

<p>SUPREME COURT, STATE OF COLORADO  2 East 14th Avenue  Denver, CO 80203</p>	<p style="text-align: right;">DATE FILED: May 15, 2014 3:49 PM</p>
<p>Original Proceeding  Pursuant to § 1-40-107(2), C.R.S. (2013)  Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and  Submission Clause for Proposed Initiative 2013-  2014 #134 and #135</p> <p><b>14SA141</b></p> <p><b>Petitioner:</b>  Richard Evans,  v.</p> <p><b>Respondents:</b>  Vickie Armstrong and Bob Hagedorn, and</p> <p><b>Title Board:</b>  Suzanne Staiert, David Blake, and Sharon  Eubanks.</p> <p><b>14SA160</b></p> <p><b>Petitioner:</b>  Richard Evans,  v.</p> <p><b>Respondents:</b>  Vickie Armstrong and Bob Hagedorn, and</p> <p><b>Title Board:</b>  Suzanne Staiert, David Blake, and Sharon  Eubanks.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Case No. 2014SA141 and  2014SA160</p>

Lino S. Lipinsky de Orlov, No. 13339  
Amy M. Siadak, No. 43702  
McKenna Long & Aldridge LLP  
1400 Wewatta Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 634-4000  
Facsimile: (303) 634-4400  
E-mails: llipinsky@mckennalong.com  
asiadak@mckennalong.com

Marcy G. Glenn, No. 12018  
Douglas L. Abbott, No. 18683  
Holland & Hart, LLP  
555 17th Street, Suite 3200  
Denver, Colorado 80202  
Telephone: (303) 295-8000  
Facsimile: (303) 295-8261  
E-mails: mglenn@hollandhart.com  
dabbott@hollandhart.com

William A. Hobbs, No. 7753  
1745 Krameria Street  
Denver, Colorado 80220  
Telephone: (303) 345-5541  
E-mail: bill.hobbs@me.com

ATTORNEYS FOR RESPONDENTS

**RESPONDENTS' 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).

It does not exceed 30 pages.

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

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, not to an entire document, where the issue was raised and ruled on.

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*

\_\_\_\_\_  
Douglas L. Abbott

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
STATEMENT OF ISSUES .....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	2
SUMMARY OF THE ARGUMENT .....	5
STANDARD OF REVIEW .....	6
I.    The Single-Subject Requirement. ....	6
II.   Requirements for Title Language.....	8
ARGUMENT .....	9
I.    Each Proposed Initiative Contains a Single Subject. ....	9
II.   Evans’s Challenges to the Language of the Titles Lack Merit. ....	11
A.   The Sequence of the Language in the Titles Is Not Misleading.....	12
B.   The Titles Adequately Describe the New Tax Under the Taxpayer’s Bill of Rights (“TABOR”).....	13
C.   The Title Board Reasonably Omitted Reference in the Titles to the Number of Authorized Slot Machines.....	14
D.   The Title Board Reasonably Omitted from the Titles Reference to Provisions Related to Hours of Operation.....	16
E.   The Title Board Correctly Omitted from the Titles a Statement That the Proposed Initiatives Do Not Require a Second Vote Prior to Taking Effect.....	18
CONCLUSION.....	18

## TABLE OF AUTHORITIES

<u>CASES</u>	<b>Page(s)</b>
<i>Armstrong v. Davidson</i> , 10 P.3d 1278 (Colo. 2000).....	9
<i>Bickel v. City of Boulder</i> , 885 P.2d 215 (Colo. 1994).....	14
<i>Earnest v. Gorman (In re Ballot Title &amp; Submission Clause for 2009- 2010 # 45)</i> , 234 P.3d 642 (Colo. 2010).....	13
<i>Feazel v. Martinez (In re Proposed Initiative on “Trespass-Streams with Flowing Water”)</i> , 910 P.2d 21 (Colo. 1996).....	8, 16
<i>Gonzales v. Lamm (In re Ballot Title 2005-06 No. 55)</i> , 138 P.3d 273 (Colo. 2006).....	7
<i>Howes v. Hayes (In re Title, Ballot Title &amp; Submission Clause, &amp; Summ. for 1997-1998 No. 74)</i> , 962 P.2d 927 (Colo. 1998).....	8
<i>Hughes v. State (In re Hunter’s Estate)</i> , 97 Colo. 279, 49 P.2d 1009 (1935).....	7
<i>In re Proposed Initiative Bingo-Raffle Licensees</i> , 915 P.2d 1320 (Colo. 1996).....	7
<i>In re Title, Ballot Title &amp; Submission Clause, &amp; Summ. for 2007-2008 #13</i> , No. 07SA154 (Colo. June 28, 2007).....	8, 10
<i>In re Title, Ballot Title &amp; Submission Clause, &amp; Summ. for 2007-2008 #14</i> , No. 07SA155 (Colo. June 28, 2007).....	8, 10

