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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

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.

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Case No. 2016 SA 158

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THE TITLE BOARD'S OPENING 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 2,350 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.

STATEMENT OF THE ISSUES

1. Whether Proposed Initiative #139 violates the single subject requirement.
2. Whether the title for Proposed Initiative #139 is vague or misleading.

STATEMENT OF THE CASE

Ali Pruitt and Ron Castagna (the "Proponents") seek to circulate Proposed Initiative #139 to obtain the signatures needed to place a measure on the ballot to amend the Colorado Constitution. Initiative #139 would impose regulations on the sale of marijuana and marijuana products. Proponents amended the original draft of #156 after a review and comment period before the Office of Legislative Council and Legislative Legal Services, and submitted their final draft of #139 to the Board on April 8, 2016. *See Cert. Copies of Title Board Record* 2.

The Board conducted a hearing on April 21, 2016, at which it set title for #139. Petitioners Dean C. Heizer, II and Gregory S. Kayne,

through counsel, filed a joint motion for rehearing on April 27, 2016. *Id.* at 29. The motion for rehearing argued that #139 contains multiple subjects and that the title set by the Title Board is vague and misleading.

A rehearing was held on April 29, 2016. The Board denied the motion finding that the #139 consisted of one subject and that the title was neither confusing nor misleading. Title Board Proceedings (Apr. 29, 2016), available at http://pub.sos.state.co.us/20160429100815A, at 46:26. On May 6, 2016 Dean Heizer and Gregory Kayne filed a petition for review in this Court.

STATEMENT OF THE FACTS

Proposed Initiative #139 would amend article XVIII, section 16 of the Colorado Constitution. The measure would add definitions to subsection 2. It then adds subsection 5.5, titled "Controlled Sale of Marijuana and Marijuana Products." The new section requires that retail marijuana and marijuana products must: (1) be sold in child-resistant or single-serving packaging; (2) have a label that includes specific health warnings; and (3) have a potency not to exceed 16% tetrahydrocannabinol (THC) by weight. *Cert. Copies of Title Board Record* 5.

SUMMARY OF THE ARGUMENT

The Board's decision should be affirmed. Proposed Initiative #139 addresses the single subject of regulating the sale of retail marijuana and marijuana products. The fact that it contains multiple provisions connected to this subject does not render each provision a separate subject. As set by the Board, the title accurately summarizes the substance of the initiative and is not misleading. The title correctly uses the phrase "retail marijuana" to refer to the regulatory scheme promulgated to implement personal use under Amendment 64.

ARGUMENT

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

A. Standard of review and preservation.

"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." *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). The Court "will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.* The Petitioners raised this issue in their motion for rehearing. *Id.* at 8.

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

The purpose of the single subject rule is to "prohibit the practice of putting together in one measure subjects having 'no necessary or proper connection,' for the purpose of garnering support for measures from parties who might otherwise stand in opposition." *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 124–25 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I), C.R.S.) [hereinafter *Amend TABOR 25*]. In addition, the requirement seeks to prevent surreptitious measures, surprise and fraud upon the voters." *Id.* (quoting § 1-40-106.5(1)(e)(II). "The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *Hayes*, 333 P.3d at 79. A "second subject with a distinct and separate purpose not dependent on or connected to the first subject" will not pass muster. *Id.* Accordingly, "umbrella proposals" that attempt to unite separate subjects under a single description are unconstitutional. *Id.* (holding that an initiative that would allow recall of both elected and non-elected governmental officers was two subjects), *see also Amend TABOR 25*, 900 P.2d at 125–26 (holding "revenue changes" was an umbrella proposal);

In re Public Rights in Waters II, 898 P.2d 1076, 1080 (Colo. 1995) (holding that initiative relating to "water" was an umbrella proposal).

In proceedings before the Board, the Petitioners argued that #139 contains multiple subjects because it seeks to address packaging, warnings, and potency.

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

The subject of #139 is to regulate the sale of retail marijuana and marijuana products. There are a number of provisions, but each of them is sufficiently connected to the subject of the measure. The measure requires that retail marijuana or marijuana products are sold: (1) in child-resistant packaging; (2) that edible retail marijuana products are individually packaged, single-serving products; (3) that the product labels include specific warnings about health risks and potency; and (4) that potency of the products does not exceed a certain limit. Thus, if

passed, the measure would set forth what the package looks like, what must go on the package, and the maximum potency of what could go in the package for retail marijuana.

Each of the provisions constitutes one way in which the sale of retail marijuana would be regulated by the measure. Each one is not, however, its own subject. Requirements for the packaging, labeling, and maximum potency are all connected to the subject of regulating the way in which retail marijuana is sold. This Court should thus affirm the Board's conclusion that #139 contains only a single subject.

