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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue 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 #134 (14SA141) and #135 (14SA160) (Consolidated) **Petitioner:** Richard Evans, v. **Respondents:** Vickie L. Armstrong and Bob Hagedorn, and **Title Board:** Suzanne Staiert, David Blake, and Sharon Eubanks.	▲ COURT USE ONLY ▲ Case No. 2014SA141 and 2014SA160

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RESPONDENTS' ANSWER 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).

It does not exceed 30 pages.

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

It contains, under a separate heading, a statement of whether the parties responding to the issue agree with the opponents' statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32.

/s/ Douglas L. Abbott
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Respondents, Vickie L. Armstrong and Bob Hagedorn ("Respondents"), respectfully submit this answer brief in support of the titles, ballot titles, and submission clauses (the "Titles") that the Title Board set for proposed initiative 2013-2014 #134 ("Initiative #134") and for proposed initiative 2013-2014 #135 ("Initiative #135) (jointly, the "Proposed Initiatives"). This brief responds to both Petitioner's opening brief and the brief of the City of Black Hawk as *amicus curiae* ("Black Hawk").

SUMMARY OF THE ARGUMENT

Petitioner and Black Hawk have failed to meet their burden of establishing that the Title Board lacked jurisdiction to set the Titles, or that the Title Board erred by adopting misleading Titles. Each Title contains a single, integrated subject, which is raising funds for public K-12 education through a tax on New Gaming[1] at horse racetracks. That single subject does not become two simply because the revenue source (New Gaming) and beneficiary (K-12 education) may fall within different categories. The Court has regularly upheld the Title Board's jurisdiction in the face of such a challenge.

With respect to the five challenges to the Titles' language, the Court has now rejected the identical challenges to the Titles for Initiatives #80 and #81, the

[1] As defined in Respondents' Opening Brief, "New Gaming" is a collective reference to the video lottery terminals that would be permitted under Initiative #134, and the limited gaming that would be permitted under Initiative #135.

predecessor measures to the Proposed Initiatives, and has affirmed the Title Board in all respects. *In re Title, Ballot Title & Submission Clause for 2013-2014 #80 & #81*, No. 2014SA106 and No. 2014SA99 (Colo. May 22, 2014) (the "#80/#81 Order"). For the same reasons that the Court rejected Petitioner's challenges in the #80/#81 Order, the Court should reject those same challenges to the Titles, as well. The order of the language in the Titles is not misleading, the number of authorized machines, hours of operation, and tax rate are not central features required to appear in the Titles, and the Title Board was not required to include language concerning a local vote in the Titles because the Proposed Initiatives themselves do not address that subject.

STANDARD OF REVIEW

Respondents agree with Petitioners concerning the standard of review. In addition, Respondents incorporate by reference the Standard of Review section of their Opening Brief. *See* Respondents' Opening Brief ("Resps.' Br.") 6-9.

ARGUMENT

I. Each Proposed Initiative Contains a Single Subject.

Petitioner asserts that this Court has only twice addressed whether an initiative that provides revenue for programs unrelated to the funding source violates the single subject requirement. Petitioner's Opening Brief ("Pet.'s Br.") 7. Petitioner further contends that these two cases establish that there "is a single

subject problem" unless a "unifying thread exists between the source of the money and the use of the money." *Id.* at 8. Neither assertion is correct.

First, as discussed in Respondent's Opening Brief, this Court has addressed single subject challenges of this nature on a number of occasions, and has consistently upheld the actions of the Title Board without comment where an initiative provides funds to programs unrelated to the source of the new revenue. *See* Resps.' Br. 7-8. For example, proposed initiatives creating an oil and gas severance tax involved a single subject even where the tax would be used for a variety of purposes having nothing to do with oil and gas or any other aspect of energy exploration or development. *In re Title, Ballot Title & Submission Clause for 2007-2008 #113*, No. 08SA198 (Colo. June 26, 2008) (state university scholarships); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #14*, No. 07SA155 (Colo. June 28, 2007) (education and school construction); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #13*, No. 07SA154 (Colo. June 28, 2007) (distribution at discretion of the General Assembly).