<i>In re Title, Ballot Title &amp; Submission Clause for 2007-2008 #103,</i> No. 08SA193 (Colo. June 26, 2008).....	7, 10
<i>In re Title, Ballot Title &amp; Submission Clause for 2007-2008 #113,</i> No. 08SA198 (Colo. June 26, 2008).....	7, 10
<i>Kelley v. Tancredo (In re Proposed Ballot Initiative on Parental Rights),</i> 913 P.2d 1127 (Colo. 1996).....	6
<i>Kemper v. Hamilton (In re Title, Ballot Title, &amp; Submission Clause for 2011-2012 #3),</i> 274 P.3d 562 (Colo. 2012).....	9, 12, 16, 18
<i>Koch v. Citizens for Educ. Reform (In re Proposed Initiative on Educ. Tax Refund),</i> 823 P.2d 1353 (Colo. 1991).....	8, 9, 16, 18
<i>Outcalt v. Schuck (In re Title, Ballot Title &amp; Submission Clause, &amp; Summ. for 1997-98 #62),</i> 961 P.2d 1077 (Colo. 1998).....	16
<i>Percy v. Fielder (In re Title, Ballot Title &amp; Submission Clause, &amp; Summ. for 1999-00 #256),</i> 12 P.3d 246 (Colo. 2000).....	8, 9, 16

**STATUTES**

C.R.S. § 1-40-106 (2013).....	1
C.R.S. § 1-40-106(3)(b) (2013) .....	17
C.R.S. § 1-40-106.5 (2013).....	1, 2, 6
C.R.S. § 1-40-106.5(1)(e)(I) (2013).....	6
C.R.S. § 1-40-106.5(1)(e)(II) (2013) .....	7
C.R.S. § 1-40-106.5 (2) (2013).....	7
C.R.S. § 1-40-106.5(3) (2013).....	7

C.R.S. § 1-40-107(2) (2013).....2

**OTHER AUTHORITIES**

Colo. Const. art. V, § 1(5.5).....1, 2, 6

Colo. Const. art. V, § 21 .....7

Colo. Const. art. X, § 20(3)(c) .....13, 14

Colo. Const. art. XVIII, § 9(7).....17

Legislative Council’s Analysis of the 1990 Ballot Proposals, *available*  
*at* <http://www.law.du.edu/images/uploads/library/CLC/350.pdf>.....17

Respondents, Vickie L. Armstrong and Bob Hagedorn (“Respondents”), respectfully submit this opening 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”).

### **STATEMENT OF ISSUES**

Do the Proposed Initiatives contain a single subject in compliance with article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 (2013)?

Do the Titles correctly and fairly express the true intent and meaning of the Proposed Initiatives in compliance with C.R.S. § 1-40-106 (2013)?

### **STATEMENT OF THE CASE**

This is an appeal from the Title Board’s setting of the Titles for the Proposed Initiatives. On March 21, 2014, Proponents filed the Proposed Initiatives with the directors of the Legislative Council and the Office of Legislative Legal Services. The legislative staff provided Respondents with its review and comment memoranda for the Initiatives on April 2, 2014, and conducted the associated review and comment meetings on April 4, 2014.

Respondents revised the Proposed Initiatives in response to the staff’s comments, and filed amended versions with the Secretary of State’s office on



April 4, 2014. At hearings conducted on April 17, 2014, the Title Board found that each Proposed Initiative contains a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 (2013). The Title Board set the Titles for the Proposed Initiatives.

