

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	<p style="text-align: right; color: blue;">DATE FILED: May 03, 2022 5:24 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</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</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell, and Jeremiah Barry</p>	
<p>Attorney for Petitioners:</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 OPENING 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).

Choose one:

It contains 6,559 words.

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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.

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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INTRODUCTION

For more than 40 years, grocery store owners have wanted to sell Chardonnay an aisle away from where their customers buy quarts of milk and loaves of bread. *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). Amendment 7 was an initiative on the 1982 ballot,¹ but it was defeated soundly, getting only 35% of the vote.²

Since that time, no legislative body—not the Colorado General Assembly and not the state’s voters—have thought that this was a meritorious policy objective. At most, grocery stores got to add full strength beer to their 3.2 beer offerings a few years ago.

In 2022, the supermarkets are trying again, but this time, they’ve broadened their measure to see if they can attract a different constituency to get their proposal to 50% plus 1 on Election Day. By means of Initiative #67 (and a raft of companion

¹ 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).

² 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).

measures this Court will see in coming weeks), they are proposing to both expand wine for their in-store sales and also allow third-party delivery services to drive any alcohol beverage sold at retail to your front door. In other words, grocery stores want one thing (a long sought-after expansion of product they can sell), but to make it palatable to other voters, they are offering something else entirely (home deliveries of wine, beer, tequila and scotch through services like Uber Eats and Drizly).

However, this package deal is one where neither objective depends upon, is necessary to, or logically related to the accomplishment of the other. In what may be a first in ballot title case law in Colorado, the language of Proponents' own initiative actually admits the two joined pieces of this measure are separate purposes. Combining them in one initiative violates the constitutional single subject rule.

Not only did the Title Board err in setting titles for lack of jurisdiction, the titles it set are deficient. The Board's single subject statement omits one of Proponent's principal purposes—delivery—which is buried within the titles. The Board also omitted from the titles another critical element of the measure—describing the scope of delivery—which renders the titles incomplete and misleading to voters.

Where an effort to join unrelated concepts is this transparent and even admitted by the measure's proponents in the text of their measure, this Court should

vacate the titles and remand to the Title Board with instructions to dismiss for lack of jurisdiction. Alternatively, the Court should direct the Board to correct the titles to properly describe key aspects of the measure and thus give voters adequate notice of what they are being asked to approve.

ISSUES PRESENTED

1. Whether Initiative #67 violated the constitutional single subject requirement by including:
 - a. The expansion of permitted sales of a single type of alcohol beverage (wine) at a single category of retail sellers (food stores) which now sell only beer; and
 - b. New authorization of third-party delivery of all types of alcohol beverages (including wine, beer, and spirits) from virtually all licensed sellers of alcohol beverages (from retail liquor stores to restaurants as well as food stores) as admittedly “separate” privileges.
2. Whether the Board violated the “clear ballot title” requirement because:
 - a. The titles’ current statement of single subject (“the expansion of retail sale of alcohol beverages”) is inaccurate as “delivery” of alcohol is a not a “retail sale” of alcohol and can be accomplished,

under this initiative, by unrelated third parties who are not licensed or in any way engaged in retail sales; and,

- b. The titles fail to state this initiative expands alcohol delivery for alcohol beverages that are sold for off-premises consumption as well as for alcoholic drinks that are sold for on-premises consumption.

STATEMENT OF THE CASE

A. Statement of Facts

Steven Ward and Levi Mendyk (“Proponents”) proposed Initiative 2021-2022 #67 (“Initiative #67” or the “Initiative”), which is one version of among 20 of their alcohol and delivery initiative filed with the Board for title setting. A companion initiative to this appeal is Initiative 2021-2022 #66 (which pursues the same, separate objectives but through the Colorado Liquor Code, *see* C.R.S. § 44-3-101 *et seq.*), and titles for the other versions of the initiative also will be appealed.