This Court's action in those instances is consistent with the rule that it has applied to legislation for decades. Statutes that increase fees on activities such as motor vehicle registration, and allocate those fees to unrelated purposes, such as old age pensions, do not violate the single subject rule. *Hughes v. State (In re*

Hunters Estate), 49 P.2d 1009, 1012 (Colo. 1935). The Court's decisions regarding the single subject requirement applicable to legislation apply equally when construing initiatives. COLO. CONST. art. V, § 21; C.R.S. §1-40-106.5(3) (2013). Therefore, *Hughes* expressly defeats Petitioner's position.

The two cases on which Petitioner relies are not to the contrary. At the outset, Petitioner misstates the holding in *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071 (Colo. 2010). That decision did not turn on the similarity or dissimilarity between the funding source and the program beneficiaries of the new revenue. The proposed initiative imposed fees on beverage containers, which fees were to be principally allocated to Colorado's nine basin roundtables and the Interbasin Compact Committee for various water allocation activities; it also prohibited the General Assembly from passing any legislation limiting the authority of the basin roundtables and Interbasin Compact Committee for a period of four years, and vested those bodies with significant new authority. *Id*. at 1074-75.

The ruling that the measure had two subjects had nothing to do with whether a beverage container tax and the operation of the basin roundtables are substantially similar or different subject areas. Rather, the two subjects were: (1) the collection and administration of the container tax, and (2) negating "the power of the General Assembly to exercise legislative supervision over the basin

roundtables and the interbasin compact committee." *Id*. at 1077. Applying the standard legal principles applicable to the single subject requirement, the Court found that *those two subjects* "are not necessarily and properly connected." *Id*. at 1079. The case is irrelevant to whether there must be a subject matter connection between a funding source and the fund recipients.

Nor does Petitioner's other authority, *Rice v. Brandon (In re Ballot Title & Submission Clause,& Summ. for 1997-1998 #105)*, 961 P.2d 1092 (Colo. 1998) (en banc), establish the rule that Petitioner asserts. There, the measure assessed fees for groundwater pumped from beneath state trust lands, and allocated those fees to public schools. *Id.* at 1096. In finding a single subject, the Court identified "a unifying thread" between "[t]he theme of the purpose of the state trust lands [which were given to the state for educational purposes] and the educational recipients[.]" *Id.*

Rice does not hold, as Petitioner suggests, that such a "unifying thread" is a prerequisite for finding a single subject, and that the absence of a unifying thread is a "single subject problem." Pet.'s Br. 8. Indeed, the Court did not engage in a lengthy discussion of the application of the single subject requirement to those facts, nor did it suggest that the subject matter of the funding source and the beneficiaries must be connected in other cases. Of course, that requirement would be contrary to *Hughes*, which makes clear that legislation providing for application

of funds to a particular purpose (here, K-12 education) does not contain multiple subjects merely because it also provides for the raising of such funds (here, through a tax on New Gaming):

> Reference to the title of the act discloses clearly, and without doubt, one distinct subject. That is to provide funds. *Whatever means, if one or more, that may be resorted to for carrying out the object, other subjects are not thereby added.* The ways designated are germane to the purpose, and are therefore incident to and within the title.

49 P.2d at 1012 (emphasis added). Moreover, the so-called "unifying thread" requirement in *Rice* also would conflict with the Court's more recent decisions repeatedly upholding the Title Board's jurisdiction against single-subject challenges, even absent any connection between the funding source and the beneficiary program. *See supra* at p. 3; Resps.' Br. 7-8.

Petitioner might try to argue that *Hughes* permits a measure to impose a new tax on an existing program that is unrelated to the beneficiaries of the tax, but that it does not permit a measure also to create a new program to be taxed, as the Proposed Initiatives do. The emphasized quoted language in *Hughes* rules out any such suggestion, however. The Court made clear that including in legislation (or in initiated amendments to the Colorado constitution) "*one or more*" "means . . . that may be resorted to for carrying out the [funding] object" does not raise single subject issues. Thus, under *Hughes*, an initiative may impose a new tax on an

existing program ("one . . . means") or it may impose a new tax on a newly created program ("more [than one] means"). In either case, "other subjects are not thereby added" because "[t]he ways designated are germane to the purpose[.]" 49 P.2d at 1012.

