DATE FILED: April 24, 2024 3:07 PM

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to §1-40-107(2), C.R.S. (2017)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 # 150 ("Damages Involving Catastrophic Injury or Wrongful Death")

Petitioner: Alethia Morgan

v.

Respondents: Evelyn Hammond and Lucas Granillo

and

Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison

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Supreme Court Case No.: 2024SA92

PETITIONER'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 3,875 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, 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.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

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Petitioner Alethia Morgan ("Petitioner"), registered elector of the State of Colorado, through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submits her Answer Brief in opposition to the title, ballot title, and submission clause (the "Title(s)") set for Proposed Initiative 2023-2024 #150 ("Initiative #150").

SUMMARY OF ARGUMENT

The differences between the Board's and Respondents' Opening Briefs demonstrate the fundamental problem with Initiative #150. By creating an affirmative right to all damages awarded, Initiative #150 repeals, modifies, or changes a host of existing laws without ever identifying them. To avoid having to grapple with this issue, the Board misstates Initiative #150's purported single subject as merely "remov[ing] damages caps in certain lawsuits". TB Op. Br. at 6. While repealing all the separate and distinct damages caps is multiple subjects in and of itself, the plain language of Initiative #150 demonstrates that it is much broader than that.

Specifically, by creating an affirmative right, the measure eliminates judges' oversight over damages awards, an issue the Board ignores based on its incorrect, narrow interpretation of what the measure does. Similarly, the Board's Opening Brief ignores that the measure lowers the burden of proof for plaintiffs to be

eligible for enhanced damages—an aspect of the measure that is incongruous with removing damages caps.

Respondents' Opening Brief conflicts with the Board's recitation of the purported single subject by confirming that the measure not only removes damages caps, but instead "allow[s] a person to recover the total amount of monetary damages awarded by a jury or judge in a lawsuit involving catastrophic injury or wrongful death." Resp. Op. Br. at 2. While Respondents acknowledge the true breadth of the measure, they contend that whatever the measure does in creating an affirmative right to all damages awarded constitutes "effects" that cannot be considered by this Court. This argument ignores that the Court must sufficiently examine Initiative #150 to understand what it does to determine whether it has a single subject. If the Court does not engage in this analysis and finds the measure has a single subject, the result will be to significantly dilute the single subject rule by opening the door to measures that make sweeping changes to dozens of unidentified laws under the guise of a loosely constructed statutory "right".

At a minimum, if the Court determines that this type of measure passes single-subject muster, the Titles must be modified to put voters on notice of what the measure does, including identifying the laws that are effectively being

repealed. If not, the significant risks of logrolling and fraud associated with these types of measures will only be exacerbated.

ARGUMENT

I. The Board's and Respondents' Opening Briefs Illustrate the Inherent Single Subject Problems with Initiative #150.

A. The Board Misapprehends the Scope of Initiative #150.

The Board's Opening Brief incorrectly construes Initiative #150 as only removing damages caps. *Id.* at 3 and 6 ("The single subject of #150 is the removal of damages caps in certain lawsuits.") But the plain language of Initiative #150 is much broader than that because the measure creates an absolute right of recovery for all damages awarded by the factfinder in cases involving so-called catastrophic injury or wrongful death. R., p. 3, Proposed C.R.S § 13-21-102.7(1). This Court cannot ignore the plain language of the measure in undertaking the single-subject inquiry. *Ballot Title 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998) (holding that the Court applies the usual rules of statutory construction, including giving words their plain meaning, when examining a measure as part of the single-subject analysis). Further, the Title Board's interpretation of Initiative #150 is contradicted by the Respondents' own interpretation, which acknowledges that the measure establishes a right to all damages awarded. Respondents' Op. Br. at 2.

This distinction is important because, in construing the measure as only removing damages caps, the Board ignores that Initiative #150 would repeal or modify a host of non-cap laws that allow judges to reduce, set aside, and allocate damage awards by juries.[1] *See* Petitioner's Op. Br. at 18-22. As a result, the Board does not analyze whether, for example, any of the following constitute a second subject: (i) removing the judiciary's power to reduce or disallow punitive damages award; (ii) overriding the Provision of Uniform Contribution Among Tortfeasors Act; (iii) nullifying the Collateral Source Statute; or (iv) nullifying the Comparative Negligence Statute. This deficiency overlays and undermines the entirety of the Board's Opening Brief.

