

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

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Original Proceeding
Pursuant to §1-40-107(2), C.R.S. (2013)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission
Clause for Proposed Initiatives 2013-2014 #80 and 2013-
2014 #81

Petitioner: RICHARD EVANS

Supreme Court Case No:
2014SA106

v.

**Respondents: VICKI ARMSTRONG AND BOB
HAGEDORN**

and

**Title Board: STAIERT; DANIEL DOMENICO; AND
JASON GELENDER**

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**BRIEF OF THE CITY OF BLACK HAWK, COLORADO
AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER**

CERTIFICATE OF COMPLAINT

I hereby certify that this BRIEF OF THE CITY OF BLACK HAWK, COLORADO, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER complies with all of the requirements of C.A.R. 32, including all formatting requirements, and I further certify that this Brief complies with C.A.R. 53(b) in that it contains 2,500 words, exclusive of appendix.

S/_____
Corey Y. Hoffmann

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The City of Black Hawk, Colorado, a home rule municipal corporation (hereinafter "the City"), by its undersigned counsel and pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of the Petitioner in this matter.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The City hereby adopts and incorporates by reference the Statement of the Issues Presented for Review in the Petitioner's Opening Brief.

STATEMENT OF THE CASE

The City hereby adopts and incorporates by reference the Statement of the Case in the Petitioner's Opening Brief, as well as the statement regarding the standard of review applicable to this case.

SUMMARY OF ARGUMENT

This petition concerns the adequacy of Ballot Title 2013-2014 #80 (hereinafter "Initiative #80") and Ballot Title 2013-2014 #81 (hereinafter "Initiative 81") (collectively the "Initiatives"). The Ballot Title Board ("Title Board") erred in denying the Petitioner's Motion for Rehearing on certain fundamental deficiencies within the Initiatives' ballot titles. The ballot titles assigned to the Initiatives do not fairly and accurately describe the subject matter of the Initiatives because they fail to set forth certain principle provisions within

the Initiatives. Specifically, the ballot titles fail to set forth that: (1) no local voter approval is required prior to the introduction of limited gaming in new jurisdictions; (2) limited gaming may be extended to twenty-four (24) hours with no prior local voter approval; and (3) the Initiatives require a minimum of 2,500 video lottery terminals ("VLTs") or slot machines (hereinafter "gaming devices")¹ at each proposed horse racetrack location. These ballot title omissions result in a high likelihood of voter confusion and are misleading to voters. As such, the Initiatives should be deemed neither fair nor accurate and remanded to the Title Board with instructions to redraft each Initiative's ballot title.

ARGUMENT

I. THE BALLOT TITLES ASSIGNED TO THE INITIATIVES DO NOT CONTAIN ALL OF THE PRINCIPLE COMPONENTS OF THE INITIATIVES AND THEREFORE DO NOT FAIRLY AND ACCURATELY DESCRIBE THE INITIATIVES.

The Title Board failed to address at least two principle components in each of the Initiatives that greatly impact voter choice and would, if not amended, cause voter confusion and surprise. It is the duty of the Title Board to fix ballot titles that "shall correctly and fairly express the true intent and meaning" of the proposed

¹ Initiative #80 proposes the licensed use of "VLTs" at certain exclusive locations while Initiative #81 proposes the licensed use of "slot machines" at horse racetrack facilities. Both terms are defined by the respective measures and contemplate games of chance that, for purposes of the *Amicus Curiae's* brief, are interchangeable. See Initiative #80 at § 17(2)(g); Initiative #81 at § 17(2)(f).

laws and constitutional amendments. C.R.S. § 1-40-106(2)(b). Section 1-40-106 further provides that:

The ballot title "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" . . . "no/against" . . . and which shall *unambiguously state the principle of the provision sought to be added*, amended, or repealed.

Id. (emphasis added). While perfection in ballot title setting is not required and the propriety of the Title Board's actions is presumed, the Court must examine whether the Title Board's chosen language "fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the board." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)(quoting *In re Ballot Title "1997-1998 # 62"*, 961 P.2d 1077, 1082 (Colo. 1998)).

A. The Initiatives' ballot titles fail to inform voters that, if approved, the proposed limited gaming at horse racetracks would be permitted without further local voter approval.

The Title Board failed to set forth in the Initiatives' ballot titles that no local voter approval is required prior to the issuance of the proposed limited gaming licensing. Historically, limited gaming, even when authorized by the Constitution, has been prohibited *unless* such gaming is first approved by an affirmative vote of

the majority of the electors in the community in which limited gaming is contemplated. Colo. Const. art. XVIII § 9(6)(a).