The Initiative addresses distinct aspects of Colorado’s liquor law, and makes two, unrelated changes to it. The first substantive change is to amend Colorado liquor law to allow the sale of wine (or what are referred to as “vinous liquors” in Colorado liquor law) by food stores (e.g. grocery or convenience stores). Currently, food stores are only allowed to sell malt beverages, that is, beer. The Proponents accomplish this by amending the license privileges of a fermented malt beverages

retailer under the Colorado Beer Code to include the authority to sell wine. Although this change would have a substantial effect on Colorado's alcohol beverage market, for purposes of changing Colorado law, achieving this purpose requires only discrete changes to the law to modify *one* type of liquor license that adds *one* type of alcohol beverage to what food stores may sell.

Initiative #67, however, goes far beyond the discrete changes necessary to allow wine sales at food stores to address another subject: a substantial rewrite of Colorado's law regarding alcohol deliveries. Initiative #67 repeals the current law on alcohol deliveries, which is limited to certain licensees (e.g. retail liquor stores) and takeout and which is conducted by the licensee itself through its own employees, subject to a limit of obtaining no more than 50% of the licensee's gross revenue from deliveries. The Initiative allows delivery by not only any retail liquor licensee but also by unlicensed, third-parties who may make deliveries instead of licensees.

All that is required is for a licensee or third-party to make deliveries is to obtain a delivery "permit," which the Initiative declares is a "a privilege separate from [an] existing license." (Initiative #67, sec. 13, proposed C.R.S. § 44-3-911.5) Delivery permits are *not* limited to food stores (i.e. holders of the amended "fermented malt beverage and wine retailer" license). Nor are permittees limited to delivering only wine (or even wine and beer, which are the beverages beer and wine

off-premises retailer licensees are allowed to sell); a permittee can, instead, deliver any and all types of alcohol beverages.

Proponents captured the separate purposes of their Initiative in their declaration (explicitly using “and”), which states:

The People of the State of Colorado hereby find and declare that Article 4 Title 44, C.R.S. known as the “Colorado Beer Code”, shall be amended to allow, beginning March 1, 2023, the sale of wine in grocery and convenience stores that are licensed to sell beer; *and* permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service provider.

(*Id.*, sec. 1. (emphasis added).)

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 #67 with the Secretary of State for submission to the Title Board.

A Title Board hearing was held on March 16, 2022, at which time the Board set titles for the Initiative. On March 23, 2022, Petitioner Christopher Fine (“Petitioner”) filed a Motion for Rehearing, alleging that the Board lacked jurisdiction because Initiative #67 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 6, 2022, during which the Board granted in part and denied in part the Motion for Rehearing. 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 and, therefore, the Board lacked jurisdiction.³

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 2:40:01.⁴) The other members of the Board recognized the Initiative raised single subject concerns (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 not only agreed with Mr. Barry's view that voters could see the issues differently, she described the measure as involving "two things," wine sales at grocery stores and the broader delivery of all types of alcohol:

³ The Board and Petitioner incorporated the arguments and discussion from the decision on Petitioner's Motion for Rehearing on Initiative #66. (Apr. 6, 2022, Title Bd. Hr'g, 3:21:54 to 3:22:07.) Thus, the concerns and arguments expressed previously with respect to Initiative #66 apply to Initiative #67.

⁴ The recording of the April 6 Title Board hearing can be found at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.

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. (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.) Given 40 years of false starts for changing state statute to allow wine in grocery stores, neither Board member had to mention the obvious; standing alone, even this concept isn't a clear winner.

Despite recognizing that the measure involves "two things," the Board voted it had jurisdiction by a single vote. The Board amended the titles it set originally for Initiative #67 with the following title:

Shall there be a change to the Colorado Revised Statutes concerning the expansion of retail sale of alcohol beverages, and, in connection therewith, establishing a new fermented malt beverage and wine retailer license to allow grocery stores, convenience stores, and other business establishments licensed to sell beer for consumption off the licensed premises to also sell wine for off-premises consumption; automatically converting a fermented malt beverage retailer license authorizing the sale of beer for off-premises consumption that was in effect on March

1, 2023, to the new fermented malt beverage and wine retailer license; allowing fermented malt beverage and wine retailer licensees to conduct tastings on the licensed premises if approved by the local licensing authority; and allowing retail establishments licensed to sell alcohol beverages to deliver all types of alcohol beverages to a person 21 years of age or older through a third-party delivery service that has obtained a delivery service permit from the state licensing authority?

