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COLORADO SUPREME COURT
2 E. 14th Ave.
Denver, CO 80203

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 Initiative 2013-2014 #80 and #81

Petitioner:

Richard Evans,

v.

Respondents:

Vicki Armstrong and Bob Hagedorn

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason Gelender

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Case No. 2014SA106

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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:

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

Choose one:

It contains 3,698 words.

The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

/s/ Matthew D. Grove

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CONSTITUTIONAL PROVISIONS

Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board ("Title Board"), hereby submit their Opening Brief.

I. Statement of the issues

Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 #80 and 2013-2014 #81 correctly and fairly express the true intent and meaning of the proposed initiatives?

II. Statement of the case

This case is consolidated appeal of a ballot title setting by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013).

On March 7, 2014, proponents Vicki Armstrong and Bob Hagedorn filed Proposed Initiatives 2013-2014 #80 and #81 ("#80" and "#81"), with the Colorado Secretary of State. The Title Board conducted a hearing on March 19, 2014, and set titles for both measures. On March 26, 2014, Petitioner Richard Evans submitted motions for rehearing on both titles. The Title Board considered the motions on April 2, 2014, granted them in part and set the titles. Petitioner filed his now-consolidated appeals shortly thereafter.

III. Statement of the facts

#80 and #81 both seek to amend Article XVIII of the Colorado Constitution by adding Section 17.

- #80 would allow for video lottery terminals at: 1) horse racetracks in Arapahoe, Mesa, and Pueblo Counties, and 2) licensed limited gaming establishments in Central City, Black Hawk, and Cripple Creek.
- #81 would allow for the expansion of horse racetrack limited gaming at yet-to-be designated locations in Arapahoe, Mesa, and Pueblo Counties. As defined by the initiative, horse racetrack limited gaming includes horse racing and other types of gaming like slot machines, roulette, and card games.

Both measures include a declaration that they seek "to improve the education of children in Colorado public schools by providing additional revenue." To further this stated goal, the measures also direct the relevant regulatory body to, in the case of #80, "implement the use of video lottery terminals at exclusive locations," and for #81, "expand

limited gaming in the State of Colorado by implementing horse racetrack limited gaming[.]"

Both measures also provide for taxation of proceeds and distribution of those collected taxes to a newly created K-12 Education Fund and to the host communities. They then go on to define key terms and outline the general conditions under which the expansion would take place and the manner in which any taxable proceeds are to be distributed.

The titles set by the Title Board mirror the text and structure of # 80 and #81. The titles start with the TABOR-mandated reference to a tax increase: $107,600,000 for #80 and $120,700,000 for #81. They then inform voters of the purpose of the measure: an increase in K-12 funding to be paid for by the levy of taxes on newly authorized limited gaming.

IV. Summary of the argument

The titles and submission clause meet the clear title standards established by this Court. They fairly and accurately set forth the major elements of the measure.

V. Argument

A. Standard of review

The titles must clearly express the single subject of the proposal. The language of the titles cannot obscure the meaning of the measure. The titles must enable all citizens, whether familiar or unfamiliar with the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45,* 234 P.3d 642, 648 (Colo. 2010) (*#45*). The Title Board must "consider the confusion that might be caused by misleading titles" and "avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." § 1-40-106(3)(a), C.R.S. (2013). Ballot titles shall be brief. *Id.* The title need not discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance,* 877 P.2d 311, 314, 315 (Colo. 1994) ("*Political Finance*").

The Court has set forth the following directive for ballot titles:

> We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major

> elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal but need not include every detail.

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 4 P.3d 213, 222 (2002*)* (*#21and #22*).

