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2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">DATE FILED: June 3, 2016 6:17 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2015-2016 #139 ("Regulation Of The Sale Of Marijuana And Marijuana Products")

Petitioners: DEAN C. HEIZER II and GREGORY S. KAYNE

v.

Respondents: ALI PRUITT and RON CASTAGNA

and

Title Board: SUZANNE STAIERT; DAVID BLAKE; and SHARON EUBANKS</td></tr>
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PETITIONERS' ANSWER BRIEF

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). It contains 3,522 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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 (R.__, p.__), 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.AR. 32.

By: s/John Paul Seman Jr.

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SUMMARY OF THE ARGUMENT

Contrary to the Respondents' and Title Board's arguments, the Title Board erred in setting the title because Initiative # 139 improperly contains more than a single subject in that it provides for nine substantive constitutional additions that address five separate and distinct subjects. Accordingly, the title set by the Title Board would permit the Proponents to "log roll" support for provisions of the Initiative that would otherwise be rejected if considered on their own merits.

The Title Board further erred by setting a vague, misleading and potentially confusing title. The title fails to define a critical term and to accurately capture the scope of the Initiative, and fails to disclose the broad legislative discretion it creates with respect to the separate and distinct subject of potency limitations.

For these reasons, the Initiative should be remanded to the Title Board with directions to return it to Proponents.

ARGUMENT

I. Initiative # 139 contains multiple subjects in violation of the Colorado Constitution.

A. Standard of Review and Preservation of Issues for Appeal.

Petitioners agree with Respondents and the Title Board that this Court employs legitimate presumptions in favor of the Board's single subject

determination; nevertheless, the Court must engage in a limited analysis of the initiative's meaning to determine whether the single subject requirement found in Colo. Const., art. V, §1 (5.5) has been violated. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175,* 985 P.2d 243, 245 (Colo. 1999). Petitioners agree that the issues were preserved for appeal.

B. Initiative # 139 Addresses a Series of Five Distinct Subjects and Impermissibly Attempts to "Log Roll" Support

Initiative # 139 consists of a series of constitutional amendments that address five separate, distinct, and independent subjects. Moreover, at least one of these five subjects is an anomaly that fails to comport with the Respondent's claim of an "overall unifying objective." As a consequence, the Initiative violates the single subject mandate set forth in Article V, Section 1 (5.5) of the state constitution. The Board was therefore in error to set the title, ballot title, and submission clause (together, the "Title") and its determination to do so should be reversed.

The Colorado Constitution establishes the single subject standard for citizen-initiated ballot initiatives and accompanying titles. In pertinent part, the Constitution says:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any such measure which shall not be embraced in the title, such measure shall be void only as to so much thereof as shall not be expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls. In such circumstances, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

Colo. Const. art. V, § 1 (5.5).

The Colorado General Assembly has further codified this standard in order to, "…forbid the treatment of incongruous subjects in the same measure… prevent surreptitious measures and apprise the people of the subject of each measure…[and] prevent surprise and fraud from being practiced upon the voters…." § 1-40-106.5(1) C.R.S.

Decisions by this Court have established precedent that characterizes this standard as the "single subject/clear title limitation applicable to proposed initiatives." *In re Title, Ballot Title and Submission Clause for 2013-2014 #76,* 333 P.3d 76, 78 (Colo. 2014). When the Court reviews title board decisions

through this lens, it employs "all legitimate presumptions" in deference to the board's determination. *In re Title, Ballot Title and Submission Clause for Proposed Amendment to Const. Section 2 to Art. VII,* 900 P.2d 104, 108 (Colo. 1995). Importantly, however, in deferring the Court does not cede its oversight responsibility: "[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated." *In re Title, Ballot Title and Submission Clause for 1997-1998 #30,* 959 P.2d 822, 825 (Colo. 1998); *see also In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175,* 985 P.2d 243, 245 (Colo. 1999); *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014).

On its face, Initiative # 139 combines a series of constitutional amendments containing as many as five separate and distinct subjects under the theme of "controlled retail marijuana sales." Far from "controlling" the sale of marijuana, however, provisions of the Initiative would permit the General Assembly to prohibit some, or even all, marijuana sales based upon its exercise of the unlimited discretion provided by the Initiative to establish a "potency limit that does not exceed 16%." Initiative # 139 at Section 16 (5.5 (b).