B. The Board's and Respondents' Opening Briefs Misinterpret the Court's Single-Subject Precedent to Avoid a Meaningful Examination of Initiative #150.

While the Board's Opening Brief incorrectly construes Initiative #150, it does recognize that the measure "might impact the applicability of multiple other damages provisions". TB's Op. Br. at 6-7. Respondents admitted below and in

[1] Instead of addressing these changes, the Board's Opening Brief focuses on whether Initiative #150 creates a new cause of action for wrongful death. However, this issue was not listed in the Petition for Review because Proponents clarified on the record at the rehearing that the measure does not create a new cause of action for wrongful death.

their Opening Brief that, by creating a right to all damages awarded—at a minimum—Initiative #150 repeals any limitation on damages that exists anywhere in Colorado law. The Board and Respondents contend the Court cannot consider how Initiative #150 would repeal, modify, or override various other Colorado laws because the "merits of the proposed initiative" are irrelevant. TB's Op. Br. at 6-7; Respondents' Op. Br. at 8-9 (citing *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 19).

But both briefs ignore that this Court has made a distinction between weighing the merits of a measure as opposed to examining a measure to understand what it does in order to determine whether it has incongruous purposes. The Court must undertake the latter inquiry, particularly in the context of a measure that admittedly is intended to repeal or override a host of unidentified laws through the creation of a statutory "right". *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278–79 (Colo. 2006); *see also In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1076 (Colo. 2010).

The Board's and Respondents' failure to engage in this analysis undermines the entirety of their single-subject arguments in the Opening Briefs. If the Court adopts this approach and takes Initiative #150 purely on its face, the result would significantly dilute the single subject requirement. Proponents would be able to

cleverly utilize an amorphous statutory right to repeal or modify multiple different laws, all without voters ever understanding the effect of an affirmative vote.

For instance, Proponents' sister measure attempted to create a statutory right for patients to access all medical records while using an extremely broad definition of medical records. *See* 2023-2024 Proposed Initiative #149, *available at* https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2023-2024/149Results.html. Without voters knowing from the text of the measure or its proposed title, the measure would have provided access to other patients' medical information (infringing on their own statutory rights), overridden healthcare providers' statutory attorney-client privilege rights, and repealed various Colorado statutory privileges allowing healthcare providers to engage in quality management and peer review to ensure high-quality healthcare in Colorado. *Id.*

On rehearing, the Board rejected the argument that these were mere "effects" of the measure and reversed its single-subject finding by a 2-1 vote. *Id.* The Board reasoned that a measure which expressly (and therefore transparently) repealed or modified all the statutes otherwise being surreptitiously repealed or modified through an amorphous right would not pass single subject muster. The analysis should be no different here, particularly when Proponents have admitted that the intent is to repeal or modify any laws that conflict with the new right.

Respondents cite to *In re 2019-2020 #3*, 2019 CO 57 to support their argument that the Court cannot engage in analysis of what Initiative #150 does as part of its single subject inquiry. However, as explained in Respondents' Opening Brief, Proponents are attempting to take this Court's holding in *In re 2019-2020 #3* a giant step further. There, the measure expressly and transparently repealed a specific law (TABOR), and thus the Court reasoned that the measure could not be deemed "surreptitious". *Id.* at ¶ 17.

Initiative #150 is the opposite of 2019-2020 #3 because instead of clearly and expressly repealing an existing law, it creates a vague statutory right to surreptitiously repeal or modify multiple different laws without identifying them. To make matters worse, by framing the measure as a statutory "right" (for only a subset of Coloradans), Proponents will garner favor with voters who generally believe more "rights" are better because those voters will have no understanding of the reaches and implications of an affirmative vote. As highlighted in Justice Marquez's dissent in 2019-2020 #3, Colorado's single subject jurisprudence still requires the Court to "examine an initiative" to determine whether the single-subject rule has been violated. *Id.* at ¶ 46. The Court should take the opportunity to affirm this requirement to guard against significant dilution of the single-subject requirement.

