

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Christopher Fine, Objector,

vs.

Steven Ward and Levi Mendyk, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2021-2022 #66

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 #66, and states:

The Board set a title for Initiative 2021-2022 #66 on March 16, 2022. The Board designated and fixed the following ballot title and submission clause:

Shall there be a change to the Colorado Revised Statutes concerning the retail sale of alcohol beverages, and, in connection therewith, establishing a new beer and wine off-premises retailer license to allow grocery stores, convenience stores, and other business establishments that derive at least twenty percent of gross annual sales revenues from the sale of food items to sell beer and wine for consumption off the licensed premises; allowing existing fermented malt beverage retailers licensed to sell beer for off-premises consumption to apply to the local licensing authority to convert the license to the new beer and wine off-premises retailer license; allowing beer and wine off-premises 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 alcohol beverages to consumers through a third-party delivery service that has obtained a delivery service permit from the state licensing authority?

I. The Board lacks jurisdiction over Initiative #66, as it violates the Constitution's single subject requirement.

Initiative #66's single subject statement is "concerning the retail sale of alcohol beverages." This measure does change the availability of some alcohol beverages at one class of license, but it also goes far beyond that.

Initiative #66 has the following separate and distinct purposes:

- A. Authorizing one (1) new class of license (“beer and wine off-premises retailer”) to allow the sale of wine where beer is sold and certain quantities of food are also sold (at least 20% of a store’s gross annual sales revenues).
- B. Using the less rigorous standards of the so-called “Beer Code” (Article 4 of Title 44) to licensees selling much more potent alcoholic beverages under the so-called “Liquor Code” (Article 3 of Title 44).
- A. Authorizing delivery of all kinds of alcohol (wine, beer, all spirituous liquors) by all liquor licensees (those allowed to sell for on-premises consumption **and** those allowed to sell only for off-premises consumption) and **not** just the newly expanded license under Initiative #67 which allows food stores to sell wine as well as beer.
- B. Authorizing delivery of all kinds of alcohol by and through unlicensed third parties (referred to as “third-party delivery services” and “technology service companies”).

This controlling precedent here is *In the Matter of the Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, 489 P.3d 1217. There, the Court found multiple subjects in an initiative that changed certain standards for one species of animal (livestock) and also changed the applicability of animal cruelty laws as to all animals.

Here, Initiative #66 changes the eligible place of sale for one (1) form of alcohol (wine) to include one (1) type of retail outlet (food stores). Initiative #66 also provides for delivery by licensed and unlicensed entities – retail outlets for alcohol that allow sales for off-premises consumption only, licensees where consumption is permitted on-premises consumption, and third-party delivery services that are not licensed or actually engaged in the sale of alcohol. This last category even includes “technology services compan[ies]” that provide “a digital network application that connects consumers and licensed retailers for the delivery of alcohol beverages” without obtaining a delivery service permit.

In other words, Initiative #66 allows for the narrow expansion of one type of alcohol at one type of license-holder but would also authorize delivery of **all** types of alcohol through **multiple** types of entities and mechanisms. This is a single subject violation, given #16, *supra*.

To assess this question from the voter’s standpoint, the Board should look to the manner in which this issue is being portrayed publicly. A recent op-ed piece by a columnist who doesn’t appear to be associated with any interested party to this proceeding extolled Initiative #66’s virtues. As the author stated, “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.” Kafer, *The Denver Post*, “Don’t postpone repeal of the last Prohibition-style laws just to save the liquor stores,” attached, at 1 (Feb. 24, 2022).

But her other point is that the initiative will allow for technological innovation – internet facilitated delivery of alcohol – which has nothing to do with curing what she views as an historical anomaly. “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.” *Id.* at 1. In context, then, the author’s “anything” includes alcohol.

This columnist makes the Objector’s single subject argument well. Tucked in the folds of a glossy argument about choosing to buy wine and breakfast cereal at the same store is a different, maybe more impactful change - namely, new legal authority for allowing alcohol delivery by both licensed and unlicensed entities. (The measure’s provision for a delivery “permit” is not a license, as it only needs to file a sample contract for delivery services, an outline of a certification program to be taken by delivery personnel, and proof of insurance.) There is no local or state process for assessing or making a decision on the capabilities, track record, or fitness of the permit holder in terms of the granting or renewal of that permit. It is different in nature and kind from the initiative’s provisions that deal solely with a specific, limited type of expanded in-store sales and thus violates the single subject requirement.

II. Even if the Title Board has jurisdiction, the titles set are legally flawed because the titles fail to inform voters of certain central elements of the measure and would mislead voters.

The title for Initiative #66 should state:

- A. Alcohol deliveries will be permitted by licensed and non-licensed entities.
- B. Alcohol deliveries will be permitted by licensees selling for on-premises as well as off-premises consumption.
- C. Non-residents of Colorado will be permitted to hold and perform, directly and indirectly, through the newly issued delivery service permits.
- D. Technology providers for alcohol delivery will not be required to first receive a license or a permit to provide this service.
- E. No hearing or investigation will be required by local or state licensing authority in order to convert an existing license to a beer and wine off-premises license.
- F. Delivery of “alcohol beverages” will include more than “beer and wine” (to which the title refers earlier in addressing the new license type) as the measure authorizes delivery of spirituous liquors as well.
- G. The less rigorous standards for regulation under Article 4 of Title 44 (the so-called “Beer Code”) will apply to licenses allowing sales of much more potent alcoholic beverages under Article 3 of Title 44 (the so-called “Liquor Code”).
- H. The radius restrictions for new fermented malt beverage and wine retailer licenses, authorized to sell wine, would be changed from 1,500 feet to 500 feet from a retail liquor store.

- I. There will be no limit on the percentage of a licensee's gross annual revenues derived from alcohol deliveries.
- J. The measure repeals the limit on the percentage of a retail liquor store's gross annual revenues derived from alcohol deliveries (currently 50%).

WHEREFORE, the titles set March 16, 2022 should be reversed, due to the single subject violations addressed herein or, if not, at least corrected to address central features of Initiative #66 identified above.

RESPECTFULLY SUBMITTED this 23rd day of March, 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 #66** was sent this day, March 23, 2022, via email to the proponents via their legal counsel:

Suzanne Taheri
Maven Law Group
STaheri@mavenlawgroup.com

s/ Erin Holweger
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/>