Applying a single subject standard essentially identical to that of Colorado, the Florida Supreme Court has repeatedly rejected the same argument that Petitioner advances here – that an initiative inappropriately "logrolls" approval of slot machines at racetracks and allocation of taxes to education. *Advisory Op. to the Att'y Gen. re Authorizes Miami –Dade and Broward Cnty. Voters to Approve Slot Machines in Parimutuel Facilities*, 880 So. 2d 522, 523-25 (Fla. 2004); *Advisory Op. to the Att'y Gen. re Authorization for Cnty. Voters to Approve or Disapprove Slot Machines Within Existing Pari-Mutuel Facilities*, 813 So. 2d 98, 101 (Fla. 2002) (initiative approving slot machines and tax revenue for education programs, classroom construction, and teachers' salaries "not problematic"); *Carroll v. Firestone*, 497 So. 2d 1204, 1206 (Fla. 1986); *Floridians Against Casino Takeover v. Let's Help Florida*, 363 So. 2d 337, 340 (Fla. 1978), *receded from on other grounds*, *Fine v. Firestone*, 448 So. 2d 984, 990 (Fla. 1984) (allocation of taxes to public schools and local law enforcement is "part and parcel of the single subject of legalized casino gambling").

In short, the revenue generated from New Gaming and the allocation of that revenue to education are two sides of the same coin and necessarily interrelated. Nothing is buried in the folds of the Proposed Initiatives or hidden from the voters. Both the Proposed Initiatives and the Titles clearly set forth how those features are dependent on each other. Resps.' Br. 10-11.

II. The Challenges to the Language of the Titles Lack Merit.

Under the deferential standard of review applicable to the Title Board's setting of titles, the Court should reject Petitioner's and Black Hawk's challenges to the Titles, just as it has now done regarding the same challenges to Initiatives #80 and # 81. *See* #80/#81 Order. As with those predecessor titles, the Titles here address all major elements of the Proposed Initiatives and correctly and fairly express the true intent and meaning of the Proposed Initiatives. This Court should therefore affirm the Title Board's decisions.

A. The Sequence of the Language in the Titles Is Neither Misleading Nor Confusing.

Petitioner asserts that Respondents made a "recent admission" that they manipulated the language of the Titles to emphasize education funding, and to draw attention away from the expansion of gaming. According to Petitioner, Respondents accomplished this goal by urging the insertion of references to education funding at the beginning and the end of both Titles. Pet.'s. Br. 1, 5-6, 11-13.

As a threshold matter, this argument presumes that education tax measures are more attractive to voters than gaming measures. But that presumption is fallacious. Since the passage of Amendment 23 in 2000, every statewide measure to increase tax revenues for public education, save one, has failed at the polls. *See* Referendum D (2005); Amendment 58 (2008); Amendment 59 (2008); Amendment 60 (2010); Proposition 103 (2011); and Amendment 66 (2013); Colorado Secretary of State, *Election Results Archive*, https://www.sos.state.co.us/pubs/elections/Results/Archives.html (last visited May 28, 2014). The lone exception is Amendment 50, the 2008 expansion of limited gaming that dedicated some of the increased revenue to education (yet had a single subject). Thus, Petitioner's premise – that there is an advantage to emphasizing education over gaming – is dubious at best.

In any event, Petitioner mischaracterizes what occurred at the Title Board rehearing by relying on selective quotes from transcripts concerning two different sets of companion measures – Initiatives #80 and #81 and the Proposed Initiatives. Pet.'s Br. 12-13. The transcripts read in context establish that the motivation for the language adopted by the Title Board was precisely what the law requires – to achieve clear and accurate titles that express the true intent and purpose of the measures. *See, e.g.*, *In re Title, Ballot Title & Submission Clause & Summ. for 1999-2000 #227 & #228*, 3 P.3d 1, 5 (Colo. 2000) (en banc) (Title Board may

consider proponents' statements in determining how best to describe the true intent and meaning of a proposed measure).

At the April 2, 2014 rehearing on Initiative #80, Respondents made clear that their intention in proposing both Initiatives #80 and #81 was to increase education funding. Pet.'s Br., Ex. 1 at 9-11, 46-47 (comments applied to both measures, *see Id*. at 9). Therefore, they suggested insertion of the reference to education funding near the beginning of the titles for both Initiative #80 and Initiative #81 because, otherwise, the as-revised version of those draft titles would not mention education until the end, as if it were merely incidental to New Gaming. *Id.* The Title Board agreed to the insertion of that reference closer to the beginning of the titles for Initiatives #80 and #81. *Id*. at 55-56. The Title Board carried that language over to the Titles.