The potency limits provision of the measure is an incongruous outlier from the stated objective of Initiative # 139, therefore it is contrary to law and will surprise and confuse Colorado voters. By way of example, this provision is no more congruous with the stated objective of the measure than would be requiring that all marijuana sold in the state be federally certified before sale. While arguably related to a general objective of "controlled sale", this, too, would constrain, or even prevent the sale of marijuana. The potency limitation provision is distinctly different than the series of provisions related to packaging and labelling. Voters will be likely be unaware that support for the general objective of "controlling" the sale of marijuana extends far beyond packaging and labelling requirements to providing the General Assembly unfettered discretion in establishing potency limitations at any level less than 16 percent.

Respondents assert that, because Amendment 64, which added Article 18, Section 16, to the state constitution, was not challenged as a single-subject violation, Initiative # 139 should be deemed permissible as well. Amendment 64, however, contained but one subject: the decriminalization of the possession and use of marijuana in Colorado. All of its provisions related to that single theme and its title made clear to voters that, by voting yes, they would permit this singular change in Colorado law.

In contrast, Initiative # 139 adopts the theme of "controlled" sales of marijuana for a series of separate and distinct mandates and prohibitions. These provisions of the Initiative would not only "control" the sale of retail marijuana through new packaging and labeling requirements. They would also, completely independently, authorize the General Assembly to establish new, and unprecedented, potency limitations that could fall anywhere between zero and sixteen percent. Moreover, Initiative # 139 would permit the legislature to adopt multiple potency limits at varying levels for different marijuana products. The Initiative then bans the sale of marijuana and marijuana products that exceed whatever limitations the legislature chooses to adopt. Nothing in these provisions has any connection whatsoever with the way recreational or medical marijuana is packaged or labelled and, thus, those provisions create at least two separate and distinct subjects that cannot be reconciled by cloaking them with the broad theme "controlled sales."

In *Gonzalez-Estay v. Lamm*, 138 P.3d 273 (Colo. 2006), this Court explained as much, stating that "an initiative grouping distinctive purposes under a broad theme will not satisfy the single subject requirement." *Id.* at 278. There, this Court addressed Initiative 2005-2006 #55, which attempted to prohibit government entities from providing non-emergency services to persons not lawfully present in

the United States. *Id*. at 275. Recognizing that the initiative did not itself define the critical term "non-emergency services," mandated that the General Assembly implement its provisions through legislation, and reached not only medical and social services, but also unrelated administrative services, this Court concluded that "[t]he theme of restricting non-emergency government services is too broad and general to make these purposes part of the same subject." *Id*. at 279, 282.

The Court identified two distinct and unrelated purposes underlying the initiative – limiting the cost of medical and social services paid for by the State and limiting access to the benefits of unrelated administrative services. *Id*. at 280. These two purposes, it explained, though cloaked in the theme of "restrictions of non-emergency services," were likely to confuse voters as to exactly what they were voting for or against. Moreover, limiting the costs of providing medical and social services was neither dependent upon, nor clearly related to, depriving certain individuals of the benefits of administrative services. Thus, the proponents' assertion that both purposes fell within the single subject of "restricting non-emergency services" was without merit and the initiative could not proceed. *Id*. at 282-83.

Like the initiative challenged in *Gonzalez-Estay*, Initiative # 139 fails to define the critical term "retail marijuana," leaving voters to wonder whether its

prohibitions will apply to medical marijuana, recreational marijuana, or both. Moreover, Initiative # 139 places the establishment of actual potency limitations in the hands of the General Assembly, with only a maximum level to serve as guidance. Finally, Initiative # 139 attempts not only to establish new packaging and labelling standards for marijuana and marijuana products, but also to provide for a separate, distinct, and unrelated prohibition against the sale of marijuana and marijuana products that exceed undefined potency thresholds. As with the initiative in *Gonzalez-Estay* these purposes are not dependent upon, or clearly related to, one another. Rather, voters could clearly favor secure packaging and clear labeling, while completely opposing the virtual prohibition on the sale of marijuana through the establishment of potency limitations. Thus, Initiative # 139 fails to satisfy the single subject requirement and should be rejected by this Court.

Similarly, Initiative # 139 impermissibly attempts to "logroll" support for its multiple purposes that are not dependent upon one another and that likely would not be enacted on their individual merits.

