

COLORADO SUPREME COURT  
2 East 14<sup>th</sup> Avenue  
Denver, Colorado 80202

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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.

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**Case Number: 2016SA158**

**RESPONDENTS' OPENING BRIEF**

## CERTIFICATION OF COMPLIANCE

I hereby certify that this Opening 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 2,604 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 raising the issue:

The Brief contains a separate heading before the discussion of the issue, with 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 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*

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**I. STATEMENT OF ISSUE PRESENTED FOR REVIEW**

1. Whether proposed Initiative 2015-2016 # 139 (“Initiative #139”) violates the single subject requirement.
2. Whether Initiative #139 violates the clear title requirement.

**II. STATEMENT OF THE CASE**

- A. Nature of the case, the course of proceedings, and the disposition below.

Respondents Ali Pruitt and Ron Castagna (“Respondents”) proposed Initiative #139 to address the controlled sale of retail marijuana. Specifically, Initiative #139 seeks to add restrictions to the packaging and potency of retail marijuana. As stated in Petitioners’ Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative #139 (the “Petition”), a review and comment meeting was held before the Offices of Legislative Council and Legislative Legal Services on April 7, 2016. Respondents submitted the final version of Initiative #139 to the Secretary of State, which then submitted it to the Title Board. The Title Board held a hearing on April 21, 2016 and set the title for Initiative #139. Petitioners filed a Motion for Rehearing (the “Motion”) on April 27, 2016, making the same arguments in that Motion that it makes here. (Motion, Record p. 29-34). The Title Board held a rehearing on April 29, 2016 and denied

Petitioners' Motion. Petitioners filed their Petition with this Court on May 6, 2016. (Record, p. 35).

B. Statement of the facts.

Initiative #139 proposes to amend Article 18, Section 16 of the Colorado Constitution to address retail sale of marijuana. Specifically, the intent behind Initiative #139 is to control the retail sale of marijuana and marijuana products by controlling portion size, and mandating clear labeling, childproof packaging, and potency limits. The Title Board set the title of Initiative #139 as follows:

An amendment to the Colorado constitution concerning the controlled sale of retail marijuana, and, in connection therewith, requiring that retail marijuana be sold in child-resistant packaging; requiring edible retail marijuana products to be sold as individually packaged, single-serving products; requiring warnings on retail marijuana and retail marijuana product packaging regarding the health risks and potency of the product; and limiting all retail marijuana and retail marijuana products sold at retail to a potency limit of 16% tetrahydrocannabinol.

(Record, p. 35).

**III. SUMMARY OF THE ARGUMENT**

In order to pass judicial scrutiny and appear on a ballot, a proposed initiative must meet three requirements. Specifically, any proposed initiative must (1) contain only one subject (known as the "single subject requirement"); (2) fairly

express the true intent and meaning of the initiative (known as the “clear title requirement”); and (3) not contain an impermissible catch phrase. Here, Petitioners have argued that Initiative #139 is improper because it violates the single subject requirement<sup>1</sup> and the clear title requirement. Neither position has any merit.

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. The fact that there are various provisions/requirements listed in Initiative #139 to accomplish this overarching goal does not result in the legal conclusion that Initiative #139 contains more than one subject.

Initiative #139 also complies with the clear title requirement. Initiative #139 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. For the reasons set forth below, this Court should affirm the Title Board’s decision.

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<sup>1</sup> Petitioners’ first two advisory issues both address the single subject requirement.

#### **IV. ARGUMENT**

##### **A. Initiative #139 contains a single subject.**

###### **1. Standard of review.**

In reviewing Title Board decisions, this Court is required to “employ all legitimate presumptions in favor of the propriety of the Board's actions.” In re Title, Ballot Title & Submission Clause for 2013-2014 #85, 328 P.3d 136, 141 (Colo. 2014) (hereafter “In re #85”). The Title Board’s finding that an initiative contains a single subject should only be overturned “in a clear case.” Id. In conducting this limited inquiry, this Court must employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning. Id. at 142.

Because the Title Board “is vested with considerable discretion in setting the title [and] ballot title and submission clause,” in reviewing actions of the Title Board, the Court “must liberally construe the single subject requirements for initiatives.” Id. The Court must also “liberally construe the single subject requirement to ‘avoid unduly restricting the initiative process.’” Id. (citing In re Title, Ballot Title & Submission Clause for 2009–2010 # 24, 218 P.3d 350, 353 (Colo. 2009)).