The second reference to education funding, near the end of the Titles, came about during the April 24, 2014 rehearing on the Proposed Initiatives. That language was moved back in the Titles because it more logically described the progression of the key features of the Proposed Initiatives: the imposition of a new tax, using language required by TABOR; the creation of New Gaming to raise revenue; and the distribution of the revenue to K-12 education. Pet.'s Br., Ex. 2 at 13-15.

The end results do not obscure the creation of New Gaming between references to education. Both Titles mention horse racetracks and gaming at their start (immediately following the mandatory TABOR language), and the words describing gaming predominate over the two brief references to education funding. No voter could read either Title and miss the fact that gaming is a central feature that operates in concert with education funding.

Petitioner's reliance on *In re Title, Ballot Title & Submission Clause Concerning Ltd. Gaming in the City of Antonito*, 873 P.2d 733 (Colo. 1994), is misplaced. *City of Antonito* predates the 1994 adoption of the single subject requirement for initiatives. The case involved the proper ordering of indisputably separate subjects: authorizing limited gaming in Antonito and implementing significant changes to limited gaming statewide. *Id*. at 736-37. Here, the Proposed Initiatives address only one subject with two interrelated components, each of which the Titles clearly express.

Moreover, the language of the title in *City of Antonito* was significantly different than the Titles of the Proposed Initiatives. The entire title related to gaming – (a) permitting limited gaming in Antonito; and (b) making various changes to the regulation of limited gaming statewide, including the addition of craps and roulette as authorized games, and changing the maximum tax rate on limited gaming proceeds. *Id*. at 736-37, 40. For this reason, a voter could easily

miss the transitions between the distinct subjects and "be mislead into believing that the measure only concerns limited gaming in Antonito." *Id*. at 742. No such risk exits with the Proposed Initiatives. Although descriptive of a single, interconnected subject, the references to education and gaming are distinct, and so the sequence of the language will not confuse or mislead voters. And so long as the Titles are not misleading, *City of Antonito* does not mandate any particular arrangement of the Titles. *Id*. The Titles at issue here are not misleading and there is no basis for reversing the order of the information that the Title Board, in its discretion, deemed logical and appropriate.

B. Ballot Titles Are Not Required to Include a Reference to the Tax Rate.

Petitioner concedes that "TABOR does not mandate use of the tax rate imposed in a ballot title," but nonetheless argues that there should be such a rule. Pet.'s Br. 15. However, as explained in Respondent's Opening Brief, TABOR requires only that the Titles include the *amount* of the tax increase in the first fiscal year, and not the tax rate. S*ee, e.g.*, *Bickel v. City of Boulder*, 885 P.2d 215, 235-37 (Colo. 1994) (en banc). Resps.' Br. 12-13. The Titles satisfy this requirement.

Moreover, Petitioner does not explain what additional information voters would glean from a tax rate that would be more informative than the amount of the tax increase under each Proposed Initiative, which appears in the first line of each Title ($102,100,000 under Initiative #134 and $114,500,000 under Initiative #135).

Petitioner simply asserts, without explanation or substantiation, that the tax rate would be "critical to voters" consideration of the measure, and would allow voters to assess "its reliability," whatever that may mean. Pet.'s Br. 15.

The requirement that Petitioner wishes to impose on the Titles simply is not required. The tax rates are clearly specified in the body of each Proposed Initiative, but, for purposes of the Titles, stating the amount of tax revenue to be generated fully complies with the law and provides voters with adequate information to make informed decisions.

C. The Titles Were Not Required to Specify the Number of Authorized Slot Machines.

Both Petitioner and Black Hawk persist in misconstruing the Proposed Initiatives when they argue that the Titles must disclose the number of slot machines that may be placed at an approved location. Petitioner incorrectly asserts that "no fewer than 2,500 slot machines can be placed at a racetrack" and that the Proposed Initiatives "guarantee" at least that number. Pet.'s Br. 15-16. Similarly, Black Hawk interprets the Proposed Initiatives as having a "numeric requirement" of "no fewer than 2,500 gaming devices." Black Hawk's Brief ("Black Hawk Br.") 9. This foundational premise is wrong, as explained in Respondents' Opening Brief. Resps.' Br. 14-15. The Proposed Initiatives require the approval or authorization of *up to 2,500 slot machines*, but neither Proposed Initiative requires that any facility actually install that number. Resps.' Br. 14-15.