SUMMARY OF ARGUMENT

Initiative #67 violates the constitutional single subject rule by including, in the words of the initiative, “separate” subjects: allowing (1) wine sales in grocery stores and convenience stores and (2) delivery. Allowing wine sales in grocery stores concerns a targeted change to what one type of licensee can sell in their store. Delivery, on the other hand, involves all types of alcohol and virtually all types of retail licensees. What Proponents have done is to hide within the folds of a narrow change a broadly applicable change to the industry. The Court has disapproved of such measures. As it violates the single subject rule, the Board lacked jurisdiction.

Not only did the Board err in setting titles, it erred in how it described the measure. Most fundamentally, the Board’s title hides the measure’s delivery objective by burying it at the end of the title. The single subject statement does not alert voters of the measure’s delivery provisions. Nor do the titles describe another key provision of the measure. The titles are silent in explaining that delivery

encompasses both on and off premises consumption alcohol beverages, which raise distinct concerns and regulatory issues.

LEGAL ARGUMENT

I. Initiative #67 contains two 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 his Motion, and, therefore, preserved the issue for review. (*See* Pet.’s Mot. for Reh’g on Initiative 2021-2022 #67 at 1-3.)

B. Initiative #67 contains two separate and distinct subjects.

As the plain language of Proponents' Initiative makes clear, the measure contains two separate and distinct subjects: (1) permitting the sale of *one type* of alcohol beverage—wine—by *one type* of licensed retail seller of alcohol (i.e. through what would be a “fermented malt beverage and wine retailer” license, which applies to businesses such as grocery stores) and (2) allowing the delivery of *any type* of alcohol beverage (beer, wine, hard liquor, etc.) from *any type* of retail licensee by *anyone*, whether a liquor licensee or not, so long as they are permitted.

1. Initiative #67'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. Senate Bill 16-197 was a significant political compromise, and it was the most significant change to Colorado's regulatory scheme for alcohol beverages since Prohibition. *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 grocery stores and other 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). As noted above, supermarkets' quest for the right to sell wine has been part of the policy debate in liquor law for more than 40 years.

Initiative #67 is a significant change to existing law that permits the purchase of more and qualitatively different alcoholic beverages in food stores: it would “allow, beginning March 1, 2023, the sale of wine in grocery and convenience stores that are licensed to sell beer.” (Initiative #67, sec. 1.) In order to achieve this purpose, Proponents need only make targeted changes to Colorado’s liquor law, which they accomplish by expanding the privilege of a fermented malt beverage license under the Colorado Beer Code to include wine sales (what becomes a “fermented malt beverage and wine retailer” license) and adjusting certain procedural issues. 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.

2. Initiative #67's second subject: alcohol delivery, using specialized software and third-party delivery services.

Aware of their past challenges in getting popular or legislative support for the concept of wine sales in grocery stores, Proponents added a second subject to their Initiative by creating a broad authorization for alcohol delivery by unlicensed, third-party delivery services. This new delivery scheme 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 #67 thus includes a second subject to legislate to achieve an entirely unrelated objective.

The separateness of these two topics is revealed in the Initiative's own declaration, which had to use the conjunction "and" to describe the measure:

The People of the State of Colorado hereby find and declare that Article 4 Title 44, C.R.S. known as the "Colorado Beer Code", shall be amended to allow, beginning March 1, 2023, the sale of wine in grocery and convenience stores that are licensed to sell beer; *and* permit home delivery of alcohol sales made by licensed retailers through third-party home delivery service provider.

(Initiative #67, sec. 1. (emphasis). The separateness of Proponents' objectives becomes all the more obvious in the statutory changes they must make. Allowing wine sales in food stores requires substantive changes to the Colorado Beer Code

(with some conforming changes in the Liquor Code). But adding delivery requires Proponents to substantively change an entirely different code—the *Liquor* Code.