The policy behind requiring prior local approval is to provide local voters (as opposed to the entirety of the state electorate) the opportunity to choose whether gaming, and its associated impacts, is a desired use within the local community. The City of Black Hawk has twenty-three (23) years of limited gaming experience and can attest to both the positive and negative impacts that limited gaming can have on the City's citizens, resources and obligations. More importantly, the City can attest that limited gaming directly impacts the lives and community of the City's residents. Increased public services and public safety needs; increased visitors to the community, impacts in public-infrastructure requirements; increased crime rates; traffic congestion; impacts on adjacent properties; and changed community dynamics represent a sampling of the significant impacts that local voters have historically had an opportunity to consider *prior* to inviting limited gaming into their communities. The City submits the Affidavit of Jack Lewis, attached hereto as **Exhibit A** and incorporated herein by this reference, to reflect these impacts in more detail. The City of Black Hawk's constituents carefully considered these factors prior to approving limited gaming in

1991, and again when limited gaming was modified in 2008 to allow for increased limits, games and hours.

The proposed Initiatives seek to authorize the licensing of one (1) horse racetrack located in each of the Colorado Counties of Arapahoe, Mesa and Pueblo (the "Counties"). *See* Initiative #80 at § 17(2)(d)(I); Initiative #81 at § 17(4)(a). Each of the three (3) proposed horse racetracks would be authorized to conduct limited gaming with a minimum of 2,500 gaming devices. *See* Initiative #80 at § 17(4)(a); Initiative #81 at § 17(4)(b). Such uses would undoubtedly have large-scale impacts on local communities; however, the measures do not provide for a separate local election prior to the authorization of such limited gaming. The omission of such a provision should be identified in the Initiatives' ballot titles. C.R.S. § 1-40-106(3)(b); *In the Matter of the Title, Ballot Title, and Submission Clause Approved February 2, 1994, Respecting the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733, 739 (Colo. 1994)(the Court will not interfere with the Title Board's choice of language if it clearly and concisely reflects the central features of the initiative).

Because the Title Board omitted a central feature of the Initiatives by not identifying the lack of prior local voter approval for the proposed horse racetracks,

the ballot titles do not correctly and fairly reflect the true intent and meaning of the Initiatives. *Id.* The Court must consider the voter confusion that would likely arise from this omission, as voters may be misled into support for the Initiatives based on an inaccurate understanding of the measures. C.R.S. § 1-40-106(3)(b); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 29*, 972 P.2d at 266. As such, the Initiatives should be deemed neither fair nor accurate and remanded to the Title Board with instructions to redraft each Initiative's ballot title.

B. The Initiatives' ballot titles fail to inform voters that, if approved, local jurisdictions would be permitted to extend limited gaming to twenty-four (24) hours per day without prior local voter approval.

The Title Board failed to set forth in the Initiatives' ballot titles that the proposed horse racetracks would be permitted to expand limited gaming to twenty-four (24) hours per day. Further, the ballot titles do not reference that such expansion requires no prior local voter approval.

To date, the question of whether limited gaming hours should be extended beyond the constitutional requirements of 8:00 a.m. to 2:00 a.m. must be submitted to a vote of the majority of the electors of the applicable city, town or county. Colo. Const. art. XVIII § 9(7)(a)(I). Prior local voter approval is required due to

the important local impacts on local residents that such a change necessarily invites.

In 2008, the City of Black Hawk's voters considered whether to extend limited gaming to twenty-four (24) hours. Some of the concerns at the time were that the expansion of gaming hours would inherently come with increased public safety service needs such as police, fire and emergency medical responders. *See* Exhibit A. Additionally, the expansion in hours was fraught with risks of increased noise, tourist traffic and crime during early morning hours. *Id.* Further, constituents had to consider the changes in community dynamic that would likely result from twenty-four (24) hour gaming. *Id.* After much thought and consideration, the City of Black Hawk's constituents accepted the calculated risk and made the affirmative decision to expand gaming hours.

The proposed Initiatives would authorize any local jurisdiction issuing permits and approvals for a limited gaming facility to expand gaming to twenty-four (24) hours per day without prior local voter approval. *See* Initiative # 80 at §17(5)(a); Initiative #81 at § 17(4)(d). Because of the substantial impact of the expansion of limited gaming hours, the proposed provisions allowing for expansion without prior local voter approval are central features of the Initiatives. *See* Exhibit A. Nonetheless, the Title Board failed to include any reference to the

fact that local gaming could be expanded to 24 hours within the ballot titles, much less that such expansion could occur with no prior local voter approval.

Importantly, even if it can be assumed that local voters are educated on the impacts of round-the-clock limited gaming in their own community, the impacts of such a policy reaches beyond local jurisdictional boundaries. Indeed, the impacts will be regional. Counties and their constituents will feel the impacts of gaming through increased traffic; roadway deterioration from large-scale vehicles used to transport gamers; and increased law enforcement needs. Conversely, positive impacts will result from increased commercial traffic and tourism. In either case, the impacts would be exacerbated with twenty-four (24) hour gaming, yet voters will not be made aware of the potential impacts unless the ballot title is revised. Simply put, the State's voters must understand the implications of the Initiatives they are voting on, for good or bad, and currently the Initiatives' ballot titles do not afford voters a fair and accurate reflection of what is contained in the measures.

