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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80202

Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board

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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.

Attorneys for Respondents Ali Pruitt and Ron Castagna:
Spencer Fane LLP
Frank McNulty, # 33692
Jamie N. Cotter, #40309
1700 Lincoln Street, Suite 2000
Denver, Colorado 80203
Phone: (303) 839-3800
Fax: (303) 839-3838
E-mail: fmcnulty@spencerfane.com; jcotter@spencerfane.com

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Case Number: 2016SA158

RESPONDENTS' ANSWER BRIEF

CERTIFICATION OF COMPLIANCE

I hereby certify that this Answer Brief ("Brief") complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in said rules. Specifically, undersigned counsel certifies that:

The Brief complies with the applicable word limits set forth in C.A.R. 28(g):

■ This Brief contains 1,708 words.

The Brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b):

■ For the party responding to the issue:

The Brief contains, under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal, and if not, why not.

■ I acknowledge that this Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

SPENCER FANE LLP

s/Jamie N. Cotter
Jamie N. Cotter

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I. STATEMENT OF THE CASE

Respondents Ali Pruitt and Ron Castagna ("Respondents") incorporate the "Statement of the Case" articulated in their Opening Brief filed with this Court on May 20, 2016

II. SUMMARY OF THE ARGUMENT

Petitioners' Dean C. Heizer II and Gregory S. Kayne ("Petitioners") intent in opposing the title of Initiative #139 is clear from the face of their Opening Brief – they object to any controls being placed on the sale of retail marijuana and do not want any such controls to be presented to the voters through a proposed amendment. This objection is wholly unrelated to the clarity of the title and is an inappropriate use of this appeal process.

In short, and for the reasons set forth in Respondents' Opening Brief, Petitioners have not met their burden to show that this is a "clear case" in which the Title Board's action should be overruled. In re Title, Ballot Title & Submission Clause for 2013-2014 #85, 328 P.3d 136, 141 (Colo. 2014) (hereafter, "In re #85"). Initiative #139 does not violate the single subject requirement because all of the provisions of Initiative #139 relate to the unifying objective of the controlled sale of retail marijuana and marijuana products. Id. Petitioners'

attempt to classify the unifying objective as "marijuana" should be rejected. Further, Initiative #139 also complies with the clear title requirement because it clearly states that the proposed amendment concerns "the controlled sale of retail marijuana," and then sets forth four provisions designed to accomplish the single stated purpose. Therefore this Court should affirm the Title Board's decision.

III. ARGUMENT

A. The Title Board did not err in determining that Initiative #139 contains a single subject.

1. Standard of review.

Respondents agree with Petitioners' standard of review and agree that this issue was preserved for appeal.

2. The Title Board correctly determined that Initiative #139 contains a single subject

Petitioners begin by alleging that the Title Board erred in determining that Initiative #139 contains a single subject because Initiative #139 constitutes a "collection of distinct and separate subjects that are not dependent upon one another." (Petitioners' Opening Brief, p. 6) (emphasis added). This position is neither legally nor factually accurate. First, Colorado law is clear that a proposed initiative that "tends to affect or carry out one general objective or purpose presents only one subject," and "provisions necessary to effectuate the purpose of the

measure are properly included within its text." In re #85, 328 P.3d at 142. The provisions within a proposed initiative must only have a "unifying or common objective," In re Title, Ballot Title, Submission Clause for 2007-2008 #62, 184 P.3d 52, 57 (Colo. 2008), the provisions do not have to be "dependent upon one another."

Second, Petitioners simply ignore the obvious single subject of Initiative #139, which is the controlled sale of retail marijuana. Instead, Petitioners allege that the "overarching theme" of Initiative #139 is "marijuana," and then allege that this "theme" is too broad to constitute a single-subject. Every provision contained in Initiative #139 clearly relates to the controlled sale of retail marijuana. Petitioners' attempt to broaden the subject of Initiative #139 should be rejected.

Second, it is not accurate to state that the provisions of Initiative #139 address "five distinct subjects." Instead, Initiative #139 contains various provisions that are all meant to effectuate the purpose of the initiative; which is the controlled sale of retail marijuana.

Glaringly, Petitioners continue to ignore prior applicable precedent, especially the precedent related to Article 18, Section 16 of the Colorado Constitution (the addition of Section 16 was accomplished through "Amendment 64" in 2012). The title of Amendment 64 was set forth in Respondents' Opening

Brief. If Petitioners' reasoning were correct, Amendment 64 would have had six separate subjects that were not "dependent upon one another":

> (1) permitting a person twenty-one years of age or older to consumer or possess limited amounts of marijuana;
> (2) providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores;
> (3) permitting local governments to regulate or prohibit such facilities;
> (4) requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana;
> (5) requiring that the first $40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and
> (6) requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp.

(Petitioner's Opening Brief, Case No. 11SA198, pg. 4).

As the Court can see from a comparison of Amendment 64, the provisions effectuating Initiative #139 are much less broad than the provisions effectuating the "regulation of marijuana," which was the subject of Amendment 64. In fact, Amendment 64 addressed both marijuana and industrial hemp, while Initiative #139 solely addresses retail marijuana. Again, there is simply no legitimate basis on which to overcome the "legitimate presumptions in favor of the propriety of the [Title] Board's actions" in setting the title of Initiative #139. See In re #85, 328

P.3d at 141. Initiative #139 contains a single subject and the Title Board's actions should be affirmed.

3. Initiative #139 does not impermissibly "log roll" together separate concepts.

Petitioners essentially argue that because Initiative #139 contains various provisions designed to effectuate the goal of the controlled sale of retail marijuana, that fact alone constitutes "log rolling." Again, Petitioners cannot meet their burden to show that the Title Board's actions should be overturned as a "clear case." In re #85, 328 P.3d at 141.