As explained above, Colorado law does not grant all liquor licensees the same privileges. Each category of licensee enjoys different authority in terms of what is sold (by-the-drink vs. sealed packages), under what conditions, and at what type of facility. Proponents actually embrace current statute which calls out the inherently “separate and distinct” nature of beer and wine regulation at retail. Proponents seek to amend it to preserve a clear line between the regulatory treatment of sales of beer, on the one hand, and wine on the other. (*See* Initiative #67, sec. 7 (amending C.R.S. § 44-4-102(2), which currently provides that “fermented malt beverages and malt liquors are separate and distinct from, and have a unique history in relation to, vinous and spirituous liquors” and that distinction warrants “maintaining a separate regulatory framework and licensing structure... except at the retail level”).

Colorado currently limits which licensees may delivery alcohol beverages and how they may deliver alcohol beverages. The Colorado Liquor Code permits delivery of alcohol beverages by retail liquor store licensees and liquor-licensed drugstore licensees, as well as an authority for takeout (e.g. by restaurants). *See* C.R.S. §§ 44-3-409 (retail liquor stores), 44-3-410 (liquor-licensed drugstores), 44-3-911 (takeout). These authorizations are carefully cabined. For instance, retail

liquor store and liquor-licensed drugstores deliveries must be made by employees of the stores in vehicles owned by the store. As to all three authorizations, they apply only so long as the licensee “derives no more than fifty percent of its gross annual revenues” from delivery or takeout. *Id.* In other words, the legislature has retained certain controls over a substance that has the potential to be abused.⁵

Initiative #67 repeals the limited authorization for delivery that currently exists and replaces it with a broad authorization for alcohol delivery that extends beyond licensees to gig services as well as delivery conglomerates such as Amazon. Under this new scheme, 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, regardless of whether they are Colorado businesses or residents, deliver alcohol so long as they obtain a “delivery permit.” (Initiative #67, sec. 13, proposed C.R.S. § 44-3-911.5.)

The holder of a delivery permit can thus deliver any type of alcohol. Under Initiative #67, 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/>). The permittee is not limited to using its

⁵ *See generally* Julien, J. et al., HEPATOLOGY, “Effect of increased alcohol consumption during COVID-19 pandemic on alcohol-associated liver disease: A modeling study” (Dec. 8, 2021).

employees or company-owned vehicles for delivery but can instead use independent contractors and whatever vehicles they use to make airport runs or deliver takeout from restaurants. And the Initiative removes the revenue cap on alcohol deliveries, which means that delivery could be the *entire* business venture (as opposed to a limited component of a licensee's business).

Neither of the Initiative's purposes bears a logical or necessary relationship to the other. 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 changing the privileges of a fermented malt beverages retailer license to permit wine sales in grocery stores. Neither is necessary to address the other, a fact made plain by Proponents filing additional initiatives on these subjects that separates them.

Justifiably concerned about single subject vulnerability in this Initiative, Proponents filed multiple standalone initiatives that address either wine sales in food stores *or* alcohol delivery. *Compare* Initiatives 2021-2022 #122-125 (third party delivery of alcohol), *with* Initiatives 2021-2022 #120, 121, 129 (wine sales in food stores).⁶ As the division of Initiative #67 into those initiatives demonstrates,

⁶ The measures are available on the Secretary of State's website at <https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/index.html>, last viewed May 2, 2022.

Proponents can achieve one objective without addressing the other—in other words, the objectives of the initiatives are logically and legally independent of each other.

It is not just the actions of Proponents that concede single subject concerns. Initiative #67 itself admits as much. In describing the availability of delivery permits to liquor licensees, the Initiative states that delivery is a privilege “*separate*” from the licensee’s license privileges:

The holder of a license listed in this subsection (1) shall be authorized to apply for and to hold a delivery service permit as *a privilege separate from its existing license*.

(Initiative #67, sec. 13, proposed C.R.S. 44-3-911.5(1) (emphasis added).) By being a “separate” privilege, Proponents are saying that sales does not include delivery and delivery does not include sales. One can exist without the other.

What Proponents have done is to take a narrow change to one subject (wine sales in food stores) and used it as a cover for a broad, general change (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 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 #67 is, as in *In re # 16*, impermissibly vague or overly general. Although Initiative #67 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. As noted above, members of the Board recognized that voters may have very different opinions on these different subjects:

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.)

My rationale on that and I want to hear from Mr. Barry is that there, it could be something where people are like, oh absolutely I want wine in the grocery stores but I'm not sure I want it at everyone's finger tips to get delivered because [inaudible]. I do see those as being two things, that someone likes one not the other. . . .