When the Court reviews a challenge to the clear title requirement of a ballot title setting, it employs all legitimate presumptions in favor of the propriety of the Board's decision. *#45*, 234 P.3d at 645. The Court will examine the text to determine whether the titles and submission clause are consistent with the standards established in statute. The Court will not determine the efficacy, construction or future application of the proposal, if passed. *Id.*

The Court has recognized that the Title Board has the difficult task of balancing the competing interests of the proponents against concerns raised by opponents and other members of the public. *In re Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives Nos. 67, 68 and 69*, 2013 CO 1, 293 P.3d 551, 554 (Colo. 2013). The Title Board's decisions are presumptively valid. The Title

Board has considerable discretion in setting ballot titles. The Court does not demand that the Title Board set the best possible titles. It will reverse the Title Board's action only if the titles are insufficient, unfair or misleading. *In re Ballot Title 2011-2012 No. 45,* 2012 CO 26, 274 P.3d 576, 582 (2012) (*#45*).

B. The title board set clear titles.

i. Summary of #80

#80 was unofficially captioned by legislative staff as "Proceeds from Video Lottery Terminals for K-12 Education." That caption reflects two key provisions that are outlined in more detail in the ballot title: establishment of the K-12 education fund, to be paid for by the implementation of electronic gaming machines in several locations around the state. Among other things, the initiative identifies those locations by county or municipality, the type of gaming that will be permitted there (video lottery terminals), and how the proceeds from tax revenues are to be distributed. The initiative defines key terms, indicates the projected amount of tax to be collected, and provides for oversight by the host community and state gaming officials.

ii. Summary of #81

#81 was unofficially captioned by legislative staff as "Horse Racetrack Limited Gaming Proceeds for K-12 Education." That caption reflects two key provisions that are outlined in more detail in the ballot title: establishment of the K-12 education fund, to be paid for by the implementation of horse racetracks in several locations around the state. Among other things, the initiative identifies those locations by county or municipality, the type of gaming that will be permitted there (video lottery terminals), and how the proceeds from tax revenues are to be distributed. The initiative defines key terms, indicates the projected amount of tax to be collected, and provides for oversight by the host community and state gaming officials.

iii. The titles mirror the major elements of #80 and #81.

The titles set by the Title Board follow the format required by this Court in *#21 and #22,* 4 P.3d 213. The titles begin with a clear summary of the measures, explaining that they seek to increase state tax collection by imposing a new tax on "net proceeds from on-site electronic gaming in part to increase funding for K-12 education" in the

case of #80, and on "authorized horse racetracks' adjusted gross proceeds from limited gaming in part to increase funding for K-12 education," in the title for #81. Both titles go on to specify that their passage would involve amendment of the Colorado Constitution to permit qualified horse racetracks in Arapahoe, Pueblo, and Mesa Counties. #80 also specifies that "electronic game machines" will be permitted at those locations as well as in "limited gaming establishments in Cripple Creek, Black Hawk, and Central City." Both titles outline the general distribution of tax revenues between the K-12 education fund, administrative overhead for the state, and the host communities.

C. The validity of the titles should be affirmed.

Petitioner raises seven very similar challenges to the titles in each of the two consolidated Petitions for Review. These challenges are addressed in order below.

i. The titles do not use political slogans or catchphrases.

Petitioners first assert that the phrases "to increase K-12 education" and "allocating approximately 95 percent"[1] are both "political statements that do not accurately or fairly inform voters of the actual wording and intent of the measure." *Pets. for Review* at 4. However, neither title actually contains the first phrase that Petitioner identifies as problematic. Rather, the language at issue is "to increase funding for K-12 education."

In any event, neither the "K-12 education" nor the "allocation" language runs afoul of this Court's admonition to avoid "words that work in favor of a proposal without contributing to voter understanding." *#45*, 234 P.3d at 649. The purpose of this rule "is to prevent prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and to avoid distracting voters from consideration of the proposed initiative's merits." *Id.* Use of "a descriptive term that straight-forwardly presents the issue to voters" is

[1] The challenged language of the two titles is identical except for the exact allocation. #80 allocates approximately 95%. #81 allocates approximately 94%.

acceptable, but "catch phrases" or "slogans" are not. *Id.* Petitioner bears the burden of language included in the title amounts to a "catch phrase" or "slogan." *Id.* at 650.