On April 23, 2014, Petitioner, Richard Evans (“Evans”), filed a motion for rehearing to challenge the Title Board’s jurisdiction to set the Titles on the grounds that the Proposed Initiatives contained multiple subjects, and challenging the wording of the Titles. On April 24, 2014, the Title Board reaffirmed that the Proposed Initiatives contain only a single subject, and revised the Titles to their current form. Evans filed these appeals, pursuant to C.R.S. § 1-40-107(2) (2013), on May 1, 2014 (Initiative #134) and on May 5, 2014 (Initiative #135).

### **STATEMENT OF THE FACTS**

The Proposed Initiatives would amend the Colorado Constitution to establish a new tax on authorized gaming to create a K-12 education fund (“Education Fund”) for the purpose of improving the education of children in Colorado public schools. Initiative #134 § 17(1), (2); Initiative #135 § 17(1), (2).<sup>1</sup>

---

<sup>1</sup> Evans submitted to this Court copies of the Proposed Initiatives and the Titles together with his Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2013-2014 #134 (“Proceeds from Video Lottery Terminals for K-12 Education”) (“Pet fro Review #134”) and 2013-2014 #135 (“Horse Racetrack Limited Gaming Proceeds for K-12 Education”) (“Pet. for Review #135”).

The Education Fund would provide the state with additional revenue to address the needs of its public schools, including reduction of class sizes, acquisition of technology for teachers and students, enhancement of school safety and security, and improvement of school facilities. Initiative #134 § 17(1); Initiative #135 § 17(1).

The moneys for the Education Fund would be raised through a new tax on the net proceeds from the use of video lottery terminals (Initiative #134) or from limited gaming (Initiative #135) (jointly, “New Gaming”) at the locations specified in the Proposed Initiatives. Initiative #134 § 17(3); Initiative #135 § 17(3). To accomplish this purpose, Initiative #134 would direct the Colorado Lottery Commission and the State Lottery Division to permit the operation of video lottery terminals at one horse racetrack in each of Arapahoe, Mesa, and Pueblo Counties. Initiative #134, §§ 17(3)(a), (9)(d). Similarly, Initiative #135 would direct the Limited Gaming Control Commission to authorize one horse racetrack in each of the three specified counties to conduct limited gaming. Initiative #135 §§ 17(3)(a), 17(7)(a).

Under Initiative #134, the horse racetracks would pay into the newly-created Education Fund a tax of thirty-seven percent of their net video lottery terminal proceeds. Initiative #134 § 17(3)(c). Under Initiative #135, the tax on authorized horse racetracks, also to be paid into the Education Fund, would be thirty-four

percent of their adjusted gross proceeds derived from horse racetrack limited gaming. Initiative #135 § 17(3)(b)(II).

In addition to the above taxes, each horse racetrack's host community would be authorized to negotiate initial and annual impact fees related to the host community's costs resulting from New Gaming. Initiative #134 § 17(4); Initiative #135 § 17(4). The Proposed Initiatives define "host community" as the single local jurisdiction that issues the permits and approvals necessary for the operation of New Gaming. Initiative #134 § 17(9)(e); Initiative #135 § 17(9)(e).

The moneys in the Education Fund would be distributed to school districts and to the Charter School Institute for the purpose of improving public K-12 education. Initiative #134 § 17(2)(a)-(d); Initiative #135 § 17(2)(a)-(d). Finally, the Proposed Initiatives provide that the moneys derived from the Proposed Initiatives could be collected, distributed and spent as voter-approved revenue changes without regard to any limitations in the Colorado Constitution or elsewhere. Initiative #134 § 17(5); Initiative #135 § 17(5).