C. An Examination of Initiative #150 Reveals Multiple Separate Subjects.

1. Respondents Admit that Initiative #150 Removes Any and All Damages Limitation Found Anywhere in Colorado Law.

Respondents admit that the intent of the measure is to "remove", i.e., repeal, all damages caps found anywhere in Colorado law in any lawsuit involving catastrophic injury or wrongful death. Respondents' Op. Br. at 6. As was the case below, Respondents do not—and likely cannot—identify all the damage limitations removed by their measure. *See id.* Neither Respondents nor the Board make any attempt to identify or assess all the damage limitations being removed, arguing that these unidentified changes fall under the broad umbrella of creating a "right" to recover all damages awarded, and, in any event cannot be considered because they are "effects" of the measure. *Id.* at 6-7.

This analysis ignores that Initiative #150 is, in essence, a "repeal-measure" in sheep's clothing, and that the only thing tying together all the different limitations being removed is the overly broad theme of "catastrophic injury or death".[2] *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 16 ("A proponent's attempt to characterize an initiative under some

[2] March 6 Hearing Audio at 3:27:45, *available at: https://csos.granicus.com/player/clip/434?view_id=1&redirect=true.*

general theme will not save the initiative from violating the single-subject rule if the initiative contains multiple subjects."). Consequently, the Board's citation to *In re Amend Tabor No. 32*, 908 P.2d 125 is inapposite. TB's Op. Br. at 7. There, the measure created a single tax credit that impacted different taxes. 908 P.2d at 129. The theme of a single tax credit cannot be compared to "catastrophic injury or death."

Likewise, the Board's citation to *In re Proposed Ballot Initiative on Parental Rights* is unavailing because Justice Mullarkey's concurrence in that case (which this Court has adopted in subsequent cases) teaches that measures such as Initiative #150 must be scrutinized and are inherently suspect in that their intended effect is to repeal or modify multiple different laws. 913 P.2d 1127, 1134-36 (Colo. 1996). Unlike the constitutional amendment in *Parental Rights*, Respondents' stated purpose with this statutory measure is to repeal or modify multiple different statutes that conflict with the measure without ever having to identify the statutes being changed.

Thus, contrary to the Board's and Respondents' positions, the single-subject rule requires an examination of the separate and distinct damages limitations being removed by Initiative #150 to determine if they are sufficiently connected. In failing to undertake this inquiry, the Board and Respondents refuse

to recognize that the damages limitations being removed were enacted under separate laws and for different policy reasons. *See* Petitioner's Op. Br. at 14-16.

Accordingly, the Board's contention that Initiative #150 does not present risks of logrolling is incorrect. TB's Op. Br. at 9 (arguing, without support or analysis, that voters are likely to be for caps generally or against them generally). The average voter will have no idea which specific caps are being removed or why they were in place in the first instance. For example, in an age of ever-increasing healthcare costs, a voter may strongly favor damages caps for healthcare professionals in order to keep healthcare costs in check, but be in favor of removing caps outside of the healthcare context. Petitioner's Opening Brief provides several other examples of logrolling risks, which the Board's and Respondents' Opening Briefs ignore with their superficial analysis of Initiative #150. The fact that Initiative #150 surreptitiously does not identify the damages limitations being removed only exacerbates these logrolling risks.

2. <u>The Board and Respondents Incorrectly Ignore or Dismiss All the Non-Cap Laws Changed by Initiative #150, Including Eliminating the Judiciary's Oversight over Damage Awards.</u>

In incorrectly assuming Initiative #150 only removes damages caps, the Board does not address the single-subject ramifications of all the changes Initiative #150 makes to non-cap laws. *Id.* On the other hand, Respondents concede that the

measure might remove the judiciary's oversight over jury awards. Op. Br. at 8. However, Respondents downplay this significant aspect of the measure as being a speculative "effect" that falls within the nebulous central purpose of creating a right to all damages awards in personal injury cases. *Id.* First, Initiative #150's elimination of judicial powers is not speculative. By its plain language, Initiative #150 would not allow a judge to reduce, allocate, or set aside a jury award because Initiative #150 creates an unconditional right to recover all such damages. R., p. 3, Proposed C.R.S § 13-21-102.7(1).

