COLORADO SUPREME COURT 2 E. 14th Ave. Denver, CO 80203	DATE FILED: May 15, 2014 4:30 PM
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
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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 3,693 words.

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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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Suzanne Staiert, David Blake, and Sharon Eubanks, as members of the Ballot Title Setting Board ("Title Board"), hereby submit their Opening Brief.

I. Statement of the issues

Did the Title Board correctly determine that Proposed Initiatives 2013-2014 #134 and 2013-2014 #135 are consistent with the single subject rule?

Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 #134 and 2013-2014 #135 correctly and fairly express the true intent and meaning of the proposed initiatives?

II. Statement of the case

This brief addresses the propriety of ballot titles set by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013).

On April 4, 2014, proponents Vicki Armstrong and Bob Hagedorn filed Proposed Initiatives 2013-2014 #134 and #135 ("#134" and "#135"), with the Colorado Secretary of State. The Title Board conducted a hearing on April 17, 2014, and set titles for both measures. On April

23, 2014, Petitioner Richard Evans submitted motions for rehearing on both titles. The Title Board considered the motions on April 24, 2014, granted them in part and set the titles. Petitioner filed the above-captioned appeals shortly thereafter.

III. Statement of the facts

#134 and #135 both seek to amend Article XVIII of the Colorado Constitution by adding Section 17. Both measures include declarations that they seek "to improve the education of children in Colorado public schools by providing additional revenue[.]" #134 §1, #135, §1. To further this stated goal, both proposed initiatives provide for the creation of a new K-12 Education fund, to be financed by the imposition of a tax on newly authorized gambling in the State of Colorado.

- #134, if adopted, would require the state lottery commission to approve the placement of video lottery terminals ("VLTs") at new licensed horse racetracks in Arapahoe, Pueblo, and Mesa Counties. The measure would impose a tax rate of 37% on "net

VLT proceeds generated per year for deposit into the K-12 Education Fund." #134, § 3(c).

- #135 would authorize "horse racetrack limited gaming" at one location in each of three counties: Arapahoe, Pueblo, and Mesa. #135, § 7(a). In addition to horse racing, "horse racetrack limited gaming" would include slot machines and various card and table games. #135, § 9(d). The measure would impose a 34% tax rate on "the horse racetrack's adjusted gross proceeds of horse racetrack limited gaming." #135, § 3(b)(II).

Both measures also provide for initial payments to the host communities and to the K-12 Education fund. They define key terms and outline the general conditions under which the gambling 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 #134 and #135. The titles start with the TABOR-mandated reference to a tax increase: $102,100,000 for #134 and $114,500,000 for #135. Each

title then informs voters of the purpose of the measures: 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 clauses meet the single subject and clear title standards established by this Court. They fairly and accurately set forth the major elements of the measures.

V. Argument

A. Standard of review

The titles must clearly express the single subject of the proposal. The Title Board does not have authority to set the title for any initiative where the proposed "measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject . . . ." *See* Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106.5(1). It is axiomatic that "in order to pass constitutional muster, a proposed initiative must concern only one subject—that is to say it must effect or carry out only one general object or purpose." *In re Title, Ballot*

Title and Submission Clause for 2005-2006 #74, 136 P.3d 237, 238-39 (Colo. 2006).

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) (*#21 and #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 initiatives do not violate the single-subject rule.

The single subject requirement has two important purposes: (1) it prevents "voter fraud and surprise caused by items concealed within a lengthy or complex proposal," and (2) it ensures that multiple incongruous subjects are not combined "for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits." *In re Proposed Initiative for 1999-2000 #29*, 972 P.2d 257, 261 (Colo. 1999).

To evaluate whether an initiative effectuates or carries out only one general object or purpose, a court looks first to the text of the proposed initiative. *In re #74*, 136 P.3d at 239. The single-subject requirement is met if the "matters encompassed are necessarily or properly connected to each other rather than disconnected or incongruous." *Id.* On the other hand, purposes are separate and distinct when they bear "no necessary or proper connection to the initiative's subject[.]" *In re #91,* 235 P.3d at 1076. Separate provisions of a measure must be "directly tied to the initiative's central focus" to satisfy the single-subject requirement. *Id.*

Petitioner argues that #134 and #135 violate the single subject requirement because they "combin[e] an expansion of K-12 education funding with the unrelated subject of changing the exceptions to the general constitutional prohibition to allow for racetrack casinos in urbanized areas." *Pets. for Review* at 4. Put another way, Petitioners complain that the measures contain two subjects because they would

not only expand gaming in Colorado, but would also define how the new taxes associated with that expansion must be spent.

Both the declarations in the initiative text and the titles set by the Title Board make clear the single subjects of #134 and #135: the establishment of the K-12 Education Fund, to be paid for by the expansion of limited gaming in Colorado. The fact that the details of implementing the K-12 Education Fund's financing are included in the measure does not establish that it covers multiple subjects. *See Howes v. Hayes,* 962 P.2d 927, 929 (Colo. 1998).

In *Rice v. Brandon*, 961 P.2d 1092 (Colo. 1998), this Court rejected a single-subject challenge to a proposed initiative that contained very similar language to #134 and #135. The measure at issue in *Rice*, 1997-1998 #105, proposed drilling shallow wells that would draw water from an aquifer in the San Luis Valley. The water from those wells would be delivered into the Rio Grande River, and fees for use of that water would be assessed to irrigators. "The funds would be applied to the

benefit of the state's public school fund and the school districts in Water Division 3." *Id.* at 1096.