Petitioner and Black Hawk argue that the 2,500 number is significant because it would be 30% of the number of gaming devices in Black Hawk (8,437), and more than the total number in Central City (2,176). Pet.'s Br. 16; Black Hawk Br. 10. Black Hawk, of course, is adjacent to Central City, so, based on Petitioner's and Black Hawk's numbers, there are approximately 10,600 slot machines in that small geographic area. In contrast, the Proposed Initiatives would approve up to 2,500 machines in an entire county. Black Hawk insists it is critical for voters to be informed of this number, despite the fact that the amendment that allowed slot machines in Black Hawk contains no numerical limit at all. *See* COLO. CONST. art. XVIII, § 9.

Petitioner also notes that the Proposed Initiatives permit a larger number of devices to be approved if the licensing authority determines that it will maximize revenue to the education fund. Petitioner then speculates that a casino in Colorado could grow to the size of a casino in Rhode Island, and speculates further about the local impacts of a facility of that size. Pet.'s Br. at 16-17.

All of this speculation does not warrant including these numbers in the Titles. An approved facility might never operate 2,500 machines, let alone obtain approval for a greater number. The number of approved machines is an implementation detail, and is not a central feature that is required to be included in

the Titles. Resps.' Br. 15-16. The Court should defer to the Title Board's discretion and uphold the Title Board's decision to keep the Titles concise.

D. The Title Board Reasonably Omitted from the Titles Reference to Provisions Related to Hours of Operation.

Both Petitioner and Black Hawk insist that the Titles are misleading because they omit the fact that hours of operation can be increased from 18 to 24 hours per day. Petitioner alleges, without elaboration or support, that voters need to know that the likely impact of these measures would be "very different" because the approved racetracks would be located in three of the more populated counties, whereas Black Hawk speculates about such details as increased traffic and roadway deterioration resulting from increasing daily operations by six hours. Pet.'s Br. 18; Black Hawk Br. 8. Additionally, Black Hawk argues that hours of operation can be expanded without local voter approval. Black Hawk Br. 7-8. None of these arguments has merit.

With regard to voter approval, the analysis is the same regardless of whether it is limited to approval of one aspect of operations, or the approval of New Gaming in general. *See S*ection II.E., *infra*. With regard to hours of operation, the Title Board reasonably omitted such operational details as described in Respondents' Opening Brief. Resps.' Br. 16-18.

E. The Title Board Correctly Omitted from the Titles Discussion of a Second Vote that Does Not Appear in the Proposed Intitatves.

Petitioner and Black Hawk argue that the Titles are deficient because they do not disclose that a second vote is not required to authorize New Gaming. Black Hawk focuses on the alleged impacts of gaming, whereas Petitioner focuses on wording changes between the Proposed Initiatives, and Initiatives #80 and #81, and the addition of clauses that state, "[n]otwithstanding any other law or constitutional provision to the contrary. . . ." Pet.'s Br. 19-22; Black Hawk Br. 3-6. Petitioner goes a step further, arguing that, because Proposed Initiative #134 defines video lottery terminals to include "virtual slot machines and table games," voters will believe that the measure relates to existing limited gaming, and will therefore conclude that it is subject to all existing rules applicable to limited gaming, including local voter approval. Pet.'s Br. 21.

Setting aside the rampant speculation that underlies all these assertions, none of the arguments changes the following truths: (1) the Proposed Initiatives say nothing about local votes; (2) Colorado law does not require a measure expanding gaming to include a local vote; and (3) the Title Board may omit from a title information that does not appear in the initiative itself and is not necessary to describe a central feature of the measure. *See* Resps.' Br. at 18. Because the Proposed Initiatives include no requirement for local voter approval, and local

approval is not a central feature of the Proposed Initiatives, it the Title Board did not need to refer to that subject in the Titles.

CONCLUSION

For the reasons stated in Respondents' Opening Brief and above, the Court should affirm the actions of the Title Board.

Respectfully submitted this 29th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby affirm that, on the 29th day of May, 2014, a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF** was sent UPS overnight delivery service to the Petitioner and his counsel and to counsel for the Title Board and the City of Blackhawk, Colorado, and by Integrated Colorado Courts E-filing System (ICCES) to counsel of record, at:

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