SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: April 10, 2024 6:00 PM
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #150 **Petitioner:** ALETHIA MORGAN v. **Respondents:** EVELYN HAMMOND and LUCAS GRANILLO and **Title Board:** THERESA CONLEY, JEREMIAH BARRY, and KURT MORRISON	▲COURT USE ONLY▲
Attorneys for Respondents Martha M. Tierney, No. 27521 TIERNEY LAWRENCE STILES LLC 225 E. 16th Street, Suite 350 Denver, CO 80203 Telephone: 303-356-4870 Email: mtierney@tls.legal	Case No.: 2024SA92

RESPONDENTS' OPENING BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2023-2024 #150

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 the brief complies with C.A.R. 28(g).

It contains 3668 words.

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.AR. 32.

By: s/Martha M. Tierney

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Evelyn Hammond and Lucas Granillo (jointly "Proponents" or "Respondents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the title, ballot title and submission clause (jointly, the "Title") that the Title Board set for Proposed Initiative 2023-2024 #150 ("Initiative #150").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether proposed initiative 2023-2024 #150 contains a single subject.

2. Whether the Title Board set a clear title for proposed initiative 2023-2024 #150.

STATEMENT OF THE CASE

Evelyn Hammond and Lucas Granillo proposed Initiative #150. A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services on February 1, 2024. Thereafter, on February 9, 2024, Proponents submitted final versions of Initiative #150 to the Secretary of State for purposes of submission to the Title Board.

A Title Board hearing was held on March 6, 2024, at which time the Title Board found that Initiative #150 contained a single subject and set a title. On March 13, 2024, Petitioner Alethia Morgan filed a Motion for Rehearing, alleging that Initiative #150 contained multiple subjects, and that its title was flawed. The

rehearing was held on March 20, 2024, at which time the Title Board maintained that the measure contained a single subject and granted the Motion for Rehearing only insofar as it made minor changes to the title. The title is set as follows:

> A change to the Colorado Revised Statutes allowing 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 unless the lawsuit is against a ski area, server of alcohol beverages, or the State of Colorado, and, in connection therewith, eliminating the statutory limitations on economic, non-economic, and punitive monetary damages for catastrophic injury or wrongful death.

R. 7. Petitioner Morgan timely filed an appeal to this Court.

SUMMARY OF THE ARGUMENT

The Title Board properly exercised its broad discretion in drafting the title for Initiative #150. The Title satisfies Colorado law because it fairly and accurately sets forth the major features of Initiative #150 and is not misleading.

Initiative #150 contains a single subject: allowing 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. The remaining provisions, including exempting certain types of lawsuits from the initiative's scope, maintaining a preponderance of the evidence as the burden of proof in these lawsuits, and setting forth key definitions of terms used in the measure, are all implementing and enforcement details that flow from the measure's single subject.

Petitioner Morgan raises three single subject objections, but two of those objections – the measure removes all damages caps across different statutes, and to any extent that the measure removes the judiciary's oversight over punitive damages – really are part of the measure's single subject. The third single subject objection is that the measure changes the burden of proof, but this objection also fails because a preponderance of the evidence is already the burden of proof in civil actions for damages. Petitioner Morgan's concerns about the effects that Initiative #150 could have on other laws or its application if enacted are not appropriate for review at this stage.

Petitioner Morgan also raises several clear title objections, including that the title includes an impermissible catchphrase by using the term "catastrophic injury." But that phrase is the commonly used term to describe the type of lifechanging injury at issue and does not work in favor of the measure without contributing to voter understanding. And it is also the term used in the proposed initiative itself, and in other state and federal statutes.

The remaining clear title objections fare no better. Petitioner Morgan objects that the title fails to list out the other damage laws changed by the measure and that it fails to inform voters about how the measure might change the power of the judiciary over punitive damages. But these concerns do not override the

discretion of the Title Board to draft a brief title that captures the major features of the measure. Finally, Petitioner Morgan complains that the title does not mention that the burden of proof for civil suits will be a preponderance of the evidence standard. But that burden of proof is current law and is not properly included in the title.

The Title Board is only obligated to fairly summarize the central points of a proposed measure and need not refer to every nuance and feature of the proposed measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

Accordingly, there is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review and Preservation.

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. state that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title." “A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other.”

In re Initiative for 2011-2012 #3, 2012 CO 25, ¶ 9. When reviewing a challenge to the Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action.*"* *In re Initiative for 2013-2014 #89,* 2014 CO 66, ¶ 8. The Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*

The Court does "not address the merits of the proposed initiative" or "suggest how it might be applied if enacted." *In re Initiative for 2019-2020 #3,* 2019 CO 57, ¶ 8. Nor can the Court "determine the initiative's efficacy, construction, or future application, as these are matters properly considered if and after the voters approve the initiative." *In re Initiative for 2015-2016 #63*, 2016 CO 34, ¶ 7. Instead, the Court "must examine the initiative's wording to determine whether it comports with the constitutional single-subject requirement." *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. To satisfy the single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re Initiative for 2013-2014 #76*, 2014 CO 52, ¶ 8. "Implementing provisions that are directly tied to the initiative's central focus are not separate subjects". *In re Initiative for 2015-2016 # 63*, 2016 CO 34, ¶ 10.