(Comments of T. Conley, 2:49:12 to 2:49:26.)

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 #67. (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 #67).) 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 #67 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 objectives. Both involve alcohol, 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.

II. Even if the Board had jurisdiction, it erred by setting titles that failed to inform voters about certain central elements of the measure and which would mislead voters.

A. Standard of review; preservation of issue below.

An initiative title must “fairly summarize the central points” of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.*, 877 P.2d 311, 315 (Colo. 1994). Titles must be “fair, clear, accurate, and complete” but are not required to “set out every detail of the initiative.” *In the Matter of the Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006).

This Court will review titles set by the Board “with great deference” but will reverse the Board where “the titles are insufficient, unfair, or misleading.” *Id.* No such deference is required where the titles “contain a material and significant omission, misstatement, or misrepresentation.” *In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998). “Perfection (in writing a ballot title) is not the goal; however, the Title Board’s chosen language must not mislead the voters.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999).

The issue of the disconnect between this expansion of retail sales and the proposed use of unrelated third-party delivery of alcohol beverages was raised

before the Title Board, and therefore is properly before this Court for review. (*See* Mot. for Reh’g on Initiative 2021-2022 #67 at 3-4; Apr. 6, 2022, Hr’g at 2:02:00 to 2:07:50, 2:10:14 to 2:14:37, 2:32:45 to 2:37:55, 3:22:32 to 3:23:11, which discussion was incorporated by the Board and Petitioner.)

B. The titles are misleading.

As part and parcel of the single subject violation, this appeal also concerns the Board’s inadequate titles, which fail to provide voters with the necessary insight to understand key elements of the Initiative. The Court reviews the Board’s work “to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 24, 369 P.3d 565, 569. Given the defective titles fixed by the Board, voters will not understand (1) the single subject of the measure and (2) that the measure allows for delivery of alcohol sold by **both** on-premises and off-premises liquor licensees.

1. *The titles inaccurately describe the measure’s single subject because “delivery” is not an “expansion of retail sale of alcohol beverages.”*

If the Court determines that the measure does not violate the Constitution’s single subject requirement, then it should at least ensure that the titles accurately

describe the measure. The Constitution prescribes that “[n]o measure shall be proposed by petition containing more than one subject, *which shall be clearly expressed in its title*[.]” Colo. Const. art. V, sec. 1(5.5) (emphasis added). The use of “clearly” to modify “single subject” was a consequential choice, whether it applies to legislative bills or to initiatives. “The matter covered by legislation is to be ‘clearly,’ not ‘dubiously’ or ‘obscurely,’ indicated by the title.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25*, 974 P.2d 458, 462 (Colo. 1999). The titles here do not pass that test.

The Board fixed the titles’ statement of single subject as an “expansion of retail *sale* of alcohol beverages.” Although that statement is accurate as to one of the Initiative’s purposes (allowing wine sales at food stores), it does not capture the second, substantive aim of the initiative to enact a new delivery scheme

In the era of Uber Eats and similar services, third-party delivery services provide convenience and access without serving as the originating point of a product. In order to obtain that product, some retail enterprise needs to be on the other end of that transaction. “The common usage of the term ‘sale’ ‘refer[s] to a contract whereby the *ownership of property* is transferred from one person to another for a sum of money or other valuable consideration.” *People v. Cardenas*, 2014 COA 35, ¶ 26, 338 P.3d 430, 434 (quoting *State Dep’t of Revenue v. Adolph Coors Co.*, 724

P.2d 1341, 1351 (Colo. 1986) (Quinn, C.J., dissenting)) (emphasis in original); C.R.S. § 4-2-106(1) (defining for purposes of the Uniform Commercial Code, “A “sale” consists in the *passing of title* from the seller to the buyer for a price” (emphasis added)).