The Titles, as amended on April 24, 2014, fairly capture these features of the Proposed Initiatives. The title for Initiative #134, as amended, reads:

Shall state taxes be increased \$102,100,000 annually in the first full fiscal year, and by such amounts that are raised thereafter, by imposing a new tax on authorized horse racetracks' net proceeds from the operation of video lottery terminals to increase statewide funding for K-12 education, and, in connection therewith, amending

the Colorado Constitution to permit one qualified horse racetrack in each of the counties of Arapahoe, Mesa, and Pueblo to operate video lottery terminals, including virtual slot machines and virtual table game devices; authorizing host communities to impose impact fees on horse racetracks authorized to operate video lottery terminals; allowing all resulting revenue to be collected and spent notwithstanding any limitations provided by law; and allocating the resulting tax revenues to a fund to be distributed to school districts and the charter school institute for K-12 education?

Pet. for Review #134, Ex. 1 at unnumbered p. 24. The title for Initiative #135, as amended, reads:

Shall state taxes be increased \$114,500,000 annually in the first full fiscal year, and by such amounts that are raised thereafter, by imposing a new tax on authorized horse racetracks' adjusted gross proceeds from limited gaming to increase statewide funding for K-12 education, and, in connection therewith, amending the Colorado Constitution to permit limited gaming in addition to pre-existing pari-mutuel wagering at one qualified horse racetrack in each of the counties of Arapahoe, Mesa, and Pueblo; authorizing host communities to impose impact fees on horse racetracks authorized to conduct limited gaming; allowing all resulting revenue to be collected and spent notwithstanding any limitations provided by law; and allocating the resulting tax revenues to a fund to be distributed to school districts and the charter school institute for K-12 education?

Pet. for Review #135, Attach. at unnumbered p. 21.

### **SUMMARY OF THE ARGUMENT**

The Title Board correctly determined that each Proposed Initiative contains only a single subject and, thus, had jurisdiction to set both Titles. The designation

of new revenue for a specified purpose is not a separate subject from the mechanism established to raise that revenue. Authorizing New Gaming and taxing New Gaming to raise revenue for K-12 education are necessarily interconnected subjects. The text of the Proposed Initiatives and the Titles clearly explain the relationship between New Gaming, the tax, and the Education Fund, so there are no surreptitious subjects or risk of voter surprise.

The Title Board also properly exercised its discretion in drafting the Titles. The Titles satisfy Colorado law because they fairly and accurately set forth the major features of the Proposed Initiatives. Accordingly, there is no basis for setting aside the Titles.

## **STANDARD OF REVIEW**

### **I. The Single-Subject Requirement.**

The Title Board has jurisdiction to set titles only for proposed initiatives that are limited to a single subject. Colo. Const. art. V, §1(5.5); C.R.S. § 1-40-106.5 (2013). The single-subject requirement is violated where multiple “incongruous” subjects “having no necessary and proper connection” are included in the same measure. C.R.S. § 1-40-106.5(1)(e)(I) (2013); *Kelley v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127, 1130-31 (Colo. 1996). The single-subject requirement also prevents surprise and fraud on the voters through

the inclusion of surreptitious subjects in a measure. C.R.S. § 1-40-106.5(1)(e)(II) (2013).

The Title Board and this Court must construe the single-subject requirement liberally to protect the right to initiative. C.R.S. § 1-40-106.5 (2) (2013). In applying this requirement to proposed initiatives, the Court must follow its decisions construing the single-subject requirement applicable to legislation. Colo. Const. art. V, § 21; C.R.S. § 1-40-106.5(3) (2013).

Under these principles, an initiative may contain several purposes, so long as they are interrelated. *Gonzales v. Lamm (In re Ballot Title 2005-06 No. 55)*, 138 P.3d 273, 278 (Colo. 2006); *In re Proposed Initiative Bingo-Raffle Licensees*, 915 P.2d 1320, 1324-25 (Colo. 1996). Legislation that increases fees imposed on discrete activities (incorporation and motor vehicle registration), and allocates to a distinct and unrelated purpose (raising revenues for old-age pensions and assistance of indigent elderly) does not violate the single subject rule. *Hughes v. State (In re Hunter's Estate)*, 97 Colo. 279, 287, 49 P.2d 1009, 1012 (1935). On several more recent occasions the Court has summarily upheld the actions of the Title Board in the face of single-subject challenges to initiatives that both raised revenue and provided for distribution of that revenue to unrelated programs. *See, e.g., In re Title, Ballot Title & Submission Clause for 2007-2008 #113*, No. 08SA198 (Colo. June 26, 2008); *In re Title, Ballot Title & Submission Clause for*

2007-2008 #103, No. 08SA193 (Colo. June 26, 2008); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #14*, No. 07SA155 (Colo. June 28, 2007); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #13*, No. 07SA154 (Colo. June 28, 2007).