Petitioners raised this issue in their Motion. (Motion, Record, p. 30).

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

An initiative violates the single subject requirement where it relates to more than one subject and has at least two distinct and separate purposes. In re #85, 328 P.3d at 142; C.R.S. §1-40-106.5(1)(a); Colo. Const. art. V §1(5.5). Conversely, 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. Provisions within a proposed initiative must have a “unifying or common objective.” In re Title, Ballot Title, Submission Clause for 2007-2008 #62, 184 P.3d 52, 57 (Colo. 2008).

Here, Respondents have proposed Initiative #139 to address the controlled retail sale of marijuana. It is true that Initiative #139 contains various provisions; however, the provisions combine to accomplish the unifying objective of the controlled sale of retail marijuana. The fact that Initiative #139 contains various provisions does not violate the single subject requirement.

As stated above, Initiative #139 will amend Article 18, Section 16 of the Colorado Constitution (the addition of Section 16 was accomplished through “Amendment 64” in 2012). Given the fact that Initiative #139 proposes to amend

Amendment 64, it is helpful to review the title of Amendment 64 and the objection thereto. As this Court is aware, the title of Amendment 64 read:

An amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and 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). In case number 11SA198, this Court heard an objection to the title to Amendment 64 based on various theories, none of which complained that the proposed initiative violated the single subject requirement. Id. Importantly, the title of Amendment 64 also contained various provisions and requirements, all of which related to the single subject of regulation of marijuana and industrial hemp. Those provisions did not undermine the fact that the proposed initiative contained a single subject.

Indeed, the Title Board focused heavily on the title of Amendment 64 in the hearing on Petitioners' Motion. The Title Board explained that the title of

Amendment 64 contained various provisions all related to the regulation of marijuana. The Title Board concluded that, like Amendment 64, Initiative #139 contains a single subject: the controlled sale of retail marijuana. The Title Board's decision should be affirmed.

Initiative #139 proposes an amendment requiring that: (1) retail marijuana be sold in child-resistant packaging; (2) edible retail marijuana products be sold as individually packaged, single-serving products; (3) retail marijuana and retail marijuana product packaging contain warnings regarding the health risks and potency of the product; and (4) retail marijuana and retail marijuana products be limited to a potency limit of 16% tetrahydrocannabinol. (Record, p. 35). These four provisions all relate to the single subject of controlled sale of retail marijuana. See e.g. In re Title, Ballot Title, Submission Clause for 2011-2012 # 45, 274 P.3d 576, 581 (Colo. 2012) (“public control of waters” describes the single subject of the proposed amendment because ...the proposed subsections necessarily and properly relate to one another by together creating a new water appropriation doctrine centered on the concept of a dominant public water estate.”) (hereafter “In re # 45 (2012)”).

Just like the title of Amendment 64, the title of Initiative #139 addresses a single subject. Petitioners' argument that the title contains four separate and

independent subjects” is simply not supported by Colorado law. Colorado law is clear that a proposed initiative can contain “provisions necessary to effectuate the purpose of the measure,” In re #85, 328 P.3d at 142, which is exactly what Initiative #139 does here.

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

This Court has explained that the purpose of the single subject requirement 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. In re Title, Ballot Title, and Submission Clause for 2013-2014 #76, 333 P.3d 76, 79 (Colo. 2014) (hereafter “In re #76”). Petitioners argued in their Motion that Initiative #139 impermissible rolls multiple subjects together “to attract voters who might oppose one of those subjects if it were standing alone.” (Record, p. 30-31). This position has no merit.

First, and for the reasons set forth above, Initiative #139 contains only one subject: the controlled sale of retail marijuana and marijuana products. The fact that the single subject is accomplished through the imposition of four provisions to effectuate that purpose does not violate the single subject requirement.

Second, there is absolutely no factual support for the position that the

provisions of Initiative #139 are designed to “log roll” separate subjects into one “complex proposal.” In re #76, 333 P.3d at 79. Each of the provisions of Initiative #139 relate to the controlled sale of retail marijuana and marijuana products. They are designed to ensure that the marijuana products being offered for retail sale are safe by virtue of their packaging and potency. There is simply no basis for the position that Initiative #139 violates the single subject requirement by impermissible rolling various subjects into one initiative. Therefore, the Court should hold that Initiative #139 does not violate the single subject requirement.

