

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Christopher Fine, Objector,

vs.

Steven Ward and Levi Mendyk, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #118

Christopher Fine, registered elector of the County of Larimer and the State of Colorado, through his undersigned counsel, objects to the Title Board’s (the “Board”) title and ballot title and submission clause set for Initiative 2021-2022 #118.

The Board set a title for Initiative 2021-2022 #118 on April 20, 2022.¹ The Board designated and erroneously fixed titles for this measure.

I. This measure violates the constitutional single subject requirement.

The single-subject requirement in Article V, sec. 1(5.5) is summarized as a direct test of the underpinnings of an initiative.

An initiative violates the single subject requirement when it has at least two **distinct and separate** purposes which are not dependent upon or connected with each other.... Where two provisions advance **separate and distinct** purposes, the fact that they both relate to a broad concept or subject is insufficient to satisfy the single subject requirement.

¹

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 fermented malt beverages, such as beer, for off-site consumption to also sell wine for off-site consumption; automatically converting such a fermented malt beverage retailer license that was in effect on March 1, 2023, to the new fermented malt beverage and wine retailer license; reducing the distance between a new or relocated licensed retail liquor store from 1500 feet to 500 feet from an existing fermented malt beverage and wine licensed retailer; allowing fermented malt beverage and wine retailer licensees to conduct tastings if approved by the local licensing authority; allowing retail establishments, including restaurants and liquor stores, to deliver any alcohol beverages, they are licensed to sell, to a person 21 years of age or older through a third-party delivery service that has obtained a delivery service permit; applying the generally applicable minimum wage rates for employees or independent contractors performing alcohol delivery; and removing the limit on the percentage of gross sales revenues a licensee may derive from alcohol beverage deliveries.

In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #64, 960 P.2d 1192 (Colo. 1998).

B. The initiative's multiple purposes

Where multiple subjects are part of one measure, this Board's job would be easier if an initiative's proponents just made plain in the text of their measure that one purpose in law was "separate and distinct" from another specific purpose. This Board would also benefit from existing law where the General Assembly just states that certain matters are separate and distinct. But how often does that happen?

It happened here. This measure confesses that its combination of wine and beer for food store sales violate the principles underlying the single subject requirement. Under current law (and under this measure's changes to that law), retail beer sales and retail wine sales are "separate and distinct."

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).

This measure does not repeal this legislative declaration. Instead, it includes it in a slightly modified form, adding the phrase, "AND FERMENTED MALT BEVERAGES AND WINE", where (*) has been placed in the above quotation. *See* Section 7 of Initiative #118.

Thus, in the proposed measure and in existing law, there is an identification of "separate and distinct" interests (the regulation of beer and wine) that nonetheless leaves them "separate and distinct... at the retail level." The measure blesses the combination of regulation of the two products while leaving intact the "separate and distinct" natures of retail sales of wine and beer, which separation is still deemed by #118 to be "necessary."

Put differently, so long as the retail level regulation of wine and beer is legally categorized as "separate and distinct," a measure that treats them in the same way and authorizes the sale of both types of alcohol from the same or adjacent shelves necessarily violates the single subject requirement. A measure cannot have a single subject if it involves two items that the law mandates are "separate and distinct." The legislature's recognition and the proponents' embrace of the "separate and distinct" character of these two products in the retail setting for this type of license must be acknowledged by the Board. And that acknowledgement is a roadblock to finding this combination to be a single subject.

This measure also states, under the new authority for third-party delivery of alcohol beverages, a licensed off-premises retailer can use independent contractors through its own delivery service permit. But it is explicit that the delivery permit is “A PRIVILEGE SEPARATE FROM ITS (the retail licensee’s) EXISTING LICENSE.” See Section 13 of Initiative #118. Thus, this measure draws a line between the two privileges it addresses, admitting they are “separate.” See also Section 1 of Initiative #118 (stating its purposes are to allow food stores to sell wine *and* permit deliveries through third parties.)

The subjects of this measure include, but are not limited to:

- Allowing food stores to sell wine as well as beer, see Exhibit A;
- Allowing every liquor licensee to use third-party delivery services for any type of alcohol that licensee sells and can be delivered – as opposed to adding one type of alcohol beverage (wine) for sale by one category of retailer (food stores), *In the Matter of the Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, 489 P.3d 1217 (initiative’s multiple subjects were standards for one species of animal (livestock) and changed the applicability of animal cruelty laws (all animals));
- Allowing delivery of alcohol beverages that are sold for off-premises consumption as well as those that are sold for on-premises consumption.
- Setting the minimum wage rate at “any generally applicable minimum wage rate for all independent contractors” – regardless of whether they work in the alcohol beverage industry or any other industry.

II. The initiative’s additional purpose – to repeal election law about prevailing measures through its “repeal and reenact” clauses

At hearing before the Title Board, proponents admitted that they included “repeal and reenact” clauses so that, notwithstanding the number of votes Initiative #115 might get as opposed to any other measure, this measure would prevail over any potential conflict with any other ballot measure or statutory amendment.

In other words, proponents seek to amend – for their measure only – C.R.S. 1-40-123(2) that provides, “in case of adoption of conflicting provisions, the one (ballot measure) that receives the greatest number of affirmative votes prevails in all particulars as to which there is a conflict.”

Not one voter in Colorado, except possibly for #115’s drafters and the three Title Board members who sat as to this measure, would know that this provision is included in this initiative. It is a violation of the single subject requirement for a measure to both change the substantive law in one area and unrelated election procedures. The Title Board should reject #115 as violating the single subject requirement on this ground alone. *In re Title, Ballot Title & Submission Clause for 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002) (“The elimination of the

single subject requirement constitutes an additional subject unrelated to the procedural requirements which must be satisfied to entitle a proponent to place his measure on the ballot”).