## **II. Requirements for Title Language.**

The Title Board is required to set titles that “consist] of a brief statement accurately reflecting the central features of the proposed measure.” *Feazel v. Martinez (In re Proposed Initiative on “Trespass-Streams with Flowing Water”)*, 910 P.2d 21, 24 (Colo. 1996). Titles are not required to “spell out every detail” or “describe every nuance and feature” of a proposed initiative. *Percy v. Fielder (In re Title, Ballot Title & Submission Clause, & Summ. for 1999-00 #256)*, 12 P.3d 246, 256 (Colo. 2000); *Koch v. Citizens for Educ. Reform (In re Proposed Initiative on Educ. Tax Refund)*, 823 P.2d 1353, 1355 (Colo. 1991). Rather, “the point of titles is to identify the proposal succinctly.” *Howes v. Hayes (In re Title, Ballot Title & Submission Clause, & Summ. for 1997-1998 No. 74)*, 962 P.2d 927, 930 (Colo. 1998). As explained further in Section II.E. below, the Title Board lacks the authority “to provide a title that includes more information than is contained in the initiative.” *In re Proposed Initiative on Educ. Tax Refund*, 823 P.2d at 1357.

The Court affords the Title Board “considerable discretion in setting the titles for a ballot initiative.” *Kemper v. Hamilton (In re Title, Ballot Title, & Submission Clause for 2011-2012 #3)*, 274 P.3d 562, 565 (Colo. 2012).

Accordingly, the Court should resolve all “legitimate presumptions” in the Title Board’s favor, invalidate a title only in a clear case, and not interfere with the Title Board’s choice of language unless it is “clearly misleading.” *Koch*, 823 P.2d at 1355. The Court “will not re-write the titles and summary to achieve the best possible statement of the proposed measure’s intent.” *See Percy*, 12 P.3d at 255.

Moreover, the Court construes the “constitutional and statutory provisions governing the initiative process in a manner that facilitates the right of initiative . . . .” *Id.* (quoting *Armstrong v. Davidson*, 10 P.3d 1278, 1282 (Colo. 2000)).

## **ARGUMENT**

### **I. Each Proposed Initiative Contains a Single Subject.**

Petitioner contends that the Proposed Initiatives “violate the single subject requirement by combining an expansion of K-12 education funding with the unrelated subject of changing the exceptions to the general constitutional prohibition on lotteries to allow for racetrack casinos in urbanized areas.” Pet. for Review #134, at 4 ¶ 1; Pet. for Review #135, at 4 ¶ 1. This argument is without merit. An initiative that increases revenue for a particular purpose does not contain



multiple subjects simply because it also establishes the means by which the revenue will be generated. To Respondents' knowledge, this Court has never found multiple subjects merely because an initiative provides revenue for programs unrelated to the funding source; rather, the Court has consistently upheld the Title Board without comment in such cases. *In re Title, Ballot Title & Submission Clause for 2007-2008 #113*, No. 08SA198 (Colo. June 26, 2008) (oil and gas severance tax distributed to fund state university scholarships, preservation of wildlife habitat, and renewable energy, transportation, and water projects); *In re Title, Ballot Title & Submission Clause for 2007-2008 #103*, No. 08SA193 (Colo. June 26, 2008) (real estate transfer tax designated in part to fund programs to prevent foreclosures and homelessness); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #14*, No. 07SA155 (Colo. June 28, 2007) (53% of severance tax designated for education and school construction); *In re Title, Ballot Title & Submission Clause, & Summ. for 2007-2008 #13*, No. 07SA154 (Colo. June 28, 2007) (75% of severance tax designated for distribution at discretion of the General Assembly).