In *Hayes v. Spalding*, this Court explained that the constitutional single subject rule is "intended to prevent proponents from engaging in 'log rolling' or 'Christmas tree tactics,'" *id*. at 85 (quoting *In re Proposed Initiative for 2001-2002 # 43*, 46 P. 3d 438, 441 (Colo. 2002)), "in which proponents attempt to garner

support for their initiative from 'various factions which may have different or even conflicting interests.'" *In re # 43* at 443 (quoting *In re "Public Rights in Waters II",* 898 P.2d 1076, 1079 (Colo. 1995)). The point is to prevent proponents "from combining multiple subjects to attract a 'yes' vote from voters who might vote 'no' on one or more of the subjects if they were proposed separately." *Hayes* at 80 (citing *In re Proposed Initiative for 1997-1998 # 84*, 961 P. 2d 456, 458 (Colo. 1998)); *see also In re Proposed Initiative for 1997-98 # 30*, 959 P.2d 822, 825 (Colo. 1998) ("One concern which led to voter enactment in 1994 of the multiple subject ban is that proponents would combine different proposals in the hopes of getting unrelated subjects passed by enlisting support for the entire initiative from advocates of the separate subjects – 'thereby securing the enactment of subjects that could not be enacted on their merits alone.'" (quoting *In re Parental Choice on Education*, 917 P.2d 292, 294 (Colo. 1996)).

As in those measures this Court has previously rejected for "log rolling," Initiative # 139 compiles separate, distinct, and substantively independent provisions – some of which voters might choose to support and others of which those same voters might well choose to reject – under a single title.

Because these provisions do not logically flow from one another, support for one provision of Initiative # 139 does not necessarily lead to support for the other

provisions. A voter's support for a constitutional provision mandating that marijuana product labels disclose the potency of particular products has absolutely no necessary, or even rational, link to that same voter's position regarding the list of alleged "health risks" Initiative # 139 proposes for official state recognition. A medical marijuana patient may have an interest in a potency label, but disagree that marijuana poses one or more of the alleged health risks which would be constitutionally mandated to be on the label.

Likewise, there is simply no reason that a voter who supported requiring that all marijuana and marijuana products be sold in child proof containers would necessarily also support a mandate that all marijuana sold in Colorado have a minimal tetrahydrocannabinol content. For example, a parent who consumes marijuana recreationally may be concerned about child-proof packaging, but also be against the tetrahydrocannabinol content limit. *See Gonzalez-Estay*, 138 P.3d at 282 (noting that, absent application of the single subject rule, voters may vote for one purpose they support, while unwittingly voting for a second purpose they oppose).

In light of its separate, distinct, and substantively independent provisions, there is no basis upon which to conclude that the Initiative would permit the "up-or-down," "yes/for, no/against" vote the state constitution requires. Rather, those

voters who sincerely desire to assure that marijuana products are distributed in child-safe containers, but who have no interest in the adoption of an arbitrary and baseless "potency" limit would, nevertheless, be confronted with voting for one in order to obtain the other. Forcing such a choice is exactly the tactic the single subject rule is intended to prohibit.

In short, Initiative # 139 poses precisely the log rolling danger that the single subject rule is intended to protect against. Initiative # 139 would very likely confront voters with the need to vote for provisions they vehemently disagree with in order to obtain passage of a single provision they just as actively support.

In conclusion, Initiative # 139 violates the single subject mandate. Its nine substantive amendments to the state constitution address five separate and independent subjects. Proponents' effort to compile all of these subjects under a single title because they each relate to a claimed general unifying objective of controls on the sale of marijuana falls short of the established legal standard for review.

II. <u>The Title set by the Title Board is impermissible under Colorado law.</u>

A. Standard of Review and Preservation of Issues for Appeal.

Petitioners agree with Respondents and the Title Board that this Court grants legitimate presumptions in favor of the Board's actions; nevertheless, the Court must examine an initiative's text to assure that the title and submission clause "correctly and fairly express the true intent and meaning" of the measure. *See* C.R.S. § 1-40-106 (3) (b). Petitioners agree that the issues were preserved for appeal.

B. The Title set for Initiative # 139 violates the clear title requirement and may mislead voters regarding the scope of Initiative # 139.

The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45,* 234 P.3d 642, 648 (Colo. 2010). Similarly, the title must allow the voter to understand the effect of a yes or no vote on the measure. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 & #22,* 44 P.3d 213, 222 (Colo. 2002). Just as this Court concluded in a recent challenge to the Title Board decision in Initiative #73,

Initiative # 139 does not alert voters and is misleading as to certain elements of the Initiative. *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24.