Both phrases – "to increase funding for K-12 education" and "allocating approximately 95 [or 94] percent" – are entirely descriptive; neither one is the sort of "brief, striking phrase[ ] designed for use in advertising or promotion" that this Court has held creates the potential for "distracting voters from consideration of the proposed initiative's merits." *Id.* at 649. They are entirely different in character from the few phrases that this Court has invalidated as sloganeering. *See id.* at 653 (Mullarkey, CJ, concurring in part and dissenting in part) (collecting cases). They do not contain "value judgment[s]." *Id.*

Moreover, both statements accurately reflect the provisions of the underlying initiatives. The titles make clear that only a portion of the tax proceeds will go to the K-12 education fund. They both specifically state that the taxes shall be imposed and the net proceeds shall be used *"in part* to increase funding for K-12 education." (emphasis added). The titles provide additional clarity by explaining that the tax revenues

will be split between administrative overhead, the K-12 education fund, and payments to the host communities. As explained in more detail *infra*, the ballot title need not break down the precise allocations of these tax revenues in order to pass muster.

Accordingly, this Court should reject Petitioner's assertion that the challenged language amounts to an impermissible "political statement" or that it fails to accurately or fairly inform voters of the actual wording and intent of the measures.

ii. The reference to "approximately 95 [or 94] percent" will not mislead voters.

Petitioner next argues that:

- For #80, "[t]he combination of the total tax increase of [$107,600,000][2] and the 'approximately 95 percent' estimate will mislead voters into thinking that K-12

[2] It appears that the two petitions inadvertently confuse the estimated tax increase contained in each title. #80 estimates a total tax increase of $107,600,000; #81 estimates a total tax increase of $120,700,000. The petitions, however, incorrectly identify #80 as having a tax increase of $120,700,000 and #81 as having a tax increase of $107,600,000.

education will benefit from 95 percent of the total tax increase."

- For #81, "[t]he combination of the total tax increase of [$120,700,000] and the 'approximately 94 percent' estimate will mislead voters into thinking that K-12 education will benefit from 94 percent of the total tax increase."

This Court affords substantial deference to the Title Board's choice of language. "Only when language used by the board is clearly misleading will this court revise the board's action." *In re Proposed Initiative Concerning State Personnel System,* 691 P.2d 1121, 1125 (Colo. 1990). The summary is "not intended to fully educate people on all aspects of the proposed law, and it need not set out in detail every aspect of the initiative." *In re Proposed Initiative Under the Designation "Tax Reform,"* 797 P.2d 1283, 1289 (Colo. 1990).

Here, Petitioner's concern appears to be that voters will misunderstand the apportionment of new tax revenues in the event that the measures pass.

- Section 8(a) of #80 establishes a tax rate of 39% on "net VLT proceeds." Thirty-seven percent of net VLT proceeds are to be deposited into the K-12 education fund. § 8(a)(I). Two percent of net VLT proceeds are to be distributed to the host community. § 8(a)(2). The title presents the same information in a more accessible way to the average voter by indicating that approximately 95%[3] of the new tax revenues – projected to be $107.6 million in the first year – will go toward the K-12 education fund. This approach is far less confusing, not to mention much more concise, than would be an attempt to describe the required distributions of net VLT proceeds as a percentage of the whole.
- Likewise, § 5(B) of #81 establishes a tax rate of 36% on "adjusted gross proceeds of horse racetrack limited gaming." Thirty-four percent of such adjusted gross proceeds are to be deposited into the K-12 education fund. § 5(B)(I). Two percent of adjusted gross proceeds are to be distributed to

[3] The more precise figure would be 94.9%. 37/39 = .9487.

the host community. § 5(B)(II). The title presents the same information in a more accessible way to the average voter by indicating that approximately 94%[4] of the new tax revenues – projected to be $120.7 million in the first year – will go toward the K-12 education fund.

