If the legislature's distinction regarding agency regulation of wine and beer is deemed to be of no consequence, such a decision would also erase the underpinnings for differential levels of regulation (depending on the alcohol beverages at issue and their alcoholic content) and, as importantly, differential levels of taxation as determined by the taxing governmental entity. *See Springston v. City of Ft. Collins*, 518 P.2d 939, 940 (Colo. 1974) (upholding district court finding that different categories of license were "separate and distinct" from one another and therefore there was a rational basis for different levels of taxation on the two types of products sold under these liquor licenses).

So long as the retail level regulation of beer and other alcohol beverages is legally categorized as "separate and distinct," a measure that ignores this delineation and authorizes the same treatment of them at the retail level necessarily violates the single subject requirement. An initiative cannot have a single subject if it involves two matters that the law mandates are "separate and distinct." As such, under

specialized facts unique to this statutory scheme, the Court should hold the Board erred in finding it had jurisdiction.

Initiative #128 may generally involve alcohol beverages, but layered within its folds are a variety of different subjects that bear no logical or necessary connection to each other. As such, the measure violates the single subject rule, and the Title Board erred by finding it had jurisdiction to set titles.

### **CONCLUSION**

Proponents have a diverse coalition to satisfy. But with the separate interests came distinct subjects for their measure. This separateness is only emphasized by the General Assembly's declaration, left in place by Proponents, that beer and other alcohol beverages are to be treated separately. The single subject rule operates to prevent this piling of interests into one measure to obtain voter approval. As such, the Court should reverse the Title Board.

Respectfully submitted this 16th 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 OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #128 (“SALES AND DELIVERY OF ALCOHOL BEVERAGES”)** was sent electronically via CCEF this day, May 16th, 2022, to the following:

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