COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 3, 2016 6:00 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107 Appeal from the Title Board 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") **Petitioner:** Dean C. Heizer, II and Gregory S. Kane, v. **Respondents:** Ali Pruitt and Ron Castagna and **Title Board:** Suzanne Staiert, David Blake, and Sharon Eubanks.	▲ **COURT USE ONLY** ▲
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THE TITLE BOARD'S 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:

1. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 2,109 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and C.A.R. 28(b) because, for the party raising the issue, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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/ W. Eric Kuhn
Attorney for the Title Board

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Title Board members Suzanne Staiert, David Blake, and Sharon Eubanks (the "Board"), by and through undersigned counsel, hereby submit the following Opening Brief.

SUMMARY OF THE ARGUMENT

Proposed Initiative #139 is about regulating the sale of retail marijuana and marijuana products. It has provisions addressing the packaging, labeling, and potency of the product, but each addresses a particular way the product is regulated. As such, the measure only has one subject. Retail marijuana is the phrase used by both the constitution and the statutes. The title accurately uses that phrase to refer to the measure's subject matter. The title also accurately reflects that the measure would impose a maximum THC potency of 16% if passed. The title is fair, clear, accurate, and complete, and the Board's decision should be affirmed.

ARGUMENT

I. Proposed Initiative #139 consists of only a single subject.

A. Standard of review and preservation.

The standard of review is listed in the Title Board's Opening Brief. "In reviewing a challenge to the Title Board's single subject

determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions" and "will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). The Petitioners raised this issue in their motion for rehearing. *Cert. Copies of Title Board Record* 8.

B. The Board correctly determined that the initiative addresses the single subject of regulating the sale of retail marijuana and marijuana products.

The Petitioners argue that the "fact that … [five distinct] subjects in some way addresses the overarching theme of 'marijuana' is insufficient to satisfy the single subject rule." Pet'rs' Op. Br. 7. But the subject in the measure here isn't just "marijuana." Nor is it merely "retail marijuana." The subject here is how to regulate retail marijuana at the point of sale. In support of that goal, the measure addresses packaging, labeling, and potency. In other words, to regulate the sale of retail marijuana, the measure would regulate what the package looks like, what goes on the package, and the maximum strength of the product that goes into the package.

The "single-subject provision will not be violated … if the 'initiative tends to effect or carry out one general object or purpose.'" *Outcelt v. Golyansky*, 917 P.2d 292, 294 (Colo. 1996) (quoting *In re Proposed Amendment Entitled "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995)). An initiative can have multiple provisions, as long as those provisions all sufficiently connected to the subject of the measure. *Id.*

The Petitioners rely on the *Public Rights in Waters II* case in support of their argument. Pet'rs' Op. Br. 6–7. But Proposed Initiative #139 differs greatly from the one analyzed in that case. This Court found two completely separate topics in *Public Rights in Waters II*: two paragraphs on district election requirements and two paragraphs on public trust water rights. *In re Title, Ballot Title, Submission Clause & Summary for Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995). It found that the districts had no power over the administration of the public trust rights. *Id.* Moreover, the measure did not state any connection between the two subjects. *Id.* As such, the amendment sought to accomplish two purposes and those purposes were not connected to each other, violating the single-subject rule. *Id.*

Here, the measure itself describes the connection between the implementing provisions and its goal. In order to control the sale of

retail marijuana, the measure specifies packaging, labeling, and potency limits. *Cert. Copies of Title Board Record* 4. There are not separate purposes in the measure—each of the provisions is necessarily and properly connected to the single goal.

The Petitioners also claim that the amendment engages in log rolling because people might agree with one idea in the measure but not another. This Court has previously observed that "[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces." *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998). This level of analysis "is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by the Colorado Constitution." *Id.* Indeed, the "single-subject requirement must be liberally construed … so as not to impose undue restrictions on the initiative process." *Id.* (citing *see In re Proposed Initiative on Parental Choice in Education*, 917 P.2d 292, 294 (Colo. 1996)).

The Petitioner argues that #139 contains multiple subjects because some voters might support child-safe containers but not the potency limit. Pet'rs' Op. Br. 9–10. Even if true, any measure can be broken

into smaller and smaller pieces that voters *might* approve or disapprove. Just because a voter is capable of disagreeing with part of a measure does not make that portion of the measure a separate subject.

Nor does *Hayes v. Spalding* support the Petitioners' argument. In that case, this Court found that two distinct but separate purposes in the measure—one changing the requirements for recall elections and the other creating a new constitutional right to recall non-elected officers. *Hayes*, 333 P.3d at 79. The Court's decision in *Hayes* was not based on whether the electorate might disagree with a way in which the measure was implemented. Rather, it was predicated on the measure containing two distinct and independent subjects, one of which might draw support from the other. *Id.* at 85.

That is not the case here. The voters are being asked to decide whether to regulate the sale of retail marijuana through specific controls on packaging, labeling, and potency. They may like one part of the measure, or dislike another part, enough to determine their vote for the measure. But they are not being asked to support revamping a recall election process because they support the idea of non-elected officials being recalled. In other words, here they may disagree with the method of implementation, but that implementation supports only one

goal. As such, the measure constitutes a single subject and the Board's decision should be affirmed.

II. The title is fair, clear, and accurate, and complete.

A. Standard of review and preservation.

The standard of review is listed in the Title Board's Opening Brief. The Petitioners preserved this argument by raising the same in their motion for rehearing. *Cert. Copies of Title Board Record* 29.