The proponents in *Rice* described the single subject of the initiative as "financing public schools from fees paid for water pumped from beneath state trust lands." *Id.* This Court agreed that the measure did not violate the single-subject rule. "Although the Initiative comprises two steps: assessing fees upon water pumped from beneath trust lands and then allocating those fees for school financing, we do not view those two steps as comprising two subjects." *Id.* at 1096.

Almost identically to *Rice*, #134 and #135 establish a two-step process: a new tax on the expansion of limited gaming, and then allocation of that tax to school financing. Although #134 and #135 lack the same "unifying thread" that the Court identified in *Rice* – *i.e.,* "[t]he theme of the purpose of state trust lands and the educational recipient," *id.* – they involve the same structure that this Court approved in that case. In fact, this arrangement appears elsewhere in the Colorado Constitution's gaming amendments. *See, e.g.,* Colo. Const. art. XVIII

§ 2(7) (permitting state lottery and providing that "all proceeds from the lottery, after deduction of prizes and expenses, shall be allocated to the conservation trust fund of the state for distribution to municipalities and counties for park, recreation, and open space purposes"); Colo. Const. art. XVIII, § 9(5) (proceeds from limited gaming distributed to general fund (50%), state historical fund (28%), Teller and Gilpin Counties (12%), and Central City, Black Hawk, and Cripple Creek (10%));

Neither #134 nor #135 poses the primary risks that the single-subject rule is designed to mitigate. First, the proposals are not lengthy and complex. To the contrary, the effect of the initiatives – establishment of the K-12 Education Fund, to be financed by an expansion of legalized gambling – is simple to discern. Second, neither measure raises the specter of passage through logrolling, which involves gathering support from groups who are interested in one subject covered by a multi-subject initiative but not the other. The reason for this is simple: the K-12 Education Fund does not currently exist, and its

sole source of funding under #134 and #135 is tax revenue to be collected from the proposed expansion of limited gaming. No supporter of education would vote for the measures for the sole purpose of creating the K-12 Education Fund because those supporters would understand from the title (and the text of the initiative) that the money for that fund does not come out of thin air. Rather, its sole source is the expansion of limited gaming that #134 and #135 propose.

Accordingly, #134 and #135 do not violate the single-subject rule, and this Court should deny Petitioner's single-subject challenge to both measures.

C. The title board set clear titles.

Petitioner also complains that the titles set by the Title Board are unclear and misleading.

1. Summary of #134

#134 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 and the type of gaming that will be permitted there (video lottery terminals). 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.

2. Summary of #135

#135 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 and the fact that the measure will "permit limited gaming in addition to pre-existing pari-mutuel wagering. 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.

3. The titles mirror the major elements of #134 and #135.

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 "authorized horse racetracks' net proceeds from the operation of video lottery terminals to increase statewide funding for K-12 education," in the case of #134, and on "authorized horse racetracks' adjusted gross proceeds from limited gaming to increase funding for K-12 education," in the title for #135. 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.

D. The validity of the titles should be affirmed.

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

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

Petitioner argues that the titles set by the Title Board are misleading because they "conceal the actual expansion of gaming to three major population centers by deliberately placing mention of the measures' gamin g provisions between the titles' references to education funding." *Pets. for Review* at 4. Thus, 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, the Title Board's organization of the titles poses little risk that the voters will misunderstand what they are voting for or against. Irrespective of the order in which the titles explain what the measures do, the expansion of gaming figures prominently throughout both of them. Both titles begin with TABOR-mandated language about tax increases, but then immediately refer to the "new tax" and the fact that the measure seeks a constitutional amendment "to permit limited gaming" (#135) or "to permit one qualified horse racetrack in each of the [subject counties] to operate video lottery terminals." (#134). The titles detail where the expansion may take place and the types of activities that will be permitted. As they must, the titles reference the K-12 Education Fund, but they do not do so in a manner that would mislead a voter into thinking that the measure has no connection to an expansion of limited gaming in Colorado.

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 #134 and #135 pass muster and Petitioner's argument should be rejected.

2. The titles need not specifically identify the actual tax rates associated with the measure.

Petitioner next argues that the titles are misleading because they omit "any reference to the new taxes imposed on gaming and the new actual tax rates set." *Pets. for Review* at 4.

The first of these assertions is simply incorrect. The titles for #134 and #135 both explicitly refer to "the new taxes imposed on gaming." Both titles begin by stating: "Shall state taxes be increased…by imposing a new tax" on the specific type of gaming that the initiative would authorize.

Petitioner is correct that neither title identifies the "actual tax rates set" by either #134 or #135. Instead, the titles refer to the projected dollar amount of the proposed tax increase. Nothing in

TABOR, however, requires a title to specifically 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 #134 and #135 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" (for #134) or "adjusted gross proceeds" (#135) 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 the precise tax rates that will be applied to reach that amount. The titles' omission of the precise tax rates is thus not misleading.

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). The Title Board's omission of the precise tax rate that will be imposed on the profits of sophisticated corporate entities – rather than on the voters themselves – was well within its discretion. This Court should reject Petitioner's claim that the omission of the tax rate from the titles was misleading.

3. 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 locations (#134, §7(a); #135 §7(b)); 2) the possibility that gaming locations could be open for 24 hours per day (#134, §8(a); #135 §7(d)); and 3) the necessity of local approval by a "host community" before operations may begin (#134, §§4, 9(e); #135, §§ 4, 9(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 #134 and/or #135 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 #134 and #135.

Respectfully submitted this 15th day of May, 2014.

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This is to certify that, on May 15, 2014, I duly served this **OPENING BRIEF** on all parties via ICCES or electronic mail, addressed as follows:

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