Once again, the potential expansion of limited gaming hours is a central feature of the Initiatives, and the Title Board's omission of such feature in the Initiatives' ballot titles is evidence that such titles do not correctly and fairly reflect the true intent and meaning of the measures. C.R.S. § 1-40-106(3)(b); *In the Matter of the Title, Ballot Title, and Submission Clause Approved February 2,*

1994, Respecting the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito, 873 P.2d at 739. The Court must consider the voter confusion that would likely arise from this omission, as voters may be misled into support for the Initiatives based on an inaccurate understanding of the measures. C.R.S. § 1-40-106(3)(b); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 29*, 972 P.2d at 266. As such, the Initiatives should be deemed neither fair nor accurate and remanded to the Title Board with instructions to redraft each Initiative's ballot title.

II. THE BALLOT TITLES ASSIGNED TO THE INITIATIVES FAIL TO ADVISE PETITION SIGNERS AND VOTERS THAT, IF APPROVED, THE INITIATIVES WOULD REQUIRE NO FEWER THAN 2,500 GAMING DEVICES AT ANY SINGLE LICENSED HORSE RACETRACK AND THEREFORE DO NOT FAIRLY AND ACCURATELY DESCRIBE THE INITIATIVES.

The Title Board erred in not referencing the fact that under both Initiatives, a licensed horse racetrack would be required to have a minimum of 2,500 gaming devices to participate in limited gaming. *See Initiative #80 at § 17(4)(b); Initiative #81 at §17(4)(a)*. This numeric requirement on gaming devices is significant. By way of reference, the City of Black Hawk is currently the largest gaming municipality in the State of Colorado, with eighteen (18) licensed limited gaming facilities. As of April 1, 2014, all of Black Hawk's gaming facilities operate a collective total of 8,437 gaming devices. The City's largest gaming facility, the

Ameristar Casino Resort Spa, currently operates 1,479 gaming devices. Thus, the Initiatives contemplate that a single horse racetrack would house, at a minimum, nearly thirty percent (30%) of all the gaming devices in the City of Black Hawk and forty percent (40%) more than the City's largest gaming facility. Clearly, the measure contemplates a gaming facility of a size and scope that has not yet been seen in the State of Colorado. The Counties' constituents would undoubtedly feel the local and regional impacts associated with such sizeable gaming, and it is imperative that the State's voters understand the magnitude of gaming proposed by the Initiatives' when voting on the measures.

While the City understands that the Court will not consider the merits of a proposed initiative in determining whether the Title Board has affixed a fair and accurate title to the Initiatives, *In re Title, Ballot Title, Submission Clause for 2011-2012 NO. 45*, 274 P.3d 576, 579 (Colo. 2012), the City would submit that the Court must consider the significance of the impact of the 2,500 gaming device requirement when assessing whether such requirement is a principle provision sought to be added by the Initiatives. C.R.S. § 1-40-106(3)(b).

The 2,500 gaming device requirement proposed by the Initiatives rises to the level of being a principle provision based upon the context of current Colorado gaming. Further, for the reasons detailed in Section I(A) hereof, the need for

transparency in the Initiatives' ballot titles is of the utmost importance because the Initiatives do not contemplate local voter approval prior to the introduction of limited gaming in the Counties.

Accordingly, the Title Board erred in failing to include reference to the 2,500 minimum gaming device requirement in the Initiatives' ballot titles, and thus the ballot titles do not correctly and fairly reflect the true intent and meaning of the Initiatives. The Court must consider the voter confusion that would likely arise from this omission, as voters may be misled into support for the Initiatives based on an inaccurate understanding of the measures. C.R.S. § 1-40-106(3)(b); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 29*, 972 P.2d at 266. Accordingly, the Initiatives should be deemed neither fair nor accurate and remanded to the Title Board with instructions to redraft each of Initiative's ballot title.

CONCLUSION

WHEREFORE, for all of the reasons set forth above, the City of Black Hawk respectfully requests this Court determine that the titles set for the Initiatives are neither fair nor accurate and remand the Initiatives to the Title Board with instructions to redraft the titles to accurately and fairly represent the text of the Initiatives.

DATED this 29th day of April, 2014.

**HAYES, PHILLIPS, HOFFMANN
& CARBERRY, P.C.**

By: S/ Corey H. Hoffmann
Corey Y. Hoffmann

ATTORNEYS FOR *Amicus Curiae*
*Original Signature on File at Hayes,
Phillips, Hoffmann & Carberry, P.C.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of April, 2014, a true and correct copy of the within **BRIEF OF THE CITY OF BLACK HAWK, COLORADO AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER** was served on the following by depositing same in the U.S. mail, postage prepaid, addressed as follows:

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