Further, because the measure is constructed as an affirmative right, voters will have no idea that current law gives judges the power to reduce, allocate, or disallow jury damage awards in multiple different contexts for different reasons. For instance, the average voter will not know that Colorado statute gives judges the ability to reduce or disallow punitive damages awards to ensure this form of punishment is not wielded inappropriately by juries. Petitioner's Op. Br. at 18. Likewise, voters will not know that the measure removes judges' statutory ability to reduce damage awards based on contribution or the collateral source doctrine. *Id.* at 19-21.

Respondents contend that all these changes are not "coiled in the folds" because voters will understand that the measure creates a right to recover all

damages awarded. Op. Br. at 8. This argument is illogical because the laws being changed are not identified anywhere in the measure or the Titles. The average voter is not a sophisticated personal injury attorney and will not know that these judicial safeguards exist in the first place, let alone why they exist. As a result, voters will have no idea that an affirmative vote will significantly change the judiciary's existing authority to oversee damage awards. These surreptitious changes to existing law epitomize why the single subject requirement exists.

3. Respondents Misapprehend that the Reduction in the Burden of Proof Relates to the Enhancement of Damages, Not a Claim for Relief.

The Board does not address the burden of proof issue in its Opening Brief, other than stating without analysis that it is an "effect" that cannot be considered. Resp. at 11. The Board is wrong because the preponderance of evidence burden of proof is expressly stated in the text of the measure. R., p. 3, Proposed C.R.S. § 13-21-102.7(2) and is not merely an "effect".

Respondents argue that Initiative #150 provides for the standard burden of proof for civil claims, and therefore does not change existing law and cannot be a separate subject. Respondents' Op. Br. at 7. Respondents miss the point. Demonstrating catastrophic injury or wrongful death is not, and will not be, an

element of any civil claim, but instead will serve as the mechanism by which plaintiffs can enhance damages, i.e., forego all damage limitations.[3]

As outlined in Petitioner's Opening Brief, Colorado law currently requires a heightened burden of proof for both the ***enhancement*** of damages and, in certain cases, even the ***eligibility*** for non-economic damages. Op. Br. at 22 (citing statutory sections). These laws require a clear and convincing burden of proof to enhance damages. *See id*. (citing C.R.S. §13-21-102.5(3)(a), (b)). Under the new proposal, plaintiffs will no longer have to satisfy the clear and convincing burden of proof in any of the contexts set forth in Petitioner's Opening Brief, such as the enhancement of non-economic damages and the availability of derivative damages. *See id.*

Thus, regardless of whether the preponderance burden of proof is considered an implementing provision of Initiative #150, it results in a significant change to existing Colorado law. This change, which makes it easier for plaintiffs to enhance damages, is separate and distinct from the stated single subject of allowing plaintiffs to recover all damages awarded. Notably, after the rehearing on Initiative #150, Respondents filed a follow-on measure that largely mirrors Initiative #150,

[3] March 6 Hearing Audio at 3:33:20, available at available at https://csos.granicus.com/player/clip/434?view_id=1&redirect=true.

but does not provide for a preponderance burden of proof to enhance damages.[4] This revised measure, along with the Board's and Respondents' decision not to meaningfully address this issue in their respective Opening Briefs, demonstrate that the change to the burden of proof is a second subject that is not connected to the "right" to recover unlimited damages.

II. The Board's and Respondents' Clear Title Arguments Fail.

A. The Titles Must Inform Voters of What the Measure Does.

The Board contends that the Titles explain "precisely" what Initiative #150 will do, while Respondents contend that the Titles are clear because they "reasonably explain[] the change to existing statutory limitations on damages". TB's Op. Br. at 17; Respondents' Op. Br. at 12. These arguments suffer from the same flaw because they fail to recognize that the affirmative statutory right created by Initiative #150 will undeniably repeal or modify dozens of existing laws that are not identified in the measure or the Titles. The Court does not need to "engage in

[4] *See* 2023-24 #277, *available at* https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/277Final.pdf.

the prediction of doubtful future effects to reach that conclusion." *In re Ballot Titles 2001-2002 #21 & #22,* 44 P.3d 213 (Colo. 2002).