"[T]he single subject requirement should be construed liberally to avoid unduly restricting the initiative process." *In re Initiative for 2007-2008 # 61*, 184 P.3d 747, 750 (Colo. 2008).

Respondents agree that Petitioner Morgan preserved her challenge to the single subject requirement.

B. **Initiative #150 Has a Single Subject.**

1. **The Removal of Damage Caps Does Not Violate the Single Subject Requirement.**

Petitioner Morgan argues that Initiative #150 violates the single subject requirement because it removes damage caps presently in statute that were put in place for different policy reasons. *See Petition,* p. 4, ¶1. Petitioner Morgan's complaint is really that she does not like the merits of the measure, and its effect on other laws that Petitioner Morgan may favor.

First, what Petitioner Morgan complains about is part and parcel of the single subject of the measure. The measure's primary purpose is to allow 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, *notwithstanding any contrary limit on any type of damages found in law*. The removal of damage caps is not a separate subject.

Second, in arguing this point in her Motion for Rehearing, Petitioner Morgan lists a litany of statutes that might be impacted by Initiative #150. R. 11-12. All these statutes concern caps on damages that may be awarded in civil actions. Initiative #150 may change those caps in situations where the claim involves catastrophic injury including death, but these are arguments about the effect of the measure on other laws, and this is precisely the type of analysis that the Court may not engage in at this stage. *See In re 2019*-2020 #3, 2019 CO 57, ¶ 8 (The Court does "not address the merits of the proposed initiative" or "suggest how it might be applied if enacted."). This is not a single subject violation.

2. <u>The Burden of Proof Set forth in the Measure Is Not a Separate Subject.</u>

Petitioner Morgan contends that the inclusion of a burden of proof standard creates a second subject separate and apart from the measure's single subject. R. 15-16. This is incorrect. Initiative #150 relates to civil actions for damages. The addition of a preponderance of the evidence standard in the measure only restates current law. In Colorado, "[a]ny provision of the law to the contrary notwithstanding . . . the burden of proof in any civil action shall be by a preponderance of the evidence." § 13-25-127, C.R.S. Thus, a preponderance of the evidence standard would apply to the measure, regardless of whether it was

included in its text. The measure's inclusion of the pre-existing burden of proof for civil actions is not a separate subject. "[M]ere implementation details directly tied to the initiative's single subject will not, in and of themselves, constitute a separate subject." *In re Initiative for 2005-06 #73*, 135 P.3d 736, 739 (Colo. 2006).

3. **Initiative #150's Effects on the Judiciary's Oversight Over the Jury, if Any, Is Not a Separate Subject.**

In her Petition, Petitioner Morgan contends that Initiative #150 violates the single subject requirement because it "alters the powers of the judiciary by nullifying a judge's authority to reduce or disallow punitive damage awards." *Petition*, p. 4 ¶ 2c. Again, what Petitioner Morgan complains about is part and parcel of the single subject of the measure. The measure's primary purpose is to allow 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. To the extent the measure alters the power of the judiciary, its text is clear. There is nothing coiled up in the folds of the measure on this point - the removal of damage caps is the single subject of the measure, and any impact of the measure on the power of the judiciary is not a separate subject.

Indeed, the nub of Petitioner Morgan's argument appears to be about an unidentified effect that the initiative might have on existing law. In its limited role in reviewing a ballot initiative, the Court is "prohibit[ed][] from addressing the

merits of a proposed initiative, and from suggesting how an initiative might be applied if enacted." *In re Title, Ballot Title, and Submission Clause of 2011-2012 #45*, 2012 CO 26, ¶ 9.

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 2013-2014 #90*, 2014 CO 63, ¶ 11.

Initiative #150 meets the single subject requirement.

II. **The Title Set by the Title Board is Not Misleading.**

A. **Standard of review and preservation.**

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The Title Board is "afforded discretion in resolving interrelated problems of length, complexity, and clarity in designating a title and ballot title and submission clause." *In re Initiative for 2015-2016 #73*, 2016 CO 24, ¶ 23. The Title Board is required to summarize the central features of a proposed initiative fairly, but it "need not explain the meaning or potential effects of the proposed initiative on the current statutory scheme." *Id*. Nor must a title recite every detail of the proposed measure. *In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002*

#21 & #22, 44 P.3d 213, 222 (Colo. 2002). The Court will reverse the title set by the Board "only if a title is insufficient, unfair, or misleading." Id. ¶ 8. The Court does not "consider whether the Title Board set the best possible title." *In re 2019-2020 #3*, 2019 CO 107, ¶ 17.

Respondents agree that Petitioner Morgan preserved her challenges to the title set by the Board.