“Delivery,” in contrast, is all about transferring *possession* of a good that originates from a producer or retailer. The common meaning of the word “deliver” is to “take and hand over to or leave for another.” Merriam-Webster Online, last visited Apr. 26, 2022, <https://www.merriam-webster.com/dictionary/deliver>. This common meaning tracks its legal definition. “‘Deliver’ generally means to transfer possession.” *Suncor Energy, Inc. v. Aspen Petroleum Prods.*, 178 P.3d 1263, 1267 (Colo. App. 2007) (quoting *Black’s Law Dictionary* 1582 (8th ed. 2004)). Or as this Court has put it, “To ship and deliver property means a change of custody.” *Noble v. People*, 180 P. 562, 563 (Colo. 1919).

Given the common and ordinary meanings of these words, a voter perusing the single subject statement would not have reason to think that the “retail sale” of alcohol beverages includes a third-party “delivery.” The act of purchasing an item is physically and functionally distinct from how the consumer obtains possession of it when a third-party is involved. The statement of single subject here, therefore, does not adequately apprise voters of the scope of the Initiative.

The Initiative works two, equally important changes to Colorado law, yet the statement of single subject only encompasses one of those changes. Voters only learn of the change to delivery as the last item in a list describing the law. Burying the change to delivery at the end of the titles does not properly alert voters to it. *See In re Title, Ballot Title, and Submission Clause Approved February 2, 1994, Respecting the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito (Limited Gaming IV)*, 873 P.2d 733, 736 (Colo. 1994) (disapproving a title where key provisions were “buried between references” to other parts of initiative, such that a “voter quickly scanning the Initiative could be misled” to its effect).

2. *The titles do not accurately describe the scope of the new delivery authorization.*

Not only do the titles fail to properly apprise voters of the Initiative’s separate aim of authorizing delivery, where the titles do disclose the delivery objective, they omit a key element of the delivery authorization. The Initiative authorizes delivery from both off-premises **and** on-premises consumption liquor licensees:

Notwithstanding any law or rule to the contrary, a delivery service permittee . . . may transport and deliver alcohol beverages from ***an off-premises retailer*** licensed pursuant to this article 3 or article 4 of this title 44, ***or from a licensee licensed for on premises consumption*** pursuant to this article 3 . . .

(Initiative #67, sec. 13, proposed C.R.S. § 44-3-911.5(1) (emphasis added).) The titles, in contrast, only refer to delivery from retail establishments: “allowing retail establishments licensed to sell alcohol beverages to deliver all types of alcohol beverages to a person 21 years of age or older through a third-party delivery service that has obtained a delivery service permit from the state licensing authority.”

The distinction between alcohol sold for on and off premises consumption is significant. Alcohol delivered from a licensee for off premises consumption will be in factory sealed containers and appropriately labeled as to what is in the alcohol beverage and its alcohol content. Alcohol for on premises consumption may include beverages such as mixed drinks prepared by the licensee. Drinks such as these are not in factory sealed containers and do not come with the information informing consumers what is in them or their alcohol content.

The difference between these two retail acts is significant. There may be public health and safety concerns for the consuming public where on-premises beverages are delivered, including the possibility of tampering with beverages, consumption of beverages in delivery vehicles, and dangers associated with high-alcohol mixed drinks. Voters may have significant concerns regarding the advisability of widespread delivery of alcohol beverages prepared for on premises

consumption, and the titles need to at least reflect that the delivery authorization applies to both off and on premises consumption licensees.

CONCLUSION

In so many ways, the Proponents concede that their measure is multiple subjects:

- They expressly state that retail sale and delivery are “separate privileges” so that violations that occur under one authorization will not affect a company’s license/permit to do business under the other.
- The legislative declaration in this measure speaks of the two goals—wine in grocery stores and third-party home delivery—as separate subjects that are only linked because they happen to be addressed in a single measure.
- In subsequent iterations of Initiative #67, Proponents split the right to offer wine-in-grocery-stores away from new authorization for third-party delivery, showing that the two have no necessary connection to each other.

The Board failed to enforce the single subject rule here, as wine sales in food stores and alcohol delivery generally are separate and distinct subjects. But even if the Board had jurisdiction, the titles set by the Board are misleading and incomplete. They do not properly describe the Initiative’s purposes and omit a critical feature of the measure from the titles.

The Court should vacate the titles and remand with instructions to return the Initiative to proponents for lack of jurisdiction or, in the alternative with instructions to correct the deficient titles.

Respectfully submitted this 3rd 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 3, 2022, to the following:

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