Petitioner may also assert that the reference to "approximately 95 [or 94] percent" does not adequately reflect the fact that the costs of administering the program are borne by the fund itself. But the language of the initiative makes clear that the K-12 education fund is the source of money for its own administrative expenses. Section 9(b) provides that "[t]he state treasurer shall pay form the moneys in the K-12 education fund all necessary expenses of the commission and the division related to the administration of the use of video lottery terminals." The titles accurately reflect this allocation by stating that the fund goes to "pay the state's administrative expenses and to be distributed to school districts and the charter school institute for local K-12 education[.]" Neither the initiatives nor the titles precisely breaks

[4] The more precise figure would be 94.4%. 34/36 = .9444.

down the distribution. Nonetheless, the title does make clear that approximately 95% (or 94%) of the new tax revenues will be allocated to the K-12 education fund, and that the administrative expenses associated with running that fund will be drawn directly from it.

For these reasons, the titles' references to "approximately 95 percent" (in #80) and "approximately 94 percent" (in #81) are not misleading and should be affirmed.

iii. The locations of the proposed expansion are adequately disclosed in the title.

As originally set by the Title Board on March 19, 2014, the titles for #80 and #81 contained no references at all to the specific locations of the proposed gaming expansion. Instead, they simply stated that the measure would "amend[ ] the Colorado Constitution to," under #80 "permit video lottery terminals to be operated in specified limited locations," and under #81, "permit limited gaming at specified horse racetracks in addition to existing pari-mutuel wagering[.]" *See Pets. for Rehearing* at 1. Petitioner sought rehearing on this lack of specificity for both measures. For # 80, he complained that "[t]he title simply

refers to 'specified limited locations' and omits any reference to existing gaming towns and three named counties to which this form of gaming will expand: Arapahoe, Mesa, and Pueblo." *Pet. for Rehearing (#80)* at 2. For #81, he asserted that "[t]he title omits any reference to [the] fact that the measure places the three racetrack casinos in three named counties: Arapahoe, Mesa, and Pueblo." *Pet. for Rehearing (#81)* a 2.

The Title Board agreed with this portion of Petitioner's request for rehearing and amended the titles to include specific references to the locations of the proposed expansion. Nonetheless, Petitioner now asserts that the description of the expansion is insufficient because it "is hidden between the title's references to education funding which is, at beast, a by-product of this gambling expansion." *Pets. for Review* at 4. In other words, Petitioner appears to be asserting that the titles are structured in a misleading fashion because they allegedly do not place enough emphasis on the source of money for the K-12 education fund.

In the Matter of the Proposed Initiated Constitutional Amendment Concerning limited Gaming in the City of Antonito, 873 P.2d 733, 742 (Colo. 1994), this Court held that "[a]lthough we have stated that the

subject matters of a title can be arranged in any order, even randomly, whatever arrangements the Board selects cannot be misleading." (internal citation omitted). In *Antonito*, the initiative had "two distinct parts," one that would "authorize limited gaming in Antonito," and one that would "effect far-reaching changes in all other areas in which limited gaming is lawful[.]" *Id.* This Court struck down the title because "the provisions having statewide effect are buried between references to Antonito so that a voter quickly scanning the Initiative could be misled into believe that the measure only concerns limited gaming in Antonito." *Id.*

Antonito was decided before Colorado's enactment of the single-subject rule for ballot initiatives, *see* § 1-40-106.5, C.R.S. (2013), and plainly covered multiple subjects – expansion of limited gaming in the town of Antonito, along with new rules for gaming statewide that would be enacted regardless of whether Antonito itself approved the expansion. Thus, the initiative "pose[d] the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious

provision coiled up in the folds of a complex initiative." *Kemper v. Hamilton (2007-2008, #17*), 172 P.3d 871, 875 (Colo. 2007).