III. This measure violates the clear title requirement for initiative titles.

The titles state the single subject of the initiative as “the expansion of retail sale of alcohol beverages,” but this is inaccurate in at least three different ways.

First, retail sales are not necessarily “expanded” simply because transfer of possession is done through a delivery service. Whether third-party delivery service results in expanded retail sales is an open, factual rather than legal question that is not addressed by the measure. Thus, “expansion” is not a word that accurately or fairly summarizes the measure.

Second, as suggested above, the title refers to “sale” of alcohol, but “delivery” is a distinct act and not implied by the notion of sale. This is particularly true since delivery can be achieved by non-licensed, non-permitted persons and entities who are not actually selling alcohol beverages.

Third, the phrase, “the expansion of retail sale of alcohol beverages,” is not descriptive as to half of the measure. This overly general summary fails to state that one of the major purposes of this measure is to allow the sale of wine in grocery stores and other liquor licensed food outlets that now sell beer only. In reaching to be general enough to encompass everything this measure covers, the Board erroneously omitted and obfuscated its actual provisions relating to new authority to sell wine in grocery stores. *See 1997-1998 #64, supra*, 960 P.2d at 1199-1200 (single subject statement of “judicial officers” was inaccurate for an initiative that changed rules for judges and also addressed powers and composition of Judicial Performance Commission; measure violated single subject requirement).

Fourth, the measure increases the minimum wage rate of certain third-party delivery employees. Their wages have nothing to do with the expansion of retail sales.

Moreover, the titles are misleading in that voters are not informed of other of the measure’s key features that warrant voter attention, including:

- A. The measure provides expressly that there is no limit on the percentage of a licensee’s gross annual revenues derived from alcohol deliveries.
- B. The measure repeals existing limits on retailer sales from deliveries (currently 50%).
- C. Technology providers for alcohol delivery will not be required to first receive a license or a permit to provide this service.

RESPECTFULLY SUBMITTED this 27th day of April, 2022.

RECHT KORNFELD, P.C.

s/ Mark G. Grueskin

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2021-2022 #118** was sent this day, April 27, 2022, via email to the proponents via their legal counsel:

Suzanne Taheri
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s/ Erin Holweger

Kafer: Don't postpone repeal of the last Prohibition-style laws just to save the liquor stores



Helen H. Richardson/The Denver Post

In this 2015 file photo, a new Safeway store at 181 W. Mineral ave in Littleton, gets stocked with bottles of wine. It was the first grocery store in the state to be awarded a liquor license after state law was changed to allow a limited number of stores per grocery chain to obtain licenses to sell hard alcohol and wine.

By [Krista Kafer](#) | Columnist for The Denver Post
February 24, 2022 at 6:01 a.m.

Remember 3.2 beer? From the end of Prohibition until recently that's all you could buy at the grocery stores or anywhere on Sundays when liquor stores were closed.

After the Colorado legislature repealed the Sunday closure law in 2008, the days of weak beer were numbered. Before the ink of the governor's signature could dry, grocery stores and big-box chains were clamoring to sell full-strength beer. Thanks to laws passed in 2016 and 2018, these businesses can sell real beer and up to five stores per food chain in the state can sell wine and hard alcohol.

Continuing to chip away at retail restrictions, Gov. Jared Polis signed two more laws last year. One allows restaurants to offer take-out and delivery of alcoholic beverages for the next four years. The other enables more Colorado craft wineries, distilleries, and cideries to obtain a pub license so they can sell food and alcohol in addition to their own products.

Thanks to these laws, customers can legally buy adult beverages at a variety of locations.

While 3.2 beer is a memory, and not a particularly good one, most grocery stores are still restricted to selling only the fizzy nonalcoholic grape juice you serve guests at the kiddie table on Thanksgiving. Thankfully, voters are likely to see a ballot initiative this November ending the restriction on wine sales at supermarkets. This vestige of Prohibition will be history.

Liquor stores, which for decades enjoyed a state-created near-monopoly on the sale of wine and beer, are worried that such a change to state law would spell an end to their businesses. Their fears are not unfounded. After the 2018 law allowing full-strength beer sales at supermarkets went into effect, some liquor stores reported losing 30% or more of their revenue. The loss of a wine sales monopoly could doom some to closure.

Liquor stores in neighborhoods without a grocery store won't be as affected. Liquor stores in closer proximity to grocery stores will have to make it worth customers' while to pay a visit by offering a superb selection or unique finds, lower prices, or services such as wine tastings. 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.

In the not-so-distant past, it was not normal to buy any of these things at the grocery store. A shopper would need to visit a butcher, a baker, a pastry shop, and a pharmacy to fill this list. Roughly a century ago, the first supermarkets opened and over time these products began to appear under one roof. Today, the independent specialty food shops that coexist with these giants do so because they offer unique products and services. They make a special trip worthwhile.

The rise of internet sales has been no less revolutionary than the rise of the supermarket and the big box store in the last century. A shopper can buy and have delivered just about anything. E-commerce accounted for 13.2% of all sales last year according to government data. The impact on brick-and-mortar shops has been considerable.

The strip mall near my childhood home had a record shop, a Radio Shack, a Hallmark store, and a Blockbuster Video. Had there been a bookstore, it, too, would be long gone. The big mall where I had my first high school job looks like it might not make another decade.

The farmers market that meets in the parking lot on summer Saturdays, however, wasn't there when I was young. It flourishes, proving the point that if you offer a great in-person buying experience, people will come.

Krista L. Kafer is a weekly Denver Post columnist. Follow her on Twitter: @kristakafer.

<https://www.denverpost.com/2022/02/24/wine-grocery-store-liquor-store-prohibition-laws/>