B. The use of the phrase "retail" does not render the title confusing or misleading.

Petitioners claim that the title may mislead voters about the proposed amendment's scope because it uses the term "retail" to modify marijuana. Pet'rs' Op. Br. 11–12. They argue that "retail" is a critical, but undefined, term that might mislead voters. *Id.* at 13.

First, the electorate "must be presumed to know the existing law at the time [it] amend[s] or clarify[ies] that law.'" *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1254 (Colo. 2012) (brackets in original) (quoting *Common Sense All. v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)). The key question in *Colorado Ethics Watch* was whether a particular phrase had a settled definition when the voter initiative was

adopted. *Id.* This Court traced the evolution of the term, which was solely defined in case law. *Id.* at 1254–56. The Court concluded that "the electorate was aware of the legal significance of the term "expressly advocated" when article XVIII was adopted by voter initiative." *Id.* at 1256.

The Petitioners state that the phrase "retail marijuana" is potentially confusing because "that term is not defined in either the text of the Initiative or in the balance of Article XVIII, § 16 of the constitution." Pet'trs' Op. Br. 12. In fact, the phrase "retail marijuana" appears 14 times in the body of section 16. Colo. Const. art. XVIII, § 16. The constitution defines "retail marijuana store" as "an entity licensed to purchase marijuana from marijuana cultivation facilities and marijuana and marijuana products from marijuana product manufacturing facilities and to sell marijuana and marijuana products to consumers." Colo. Const. art. XVIII, § 16.

Proposed Initiative #139 provides that "in order to accommodate public health and safety as they related to marijuana in Colorado, … marijuana and marijuana products that are offered for sale must" meet the packaging, labeling, and potency requirements. *Cert. Copies of Title Board Record* 4. The subsection added by the measure is contained in section 16, which is titled Personal Use and Regulation of Marijuana.

Colo. Const. art. XVIII, § 16. Section 16 also provides that nothing contained in it "shall be construed: [t]o limit any privileges or rights of a medical marijuana patient, primary caregiver, or licensed entity as provided in section 14 of this article and the Colorado Medical Marijuana Code." *Id.* § 16(7)(a).

In addition to the constitution referring to "retail marijuana," the General Assembly called the regulatory framework for implementing that section the Colorado Retail Marijuana Code. § 12-43.4-101, C.R.S. (2015). It defines "retail marijuana" as "'marijuana' or 'marihuana', as defined in section 16(2)(f) of article XVIII of the state constitution that is cultivated, manufactured, distributed, or sold by a licensed" "retail marijuana store, a retail marijuana cultivation facility, a retail marijuana products manufacturer, or a retail marijuana testing facility." § 12-43.4-103(15), (17). This all shows that "retail marijuana" is the proper label for the measure.

The Petitioners also rely on *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) [hereinafter *In re Parental Notification*], for the proposition that the case should be remanded because "retail" is an undefined term. *Cert. Copies of Title Board Record* 12–13. The *Parental Notification* case had markedly different facts.

That case was remanded because the measure's definition of the term "abortion" was not reflected in the title. *In re Parental Notification*, 794 P.3d at 242. The issue was not simply that the term was undefined. Rather, the Court observed that "the legal status of the fetus is one of the central issues of the abortion debate. Neither Colorado statute nor common law has addressed the issue of when life begins." *Id.* Thus, the definition of "abortion" in the measure "adopts a legal standard that is new and likely to be controversial, even though limited in application to the implementation of the proposed parental notification initiative." *Id.* It was the new legal standard contained in the definition, and not that the term was undefined, that triggered the remand in that case.

No such issue exists here—there is no undisclosed definition containing an important policy choice. Both the Colorado Constitution and the Colorado Revised Statues refer to "medical marijuana" when referring to section 14 and "retail marijuana" when referring to section 16. Colo. Const. art. XVIII, §§ 14, 16; §§ 12-43.3-101, 12-43.4-101, C.R.S. Voters are presumed to know the law and the Board appropriately used retail marijuana to refer to the initiative's subject matter.

C. The title is not confusing or misleading with regard to the maximum THC potency.

The Petitioners finally argue that the title is confusing because it does not signal voters that the amount of tetrahydrocannabinol (THC) in a marijuana product could vary from 16%. Pet'rs' Op. Br. 13–14.

The title neither claims nor implies that 16% THC is the only concentration at which marijuana products could be sold. Rather, the title states that adopting the amendment will "limit[] all retail marijuana and retail marijuana products sold at retail to a *potency limit* of 16% tetrahydrocannabinol." *Cert. Copies of Title Board Record* 35 (emphasis added). The final text of the measure states that "the potency of marijuana and marijuana products will be controlled with an upward *potency limit* that does not exceed 16%." *Id.* at 5 (emphasis added).

The title fairly, accurately, and completely reflects the meaning of the proposed amendment. Both state that retail marijuana products will be sold to a potency limit of 16% THC. Inherent in both the phrase "the potency … will be controlled with an upward potency limit that does not exceed 16%" and the phrase "limiting … to a potency limit of 16%" is a ceiling above which potency cannot raise. Neither the title nor the measure state or imply to voters that the measure would set a floor

or a single potency. As such, the title is not unfair, incomplete, or misleading through its language.

CONCLUSION

The measure contains a single subject and the title is fair, accurate, clear, and complete. The Court should affirm the Board's actions in setting the title for Proposed Initiative #139.

Respectfully submitted this 3rd day of June, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on June 3, 2016, I electronically filed a true and correct copy of The Title Board's Answer Brief with the Clerk of the Court via ICCES and served a true and correct copy of the same on the following via ICCES in the manner specified:

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