B. The Title Need Not Include a List of All Laws That May be Affected by the Measure.

Petitioner Morgan erroneously contends that the title is misleading because it does not include a "host of damages-related laws changed by the measure." *Petition,* p. 4, ¶ 2a. The Title Board considered Petitioner's concerns in this regard but rejected the request to list out all impacted laws, and instead inserted language in the title advising voters that the measure "eliminat[es] the statutory limitations on economic, non-economic, and punitive monetary damages for catastrophic injury or wrongful death."

Thus, the Title Board exercised its discretion to craft a title that seeks to avoid "public confusion," is "brief" and "unambiguously states the principle of the provision sought to be added, amended, or repealed." §1-40-106(3)(b), C.R.S. This Court should defer to the Title Board's discretion. *In re Title, Ballot Title, & Submission Clause for 1999-2000 #256*, 12 P.3d 246, 255 (Colo. 2000) ("In

reviewing the actions of the Board, we grant great deference to the board's broad discretion in the exercise of its drafting authority.")

C. The Title Does Not Need to Include the Burden of Proof.

Petitioner Morgan claims that the title is misleading because it does not include a reference to the measure's inclusion of a preponderance of the evidence burden of proof. However, as explained above, the addition of a preponderance of the evidence standard in the measure only restates current law. *See,* §13-25-127, C.R.S. ("Any provision of the law to the contrary notwithstanding . . . the burden of proof in any civil action shall be by a preponderance of the evidence.").

Including in the title a provision of the measure that does not change current law does not add to voter understanding of the measure. "While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative." *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008).

D. The Title Need Not Speculate About the Impact of the Measure on the Powers of the Judiciary Branch.

Petitioner Morgan argues that the title should mention that the measure may impact the judiciary's role in reducing punitive damage awards. The General Assembly has instructed the Board that "[b]allot titles shall be brief." § 1-40-106(3)(b). Accordingly, the title must "summarize the central features of a

proposed initiative," but it need not "include a description of every feature" of the measure. *In re 2019-2020 #3*, 2019 CO 107, ¶ 16.

Here, the title makes clear that the measure "eliminat[es] the statutory limitations on economic, non-economic, and punitive monetary damages for catastrophic injury or wrongful death." Given the Title Board's broad "discretion in resolving problems of length, complexity, and clarity in setting a title and ballot title and submission clause," the title reasonably explains the change to existing statutory limitations on damages. *In re 2013-2014 #90*, 2014 CO 63, ¶ 24.

E. <u>The Term "Catastrophic Injury" Is Not a Catch Phrase</u>.

Finally, Petitioner Morgan argues that the title for Initiative #150 contains an impermissible catchphrase by including the term "catastrophic injury." *Petition,* p. 4, ¶ 2(d). The Title Board "must avoid using catch phrases when setting a title." *In re Initiative for 2013-2014 #85*, 2014 CO 62, ¶ 31. A phrase is a catchphrase if it "work[s] in favor of a proposal without contributing to voter understanding." *In re Initiative for 2015-2016 #63,* 2016 CO 34, ¶ 24. But "phrases that merely describe the proposed initiative are not impermissible catch phrases." *In re 2013-2014 #85,* 2014 CO 62, ¶ 31. Nor is a phrase a catchphrase "when it contributes to a voter's rational comprehension and does not promote

impulsive choices based on false assumptions about the initiative's purpose and its effects if enacted." *In re 2019-2020 #3,* 2019 CO 107, ¶ 28.

Here, the term "catastrophic injury" contributes to a voter's understanding of Initiative #150 and so is not a catchphrase. "Catastrophic injury" is a commonly used term to describe a devastating, life-changing injury. See, for e.g., 42 USC §3796b(1) ("catastrophic injury" means consequences of an injury that permanently prevent an individual from performing any gainful work"); § 24-33.5-1229, C.R.S. ("The fatal or catastrophic injury was caused by . . ..")

Petitioner Morgan's suggestion to use the actual definition of the term as reflected in the measure will not add to voter understanding. Indeed, Petitioner Morgan argues only that part of the definition should be used, ignoring much of the definition, which would likely lead to voter confusion.

The purpose of forbidding the use of catch phrases in an initiative is to "guard against inflammatory . . . words or phrases that promote prejudice in place of voter understanding of what is really being proposed" but, words that "merely describe the proposal are not impermissible catch phrases. *In re 2013-2014 #89,* 2014 CO 66, ¶ 26.

The Title Board rejected Petitioner Morgan's catch phrase contention, and appropriately determined that the term "catastrophic injury" would contribute to reader understanding.

Finally, Initiative #150 uses the term "catastrophic injury" and defines the term in its text. Initiative #150 does not redefine an existing definition in Colorado statutes, because while it is used in Colorado statutes, "catastrophic injury" is not a defined term, so the definition does not create a new legal standard.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board regarding Proposed Initiative 2023-2024 #150.

Respectfully submitted this 10th day of April 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April 2024 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2023-2024 #150** was filed and served via the Colorado Courts E-Filing System to the following:

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