Consistent with the foregoing decisions, there is no requirement that the revenue beneficiaries and the revenue source in an initiative be in related subject areas. All that is required is that the provisions of an initiative be interrelated and dependent on each other. These Proposed Initiatives easily satisfy this

requirement. The Education Fund can exist only if the provisions for New Gaming provide the necessary funds. Conversely, no New Gaming can exist unless the resulting revenue is taxed to fund education. It would be an empty gesture to mandate a new education fund by itself, while failing to provide a source of revenue for the fund.

The core purpose of the single-subject requirement is not to stifle creative funding mechanisms for public causes, but to prevent voter confusion or fraud by the insertion of surreptitious subjects into initiatives. That core purpose is not implicated here. The Proposed Initiatives and their Titles describe each major component — the Education Fund and the New Gaming to fund it. There are no surreptitious or hidden subjects, and voters will not be confused about the interrelationship between the features of the Proposed Initiatives.

## **II. Evans's 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 Evans's five challenges to the Titles. Four of his objections concern alleged omissions from the Titles, but none of the omitted information is central to the Proposed Initiatives. Evans's remaining objection is to the physical placement of language in the Titles. That objection is equally insubstantial.

The Titles 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 on both Proposed Initiatives.

**A. The Sequence of the Language in the Titles Is Not Misleading.**

Evans asserts that the Titles “conceal the actual expansion of gaming to three major population centers by deliberately placing mention of the measures’ gaming provisions between the titles’ references to education funding” Pet. for Review #134, at 4 ¶ 2; Pet. for Review #135, at 4 ¶ 2. Nothing is concealed. To the contrary, the Titles plainly state that the Proposed Initiatives would permit New Gaming at “one qualified horse racetrack in each of the counties of Arapahoe, Mesa, and Pueblo . . . .” This phrase occupies more than one line of text in the Titles.

In addition, the Proposed Initiatives’ provisions addressing K-12 education funding and New Gaming at authorized locations are interconnected – neither feature of the Initiatives can occur without the other. Under these circumstances, the Titles’ disclosure of the authorization of New Gaming is hardly surreptitious or hidden in the folds of the Title. *See Kemper*, 274 P.3d at 566.

The clear title requirement does not mandate the specific placement of language within a title. Rather, if the language of the Titles, read “as a whole,”

adequately conveys the meaning of the Proposed Initiatives, the Titles are not misleading and this Court must affirm them. *See Earnest v. Gorman (In re Ballot Title & Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 647 (Colo. 2010). For the reasons stated above, the Titles, read as a whole, fairly and accurately describe the Proposed Initiatives.

**B. The Titles Adequately Describe the New Tax Under the Taxpayer’s Bill of Rights (“TABOR”).**

Evans asserts that the Titles “omit[] any reference to the new taxes imposed on gaming and the new actual tax rates set, both of which represent the triggering events for TABOR ballot question wording.” Pet. for Review #134, at 4 ¶ 3; Pet. for Review #135, at 4 ¶ 3. This assertion is both inaccurate and misguided.

Evans’s statement that the Titles “omit[] any reference to the new taxes” is bewildering in light of this language in Titles: “*Shall state taxes be increased* [\$102,100,000 under Initiative #134 and \$114,500,000 under Initiative #135] annually in the first full fiscal year, and by such amounts that are raised thereafter, *by imposing a new tax . . . ?*” (Emphases added.) The Titles unambiguously disclose, in full compliance with TABOR, that the Proposed Initiatives would impose a new tax. *See* Colo. Const. art. X, § 20(3)(c); Title for Initiative #134; Title for Initiative #135.

Moreover, neither TABOR nor any other Colorado law requires that a title state the tax rate that would be imposed under an initiated measure. TABOR

requires that the Titles include only the *amount* of the tax increase in the first fiscal year, and not the tax rate. *Id.*; see, e.g., *Bickel v. City of Boulder*, 885 P.2d 215, 235-37 (Colo. 1994). The Titles fully satisfy this requirement.

**C. The Title Board Reasonably Omitted Reference in the Titles to the Number of Authorized Slot Machines.**

Evans states that the Titles “omit[] reference to fact [sic] that no fewer than 2,500 slot machines can be placed at the three racetrack casinos and there is no maximum number of gaming devices.” Pet. for Review #134 at 4 ¶ 4; Pet. for Review #135 at 4 ¶ 4. Once again, Evans misunderstands both the Proposed Initiatives and the requirements for title-setting.