Specifically, with the respect to the damage caps being removed, the Respondents, who are the proponents of the measure, ***admit*** that Initiative #150 is intended to remove ***all*** damage limitations, yet on the other hand contend that the Titles need not identify ***any*** of the laws being changed. This conclusion mistakenly assumes that the voters are aware of the existing damage limitations. The fraud and logrolling risks identified by Petitioners will be significantly magnified if voters are not told, for example, that the damage limitations protecting healthcare professionals, promoting public use of private lands, and arising from construction defect claims are all being removed. If the Court is going to permit Proponents to eliminate multiple separate and distinct damages caps by creating a "right" to damage awards, then, at a minimum, voters need to be told of the laws being changed so they can make an informed decision at the ballot box.

Likewise, no speculation is required to conclude that Initiative #150 changes the burden of proof to enhance damages. The preponderance burden is expressly stated in the measure. Respondents nevertheless contend that the burden of proof need not be identified because it does not change current law. Respondents' Op. Br. at 11. Again, this argument is based on Respondents' incorrect assumption that

the preponderance of evidence burden concerns an element of liability for a tort claim when, in fact, it is the burden of proof to enhance damages through a showing of catastrophic injury or wrongful death. As discussed in section I.C.3, above, this is undeniably a change from current law, which requires a ***judge*** (as opposed to the jury) to find by clear and convincing evidence that enhanced damages are warranted. Petitioner's Op. Br. at 22-23. This critical change is not a minor detail given that the General Assembly went to the trouble—in multiple statutes—of requiring a judge to make a finding by clear and convincing evidence for damages to be enhanced. *See* Petitioner's Op. Br. at 22-24. If Initiative #150 is allowed to move towards the ballot box, this change must be identified in the Titles.

Finally, no speculating is required to conclude that the measure removes the judiciary's power to oversee damage awards. If plaintiffs have a "right" to all damages awarded by a jury, then judges will not be able to reduce or set aside such jury awards. This is a seismic change to Colorado law governing civil claims and must be identified in the Titles if the Court finds Initiative #150 has a single subject.

B. "Catastrophic Injury" Is an Improper Catchphrase Because Its Definition Does Not Align with a Voter's Understanding of the Term.

The Board concedes that "'catastrophic' is an "inherently alarming" word, particularly when associated with "injury", and that voters would have a preconceived notion of what the term "catastrophic injury" means. TB Op. Br. at 21. Similarly, Respondents contend that voters would associate this term with a "devasting, life-changing injury." Respondents' Op. Br. at 13. Nevertheless, the Board and Respondents reason that "catastrophic injury" is not a catchphrase because it is the term used in the measure and therefore "accurately reflects the substance of the initiative". TB Op. Br. at 21; Respondents' Op. Br. at 12-13.

The Board and Respondents fail to appreciate that the problem with using this catchphrase in the Titles is that the measure's definition does not line up with the "alarming" meaning voters would apply to "catastrophic injury". Notably, neither Respondents' nor the Board's Opening Briefs analyze the definition of the term as stated in the measure. That is because, as defined, the injury need not be permanent, and only needs to be "severe", in that it "limits activities of normal daily life." R., p. 3, Proposed C.R.S. § 13-21-102.7(2)(a).

Thus, a catastrophic injury would include a broken arm, a torn ligament, a broken hand, a severely sprained ankle, and various other non-catastrophic injuries because these injuries "limit activities of normal daily life", albeit temporarily. Respondents' example of how this phrase is defined in federal statute confirms that

the definition in Initiative #150 does not align with the common usage or understanding of the phrase. Respondents' Op. Br. at 13 (citing 42 U.S.C. § 3796b(1)) (defining "catastrophic injury" as one that "***permanently*** prevent[s] an individual from performing any gainful work") (emphasis added).

As a result, Initiative #150's threshold for enhancing damages is not nearly as high as the Titles suggest by the usage of the misleading catchphrase, "catastrophic injury". A wide swath of potential injuries would be eligible for unlimited damages, which voters would not understand based on the Titles as constructed. Accordingly, if Initiative #150 moves forward, the Titles need to be corrected to use the actual definition of "catastrophic injury" or at least an accurate paraphrase of the definition.

CONCLUSION

Petitioner respectfully requests this Court find that Initiative #150 contains multiple subjects and should be returned to Proponents. Alternatively, if the Court finds that Initiative #150 contains a single subject, the Titles should be remanded to the Board with instructions to address the clear-title issues set forth above.

Respectfully submitted this 24th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2024, a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** was duly filed with the Court and served via CCEF upon the following:

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