**B. Initiative #139 contains a clear title that is not vague or misleading.**

1. Standard of review.

The Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause. In re #85, 328 P.3d at 144. The Title Board's duty in setting a title is to summarize the central features of the proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme. Id.

When reviewing a challenge to the title and ballot title and submission clause, this Court must employ all legitimate presumptions in favor of the propriety of the Title Board's actions. Id. The Title Board need not set the “best possible” title; rather, the title must fairly reflect the proposed initiative such that voters “will not be misled into support for or against a proposition by reason of the words employed by the Title Board.” In re # 45 (2012), 274 P.3d at 581-82. This Court affords the Title Board great deference in the exercise of its drafting authority. Id. The Court should only reverse the Title Board's decision if the titles are “insufficient, unfair, or misleading.” Id.

Petitioners raised this issue in their Motion. (Motion, Record, p. 31).

2. Initiative #139 is not vague or misleading.

The Colorado Constitution dictates that an initiative's single subject shall be clearly expressed in its title. Colo. Const. art. V, § 1(5.5); In re # 45 (2012), 274 P.3d at 581. 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 & Submission Clause for 2009–2010 # 45, 234 P.3d 642, 648 (Colo. 2010) (hereafter “In re #45 (2010)”). When it sets a title, the Title Board “shall consider the public confusion that might be caused by misleading titles and shall, whenever

practicable, avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear.” C.R.S. § 1–40–106(3)(b); In re #85, 328 P.3d at 143-44. The title “shall correctly and fairly express the true intent and meaning” of the initiative. Id. at 144.

Initiative #139 starts by explaining that the proposed amendment concerns “the controlled sale of retail marijuana,” and then sets forth four provisions meant to accomplish that single stated objective. (Record, p. 35). The challenge to Initiative #139 is similar to the challenge levied in In re #45 (2010), 274 P.3d at 582. In that case, the petitioner challenged an initiative concerning the “public control of water,” which contained various provisions and requirements related to that overarching concern. Id. In addressing the petitioner’s argument that the title was not clear, the Court explained that:

The Titles first expressly state the single subject of Initiative 45 by describing the proposal as “[a]n amendment to the Colorado constitution concerning public control of water.” They then summarize how proposed subsections (2) through (6) of the proposal relate to this subject, and thereby reflect the true intent and meaning of the measure.

Id.

Therefore, the Court rejected the petitioner’s argument and held that the title of the initiative was clear.

The same conclusion is appropriate here. There is nothing vague or misleading about Initiative #139. Initiative #139 clearly relates to the packaging and potency requirements for the sale of retail marijuana. Further, there is nothing in Initiative #139 that “subverts the will of the people of Colorado by establishing a potency limit of sixteen percent tetrahydrocannabinol,” by “neutering the voter-passed Amendment 64.” (Motion, Record, p. 31). The provision for potency limits is clearly set forth in the title of Initiative #139, and such a limit would have to be approved by the voters of the State of Colorado assuming Initiative #139 is included on the ballot. Petitioners’ argument does not relate to the clarity of the title but to Petitioners’ personal belief that such a restriction should not be imposed. The fact that Petitioners personally do not want such a potency limit does not make Initiative #139 vague or misleading. Initiative #139’s title must distill Initiative #139 down to a “reasonably ascertainable expression of the initiative’s purpose.” In re #45 (2010), 234 P.3d at 648. That is exactly what the title of Initiative #139 does here.

Similarly, Petitioners’ argument that “retail marijuana” is undefined in the title is a red herring. (Record, p. 31). 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 “recreational” marijuana and marijuana products. The title of Initiative #139 clearly seeks to impose controls on the packaging and potency of retail marijuana. For these reasons, Initiative #139 contains a clear title and the Court should affirm the Title Board’s decision.

**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 20th day of May, 2016.

Respectfully submitted,

SPENCER FANE LLP

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*s/Jamie N. Cotter*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 20th day of May, 2016, a true and correct copy of the within **OPENING BRIEF** was served via ICCES or U.S. Mail postage prepaid, as follows on the following:

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