The text of Initiative # 139 indicates that its new, constitutional mandates are intended to apply to all "marijuana and marijuana products that are offered for sale." *See* Exhibit A of Petitioners' Opening Brief at Section 16 (5.5). The Title, however, modifies the terms "marijuana" and "marijuana products" with the term "retail." Thus, the Title could well suggest to voters – particularly those who are unfamiliar with the Initiative's subject matter and who have no knowledge of the related statutes and regulations – that the Initiative's new constitutional mandates apply only to certain types of marijuana, referred to as "retail marijuana," but not to others, such as that marijuana offered for sale exclusively to medical marijuana patients.

Because the Title includes repeated use of a critical, but undefined, term, it could potentially mislead voters regarding the true scope, and potential effects, of Initiative # 139. The Title "should fairly and succinctly advise the voters what is being submitted, so that in the haste of an election the voter will not be misled into voting for or against a proposition by reason of the words employed." *Dye v.*

Baker, 354 P.2d 498, 500 (Colo. 1960) (disapproving the Title Board's submission clause as misleading).

Despite the assertions of the Respondents and the Title Board to the contrary, the title of Initiative # 139 does not assure that average voters, with no knowledge of the related statutes and regulations, will understand the scope of the measure and whether it applies to recreational or medical marijuana. The Title of Initiative # 139 fails to properly reflect its scope and reach and is therefore impermissibly vague and confusing.

Similarly, the Title is misleading with respect to the potency limit included in Initiative # 139. The Title states that Initiative # 139 would limit "all retail marijuana and retail marijuana products sold at retail *to a potency limit of 16%* tetrahydrocannabinol." *See* Exhibit C of Petitioners' Opening Brief (emphasis added). However, the Initiative text states that "the potency of marijuana and marijuana products will be controlled with an upward potency limit *that does not exceed* 16%." Exhibit A of Petitioners' Opening Brief at p. 4, Section 16 (5.5) (b) (emphasis added). The text further provides that the General Assembly is authorized to adopt legislation "related to the controlled sale of marijuana and marijuana products" that does not contravene the Initiative. *Id.* at Section 16 (5.5) (c). Taken together, these provisions indicate that (i) Initiative # 139 does not

actually establish a potency limit of 16% tetrahydrocannabinol, but only a threshold beyond which a potency limit may not be set, and (ii) the General Assembly could, through legislation, establish a substantially lower potency limit. Nothing in the Title indicates to voters that this is the case.

Voters reading the Title may believe that Initiative # 139 sets, through a constitutional amendment, a 16 percent tetrahydrocannabinol potency limit for all marijuana and marijuana products. In fact, the Initiative does no such thing, permitting legislation to establish multiple potency limits for different marijuana products, so long as all remain beneath the 16 percent potency threshold. Legislation setting a potency limit of 5 percent for all marijuana would also be permitted under the text of Initiative # 139. Such a limit would be permissible under the language of Initiative # 139, but would directly conflict with the language of the Title. As a consequence, the Title set for Initiative # 139 is misleading, could easily give rise to substantial voter confusion regarding the potency limit, and contravenes the clear title requirement.

In sum, the Title does not assure that average voters, with no particular knowledge regarding the multiple subjects the Initiative addresses, will understand that they are voting for a measure that applies to all marijuana and marijuana products, including those offered exclusively to medical marijuana patients, and

that authorizes the adoption of multiple tetrahydrocannabinol potency limits at levels substantially less than 16 percent. The Title therefore fails the clear title requirement and this Court should remand it to the Board.

CONCLUSION

For all of the reasons set forth above, this Court should conclude that Initiative # 139 addresses multiple, independent subjects. In doing so, the Initiative would potentially require that voters support provisions they actually oppose in order to vote in favor of those that they support. This does not comport with the single subject rule.

Moreover, the Title set by the Board is unclear, misleading and confusing. It does nothing to assure that voters understand the actual scope of the Initiative or that the Initiative permits tetrahydrocannabinol potency limitations at any level well less than 16 percent.

Dean C. Heizer II and Gregory S. Kayne ("Petitioners"), registered electors of the State of Colorado, through undersigned counsel, respectfully submit this Answer Brief in support of their petition for review of the title, ballot title, and submission clause (jointly, the "Title") set for proposed Initiative 2015-2016 # 139 ("Regulation of the Sale of Marijuana and Marijuana Products") ("Initiative # 139"

or the "Initiative") and request this Court to remand the Initiative to the Title Board with directions that it be returned to the Proponents.

Respectfully submitted this 3rd day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2016, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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