Here, by contrast, #80 and #81 have not been challenged on single-subject grounds. The Title Board's organization of the titles therefore poses little risk that the voters will not understand the ramifications of the measure. This becomes all the more clear from a review of the titles themselves. Irrespective of the order in which the titles explains what the measures do, the expansion of gaming figures prominently throughout both titles, which details where the expansion may take place and the types of activities that will be permitted. Given the "great deference" accorded to the Title Board "in the exercise of its drafting authority," *#45,* 274 P.3d at 582, the organization of the titles for #80 and #81 pass muster and Petitioner's argument should be rejected.

iv. The titles need not identify the specific tax rate.

Petitioner next argues that the titles should be invalidated because each title "omits any reference to the new tax and actual tax rate[.]" *Pets. for Review* at 4. The petition for review of #81 adds that

the title also omits "the fact that the track operator retains sixty-one percent of the net proceeds."[5] *Pet. for Review* (#81) at 4. However, nowhere in TABOR is there a requirement that the title identify the "actual tax rate." Instead, Colo. Const. art. X, § 20(3)(c), requires only that a ballot title for a statewide tax increase to being by stating "SHALL STATE TAXES BE INCREASED (first, or if phased in, final full fiscal year dollar increase) ANNUALLY…?" That is precisely the statement that the titles for #80 and #81 contain.

Nor is either title's lack of reference to the actual tax rate likely to matter to any voters. The tax will not be imposed directly on the citizens who vote for or against the measure, but instead on the "net VLT proceeds" or "adjusted gross proceeds" of the corporations that will run any new gaming facilities. Given that context, the actual amount of money projected to be raised by the measure is far more important than

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[5] #81's Petition for Review incorrectly states the tax rate, the percentage retained by the racetrack operator, and the fact that the operator retains a percentage of "adjusted gross proceeds." Under § 5(b) of #81, the total tax rate on adjusted gross proceeds is 36% and not, as the petition states, 39%. Consequently, the racetrack operator would retain 64% and not, as the petition states, 61% of those proceeds. And finally, #81 references "adjusted gross proceeds" and not, as the petition states, "net proceeds."

the precise tax rates that will be applied to reach that amount. The titles' omission of the precise tax rates is thus not misleading.

v. The titles are not misleading due to the failure to specifically identify the number of gaming devices authorized by the measure, the potential hours of operation, or the necessity of local voter approval.

Petitioner's last three arguments in each petition identify three provisions that appear in the language of the measures, but not in the title: 1) the requirement of authorization for at least 2,500 gaming devices in the specified exclusive locations (#80, §4(a); #81 §4(B)); 2) the possibility that gaming locations could be open for 24 hours per day (#80, §5(a); #81 § 4(D)); and 3) the necessity of local approval by a "host community" before operations may begin (#80, §2(e); #81, §2(e)).

As this Court held in *Political Finance,* 877 P.2d at 314, the title need not discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. To the contrary, "[i]t is well-established that the titles and summary need not spell out every detail of a proposed

initiative in order to convey its meaning accurately and fairly." *Howes v. Hayes (1997-1998, #74),* 962 P.2d 927, 930 (Colo. 1998). This is because "the point of the titles is to identify the proposal succinctly." *Id.*

Here, the precise number of gambling machines, the potential hours of operation, and the necessity of acquiring local permitting and approvals before the commencement of operations are, at best, peripheral to the core of the proposed constitutional change. The key information for a voter considering whether to support #80 and/or #81 is that they will impose taxes on expanded limited gaming, and that taxes collected will go primarily toward the newly established K-12 education fund. The precise operational details of this proposal are simply not material to a voter's decision on these points. As such, the Title Board acted within its discretion when it decided to omit this information from the title. Petitioner's claim should be rejected.

CONCLUSION

Based on the foregoing reasoning and authorities, the Title Board respectfully requests that this Court approve the titles for #80 and #81.

Respectfully submitted this 29th day of April, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on April 29, 2014, I duly served this **OPENING BRIEF** on all parties via ICCES or electronic mail, addressed as follows:

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