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

A. Standard of review and preservation.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, & Submission Clause for 2009-10 #45,* 234 P.3d 642, 648 (Colo. 2010) [hereinafter *In re #45*]. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996) [hereinafter *In re Trespass-Streams*]. The Court will

reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title, & Submission Clause for 2009-10 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title, & Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982). The Court will "liberally construe the single-subject requirement to 'avoid unduly restricting the initiative process.'" *In re Title, Ballot Title, & Submission Clause for 2013-2014 #129*, 333 P.3d 101, 104 (Colo. 2014) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009).

In addition to this deferential standard, the court does not consider the merits of the measure. *In re Title, Ballot Title, & Submission Clause for 2013-14 #89*, 328 P.3d 172, 176 (Colo. 2014) [hereinafter *In re #89*] (quoting *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 274 P.3d 562 (Colo. 2012). Nor does the Court "review the initiative's 'efficacy, construction, or future application,' as those issues do not come up unless and until the voters approve the amendment." *Id.* (citing *In re 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010); *In re Title, Ballot Title &*

Submission Clause & Summary for 1999-2000 #200A, 992 P.2d 27, 30 (Colo. 2000) ("[T]he initiative's efficacy, construction, or future application … is a matter for judicial determination in a proper case should the voters approve the initiative.")).

The Petitioners preserved this argument by raising the same in their motion for rehearing. *Cert. Copies of Title Board Record* 29.

B. Standards governing titles set by the board.

Section 1-40-106(3)(b), C.R.S. establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, & Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). The statute provides:

> In setting 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. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed…within two weeks after the first meeting of the title board. …Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which

> may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

An initiative title must "consist of a brief statement accurately reflecting the central features of a proposed measure. *In re Trespass-Streams*, 910 P.2d at 24. Accordingly, the title board should "set fair, clear, and accurate titles that do not mislead the voters through a material omission or representation." *In re #89*, 328 P.3d at 178. An initiative is not required to contain every detail of a proposition and should not speculate as to the effects of enacting the initiative. *Id.*

C. The title set by the Board is fair, clear, accurate, and complete.

The title the Board set for #139 is a brief statement accurately reflecting the central features of the measure. A yes vote for the measure will result in certain controls on the sale of retail marijuana and marijuana products, namely in packaging, labeling, and potency. *See Cert. Copies of Title Board Record* 2. The title set by the board specifically lists those controls. *Id.* at 35.

The Petitioners advanced two reasons in the motion for rehearing and their petition for why they believe the measure is vague and misleading. First, because the title and submission clause don't reflect what is meant by "retail marijuana" and doesn't reflect whether the title encompasses recreational marijuana, medical marijuana, or both. *Id.* at 31. Second, they assert that the "real purpose of the measure is to subvert the will of the people of Colorado by establishing a potency limit of 16% tetrahydrocannabinol thereby effectively neutering the voter-passed Amendment 64." *Id.*

"'The electorate, as well as the legislature, must be presumed to know the existing law at the time [it] amend[s] or clarif[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)). Medical and recreational marijuana were passed by Colorado voters at two separate times. Voters passed "Medical Use of Marijuana for Persons Suffering from Debilitating Medical Conditions" in 2000, which is located in section 14 of article XVIII. Colo. Const. art. XVIII, § 14. Amendment 64, titled "Personal Use and Regulation of Marijuana," was passed by voters in 2012 and is located in section 16 of the same article. *Id.* § 16.

When the General Assembly enacted the regulatory framework around medical marijuana, it created the Colorado Medical Marijuana Code. § 12-43.3-101, C.R.S. Similarly, when it enacted the regulatory framework for personal use, the General Assembly enacted the next article in Title 12, the Colorado Retail Marijuana Code. § 12-43.4-101. As the names suggest, Article 43.3 applies to medical marijuana, § 12-43.3-102(2), and Article 43.4 applies to retail marijuana. § 12-43.4-102(2). The Colorado Retail Marijuana Code 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).

While the Petitioners object because the title doesn't refer to "recreational marijuana," that term never appears in the constitution or the articles implementing either amendment. The General Assembly refers to "retail marijuana" when referring to the personal use authorized under Amendment 64. The initiative would only amend the personal use section of the constitution, and the title uses the

appropriate phrase to refer to retail marijuana. As such, this argument should be rejected.

The Court should also reject the notion that the initiative would "subvert the will of the people." *Cert. Copies of Title Board Record* 31. The title clearly reflects the fact that if the initiative passes it will "limit[] all retail marijuana and retail marijuana products sold at retail to a potency limit of 16% [THC]." *Id.* at 35. As it was the will of the people to permit the personal use of marijuana when they passed Amendment 64, so would it be the will of the people if they voted to limit the maximum potency through this initiative. The title is neither vague nor misleading when it explicitly advises voters of this fact.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for Proposed Initiative #139.

Respectfully submitted this 20th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on May 20, 2016, I electronically filed a true and correct copy of The Title Board's Opening 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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