The relevant language of Initiative #134 provides:

. . . the director *shall approve* the use of the greater of two thousand five hundred video lottery terminals or such other number as requested by the operator of a licensed exclusive location *and as determined by the director to maximize revenue to the K-12 education fund.*

See Initiative #134 § 17(7)(a) (emphases added).

The relevant language of Initiative #135 provides:

Horse racetracks licensed to conduct horse racetrack limited gaming are *authorized* to have the greater of two thousand five hundred slot machines or such other number of slot machines as requested by the horse racetrack *and as determined by the director to maximize revenue to the K-12 education fund.*

See Initiative #135 § 17(7)(b) (emphases added).

Evans mischaracterizes the Proposed Initiatives in two respects. First, Evans errs in summarizing the language quoted above as requiring the placement of at least 2,500 machines at each authorized location. The Proposed Initiatives do not specify the number of video lottery terminals or slot machines that must be “*placed*” at an authorized location (as Respondent assumes), but only the number that must be “*approved*” or “*authorized*.” See Initiative #134 § 17(7)(a); Initiative #135 § 17(7)(b). This distinction is significant because an authorized location is free to decide to operate fewer than the approved number.

Second, Evans errs in stating that “there is no maximum number of gaming devices” at horse racetracks. To the contrary, the Proposed Initiatives limit the number of video lottery terminals or slot machines to 2,500 unless the licensing authority approves a greater number to maximize the tax revenue paid to the Education Fund. See Initiative #134 § 17(7)(a)-(b); Initiative #135 § 17(7)(a). For example, additional machines could not be authorized if they would remain idle due to a lack of demand.

Beyond Evans’s mischaracterization of the Proposed Initiatives, the Title Board reasonably omitted information relating to the number of authorized machines because that implementation provision is not a central feature of the Proposed Initiatives. Titles are required to be brief, and thus are not required to “spell out every detail” or “describe every nuance and feature” of a proposed

initiative. *Percy*, 12 P.3d at 256, *see Feazel*, 910 P.2d at 24; *Koch*, 823 P.2d at 1355. To require that a title describe every feature of an initiative would “transform what the General Assembly intended — a relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters — into an item-by-item paraphrase of the proposed constitutional amendment . . . .” *Outcalt v. Schuck (In re Title, Ballot Title & Submission Clause, & Summ. for 1997-98 #62)*, 961 P.2d 1077, 1083 (Colo. 1998).

The central features of the Proposed Initiatives are the imposition of a new tax, the creation of the new Education Fund, and the approval of New Gaming to generate revenues for that fund. Details regarding implementation of New Gaming are not central features and need not be described in the Titles. The Court should defer to the Title Board’s discretion and uphold the Title Board’s decision to keep the Titles as concise as is reasonable and not to include these administrative details in the Titles. *See Kemper*, 274 P.3d at 565.

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

Evans contends that the Titles “omit[] reference to fact [*sic*] that the measure permits local jurisdictions to expand gaming hours to 24 hours per day.” Pet. for Review #134, at 5 ¶ 5; Pet. for Review #135, at 5 ¶ 5. As explained in Section II.C. above, however, the Title Board must keep titles brief and is not required to describe every detail of a proposed initiative. The provision of the

Proposed Initiatives allowing host communities to extend the hours of New Gaming concerns the implementation of New Gaming, and is not a central feature of either Proposed Initiative.

If the Titles were to state that the Proposed Initiatives would allow host communities to extend the hours of New Gaming, they would need to further explain that the Proposed Initiatives prohibit New Gaming between the hours of 2 a.m. and 8 a.m., unless extended. Initiative #134 § 17(8)(a); Initiative #135 § 17(7)(d). This would add length to the Titles to describe relatively minor implementation details, without enhancing voter understanding of the Proposed Initiatives, contrary to the Title Board's statutory duty to draft brief titles that state only the central features of the measures. See C.R.S. § 1-40-106(3)(b) (2013).