Specifically, Petitioners assert without support that a hypothetical voter could not possibly support both a disclosure of potency limits and a disclosure of "health risks" associated with marijuana. In fact, the opposite is true. Initiative #139 asks voters to vote either for or against increased restrictions on the sale of retail marijuana. The provisions all describe various restrictions that accomplish that overarching goal of the controlled sale of retail marijuana. Clearly, Petitioners do not support any restrictions on the sale of retail marijuana, and that is certainly their right to vote against any proposed amendment. However, Petitioners are attempting to use the appellate process to "unduly restrict the initiative process" in clear violation of Colorado Supreme Court precedent. See In

re # 85, 328 P.3d at 142 (citing In re Title, Ballot Title & Submission Clause for 2009-2010 # 24, 218 P.3d 350, 353 (Colo. 2009)) (explaining that the Court must "liberally construe the single subject requirement to avoid unduly restricting the initiative process.")

Because Initiative #139 contains only one subject: the controlled sale of retail marijuana and marijuana products, it cannot be found to be "log rolling." Second, the provisions of Initiative #139 all relate to the controlled sale of retail marijuana and elicit either a "yes" or "no" vote for said restrictions. The fact that more than one restriction is proposed does not create per se log rolling as articulated by Petitioners. Again, review of the title to Amendment 64 is helpful. The title to Amendment 64 addressed the purchasing, licensing of facilities and taxation of marijuana under one title. For the same reasons that Amendment 64 contained one subject, Initiative #139 contains one subject.

B. Initiative #139 contains a clear title

1. Standard of review.

Respondents agree with Petitioners' standard of review and agree that this issue was preserved for appeal.

2. Initiative #139 is not misleading.

The thrust of Petitioners' argument is that the use of the term "retail marijuana" in Initiative #139 is misleading. As set forth in Respondents' Opening Brief, the clear purpose of Initiative #139 is to place controls on the sale of retail marijuana and marijuana products through an amendment to Article 18 Section 16 of the Colorado Constitution – which is the section dealing with "retail" or "recreational" marijuana as it has been referred to in Colorado. The title of Initiative #139 clearly seeks to impose controls on the packaging and potency of retail marijuana, not medical marijuana.

Petitioners' manufactured ignorance with respect to what is meant by "retail marijuana" should be rejected. First, a cursory review of the use of the word "retail marijuana" in Colorado's media makes clear that "retail marijuana" is different than "medical marijuana." For example, the Colorado Department of Revenue's website clearly distinguishes between "Medical Marijuana" and "Retail Marijuana" in providing information to the citizens of this state. See https://www.colorado.gov/pacific/enforcement/application-and-licensing-marijuana-enforcement. TIME Magazine employs the same distinction. http://time.com/3318719/colorado-retail-medical-marijuana-sales/. In fact, the marijuana industry itself identifies "retail marijuana" as different than "medical

marijuana" on every website that Respondents could locate. See e.g. http://www.coloradonorml.org/recreational-marijuana/.

Initiative #139 does not amend the section of the Colorado Constitution relating to "medical marijuana," and Initiative #139 uses the well-accepted term "retail marijuana" to make clear to what products it applies. Importantly, it is not clear what other term Respondents should have chosen to accomplish their goal. The only other available option would be "recreational marijuana," however, that term is not defined in Article 18, Section 16 of the Colorado Constitution either, and presumably Petitioners would have argued that such term would be inappropriate since the State of Colorado and the industry itself use the term "retail marijuana" when discussing retail for sale without a medical prescription. Therefore, the use of the term "retail marijuana" is not misleading.

Petitioners then argue that the portion of the title relating to the potency limit is misleading because the average voter will not understand what is meant by the term "limit." That is, Petitioners point out that Initiative #139 proposes a potency limit not to exceed 16% THC, which hypothetically means that the General Assembly could pass legislation setting a lower potency limit on certain products. Merriam-Webster's Dictionary defines the word "limit" as "a point beyond which it is not possible to go." Nothing in Initiative #139 attempts to set a floor on the

potency level of retail marijuana, and nothing about the word "limit" implies that potency levels could not be decreased by the legislature in the future. Petitioners' feigned confusion over the use of the term "limit" should be rejected.

For these reasons, Initiative #139 contains a clear title and the Court should affirm the Title Board's decision.

IV. CONCLUSION

For the reasons set forth herein, the Court should affirm the Title Board's decision in setting the title for Initiative #139.

DATED this 3rd day of June, 2016.

Respectfully submitted,

SPENCER FANE LLP
This document was electronically filed pursuant to Rule 30, C.A.R. The original is maintained at the office of Spencer Fane LLP

s/Jamie N. Cotter
Jamie N. Cotter

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of June, 2016, a true and correct copy of the within **ANSWER BRIEF** was served via ICCES or U.S. Mail postage prepaid, as follows on the following:

Via ICCES: John Paul Seman, Jr. 1700 Lincoln Street, Suite 1530 Denver, Colorado 80203	Via ICCES: Kevin C. Paul 2401 15th Street, Suite 300 Denver, Colorado 80202
Via U.S. Mail: Suzanne Staiert Colorado Department of State 1700 Broadway, Suite 200 Denver, Colorado 80203	Via U.S. Mail: David C. Blake Chief Deputy Attorney General Office of the Attorney General Colorado Department of Law Ralph L. Carr Judicial Building 1300 Broadway, 10th Floor Denver, Colorado 80203
Via U.S. Mail: Sharon Eubanks Deputy Director Office of Legislative Legal Services State Capitol Building 200 E. Colfax, Room 091 Denver, Colorado 80203	

s/Nikki M. Hoff
Nikki M. Hoff