DATE FILED: May 29, 2014 6:00 PM

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 and #135

Petitioner:

Richard Evans,

v.

Respondents:

Vicki Armstrong and Bob Hagedorn

and

Title Board:

Suzanne Staiert, David Blake, and Sharon Eubanks

▲COURT USE ONLY▲

Case No. 2014SA141

JOHN W. SUTHERS, Attorney General
MATTHEW D. GROVE, Assistant Attorney General,
Reg. No. 34269*
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6157
FAX: 720-508-6041
E-Mail: matt.grove@state.co.us
*Counsel of Record

TITLE BOARD'S 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).

Choose one:

It contains 1,170 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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

Suzanne Staiert, David Blake, and Sharon Eubanks, as members of the Ballot Title Setting Board ("Title Board"), hereby submit their Answer Brief. The Title Board's opening brief anticipated many of the arguments that Petitioner has raised in his own opening brief. In the interest of brevity, issues that have already been thoroughly addressed will not be discussed here.

I. #134 and #135 do not violate the single-subject rule.

At the threshold, and as the Respondents' answer brief points out, the type of single-subject challenge at issue in this case has been raised repeatedly in recent election cycles. The Court has rejected this type of challenge without a written opinion on each occasion. Regardless of the outcome here, the Title Board respectfully submits that published guidance from the Court on this issue could streamline the title process and the number of issues presented on appeal in future election cycles.

Petitioner contends that the single-subject rule demands a direct connection between a ballot initiative's method of raising money and the manner in which it requires it to be spent. *Pet. Open. Br.* at 8 ("the fact that a measure raises revenue indirectly in terms of the ultimate usage of

those monies is a single subject problem unless that unifying thread exists between the source of the money and the use of the money").

As discussed in the Title Board's opening brief, this Court has previously relied on such a "unifying thread" to reject single-subject challenges. *See Rice v. Brandon (1997-1998 #105),* 961 P.2d 1092, 1095 (Colo. 1998) (state trust lands' dedication to school funding represented unifying thread for initiative that would impose fees on water diversion and commit those fees to school funding).

But while the Court held in *Rice (#105)* that a unifying thread is, standing on its own, *sufficient* to overcome a single-subject challenge to a measure that would impose a new tax and direct how it is to be spent, this Court has never held that such a direct connection is a *necessary* condition.[1] Petitioner suggests otherwise, relying on *In re Title, Ballot Title, Submission Clause for 2009-2010 #91,* 235 P.3d 1071 (Colo. 2010)

[1] It is nonetheless at least arguable that a "unifying thread" here exists. #134 and #135 provide that the money for the regulation of gambling facilities authorized by the two measures is to be allocated from the K-12 Education Fund. While that amount is likely to be a small percentage of the entire amount of new taxes collected, it does nonetheless demonstrate at least some direct nexus between the taxes collected and their allocation. Assuming *arguendo* that a unifying thread is required, the regulatory allocation should be sufficient.

(*#91).* Like the challenged initiatives here, the measure in *#91* would have specifically instructed the State Treasurer as to the distribution of new tax revenues. The majority expressed no concern about this arrangement, noting that "[i]mplementing provisions directly tied to the initiative's central focus are not separate subjects." *Id.* at 1076. Instead, the Court's invalidation of the measure on single-subject grounds focused on its juxtaposition of "a beverage container tax and its administration" with "a separate and distinct subject that would negate the power of the General Assembly to exercise legislative supervision over the basin roundtables and the interbasin compact committee[.]" *Id.* at 1077. Thus, Petitioner's arguments notwithstanding, the measure in *#91* was not stricken because it contained directions on how to spend new tax revenue. Instead, it violated the single-subject rule because, in addition to imposing the new tax, it usurped the General Assembly's authority over water law in Colorado.

#134 and #135 delineate the distribution of the new taxes that the measures impose, but they do not take the next, fatal, step that proved problematic in *#91*: arrogation of the General Assembly's regulatory

authority. Nor is there any reason to expand the holding of *#91* to cover a measure that simply creates a new tax and directs how it should be spent. To the contrary, this Court has long acknowledged that the state "has the unlimited power of taxation, not only as to the subjects of taxation, but also as to the rate, and may tax its own citizens for the prosecution of any particular business." *Parsons v. People,* 76 P. 666, 670 (Colo. 1904). Thus, in the legislative context, this Court has concluded that a tax imposed upon a narrow subject and allocated to a more general purpose does not violate the single subject rule. *In re Hunter's Estate*, 49 P.2d 1009, 1011 (Colo. 1935) (surcharge on inheritance taxes and certain fees that was allocated to old age pension fund did not violate single-subject rule).

Nor does Petitioner's argument make sense from a policy perspective. Indeed, if Petitioner's theory holds, it would not be a stretch to conclude that revenues from new taxes could only be spent on matters somehow related to the tax themselves. Thus, for example, new severance taxes collected could not be allocated to the general fund; the state would instead have to spend them on purposes related to mineral

extraction and sale. This Court has never held that there must be such a relationship between the source of tax revenues and the manner in which such revenues are spent.

II. Proponents' statements and intent are irrelevant; all that matters is whether the language of the title is objectively misleading.

In Case No. 2014SA 106, this Court affirmed the Title Board's ordering of language with respect to Initiatives #80 and #81. While there are slight differences between the titles for #80, #81, and the two initiatives at issue here, each of the titles follows the same basic structure. They begin with TABOR-mandated language and then go on to disclose the proposed expansion of gaming and associated allocation of new tax revenues. Because of the similarity in structure and language amongst all of these titles, this Court should reach the same conclusion here as it did in 2014SA 106.

Petitioner quotes statements made by the Proponents' attorney at the Title Board hearing, arguing that they amount to an "admi[ssion] that the real purpose of making this change was to give voters the message that Proponents most wanted to read where they were most

likely to read it." *Pet. Open. Br.* at 13. Taken in context, these statements do not support Petitioner's assertion that the titles were designed to hide the gambling expansion from potential petition signers.

Just as important, however, is that the Proponents' reasons for suggesting the wording of the title are irrelevant. The Title Board's responsibility is to set titles that are objectively informative to individuals who are approached by petition circulators and asked to sign. They should be reviewed by this Court under a "reasonable person" standard. A reasonable person would be expected to base his or her decision based on the language of the title itself, not on the subjective intent of the petition proponent as announced at a hearing on the language that the title should or should not include. Even assuming that Petitioner is correct about the Proponents' subjective motivations for requesting that the Title Board arrange the titles in the manner that it did, this Court should limit its analysis only to the four corners of the challenged title. It should decline Petitioner's invitation to consider the motivations of the Proponents – as expressed to the Title Board or in any other forum – under any circumstances.

III. Conclusion

Based on the reasoning and authorities herein and in its opening brief, the Title Board respectfully requests that this Court affirm the Titles for #134 and #135.

Respectfully submitted this 29th day of May, 2014.

JOHN W. SUTHERS
Attorney General

/s/ *Matthew D. Grove*
MATTHEW D. GROVE, 34269*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

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

Mark Grueskin
Heizer Paul Grueskin LLP
2401 15th Street, Suite 300
Denver, Colorado 80202
mark@rechtkornfeld.com

Marcy G. Glenn
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
E-mail:

Lino S. Lipinsky de Orlov
Amy M. Siadak, No. 43702
1400 Wewatta Street, Suite 700
Denver, Colorado 80202

William A. Hobbs, No. 7753
1745 Krameria Street
Denver, Colorado 80220

/s/ *Matthew D. Grove*