Additionally, the hours during which authorized locations may allow New Gaming under the Proposed Initiatives are consistent with the existing constitutional provisions governing limited gaming. See Colo. Const. art. XVIII, § 9(7). Significantly, the title of the 1990 initiative that established limited gaming in those three communities made no mention of hours of operation. See Legislative Council's Analysis of the 1990 Ballot Proposals, at 14, *available at* <http://www.law.du.edu/images/uploads/library/CLC/350.pdf>. Voters are likely to assume this information, and, at the very least, would not be misled by its omission from the Titles.



Deferring to the Title Board’s discretion, the Court should uphold the Title Board’s reasonable decision to omit from the Titles information regarding hours of operation. *See Kemper*, 274 P.3d at 565.

**E. The Title Board Correctly Omitted from the Titles a Statement That the Proposed Initiatives Do Not Require a Second Vote Prior to Taking Effect.**

In his final argument, Petitioner asserts that the Titles should address a feature *not* included in the Proposed Initiatives — that they do not require a second vote for authorization of New Gaming. Pet. for Review #134 at 5 ¶ 6; Pet. for Review #135 at 5 ¶ 6. This information has no lawful place in the Titles.

The Title Board lacks the authority to include information in a title that does not appear in the initiative itself. *See Koch*, 823 P.2d at 1357. Here, the Proposed Initiatives do not require a second vote prior to the implementation of New Gaming. Accordingly, it would have been improper for the Title Board to have included in the Titles a reference to local voter approval. *See id.* Accordingly, this argument is also without merit.

**CONCLUSION**

The Title Board fully discharged its constitutional and statutory responsibilities when it set the Titles for the Proposed Initiatives. The Title Board correctly determined that each Title contains a single subject, and that it had jurisdiction to set the Titles. Those Titles set forth, in plain language and

concisely, the central features of the Proposed Initiatives. The Titles are clear and not misleading. They comply fully with TABOR. For the reasons stated above, Proponents respectfully request that the Court affirm the actions of the Title Board.

Respectfully submitted this 15th day of May, 2014.

MCKENNA LONG & ALDRIDGE  
LLP

*s/ Lino S. Lipinsky de Orlov*

---

Lino S. Lipinsky de Orlov, No. 13339  
Amy M. Siadak, No. 43702  
1400 Wewatta Street, Suite 700  
Denver, Colorado 80202  
Telephone: (303) 634-4000  
Facsimile: (303) 634-4400  
Emails: llipinsky@mckennalong.com  
asiadak@mckennalong.com

HOLLAND & HART LLP

*s/ Marcy G. Glenn*

---

Marcy G. Glenn, No. 12018  
Douglas L. Abbott, No. 18683  
555 Seventeenth Street, Suite 3200  
Denver, Colorado 80202  
Telephone: (303) 295-8000  
Facsimile: (303) 295-8261  
Emails: mglenn@hollandhart.com  
dabbott@hollandhart.com

WILLIAM A. HOBBS

*s/ William A. Hobbs*

---

William A. Hobbs, No. 7753

1745 Krameria Street

Denver, Colorado 80220

Telephone: (303) 345-5541

Email: Bill.hobbs@me.com

CO-COUNSEL FOR  
RESPONDENTS, VICKIE L.  
ARMSTRONG AND BOB  
HAGEDORN

**CERTIFICATE OF SERVICE**

I hereby affirm that, on the 15th day of May, 2014, a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent UPS overnight delivery service to the Petitioner and his counsel and to counsel for the Title Board, and by Integrated Colorado Courts E-filing System (ICCES) to counsel of record, at:

Mr. Richard Evans  
1724 S. Unita Way  
Denver, CO 80231

Mark Grueskin, Esq.  
Recht Kornfeld, P.C.  
1600 Stout Street, Suite 1000  
Denver, CO 80202

Matthew D. Grove, Esq.  
Office of the Attorney General  
1300 Broadway, 6th Floor  
Denver, CO 80203

*s/ Judi Marsh*

\_\_\_\_\_   
Judi Marsh

DN 32267436.19

6858222\_2