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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 #138

Petitioners:

Vickie L. Armstrong and Bob Hagedorn

v.

Respondents:

Richard Evans and Stephen Roark

and

Title Board:

Suzanne Staiert, David Blake, and Jason Gelender

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Case No. 2014SA142

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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).

It contains 2,553 words.

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 (R. , p.), not to an entire document, where the issue was raised and ruled on.

/s/ Matt Grove

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Suzanne Staiert, David Blake, and Jason Gelender, 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 Initiative 2013-2014 #138 is 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 #138 correctly and fairly express the true intent and meaning of the proposed initiative?

II. Statement of the case

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

On April 4, 2014, proponents Richard Evans and Stephen Roark filed Proposed Initiative 2013-2014 #138 ("#138), 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, Petitioners submitted a motion for rehearing. The Title Board denied the motion on April 24, 2014. Petitioner filed the above-captioned appeal shortly thereafter

III. Statement of the facts

#138 seeks to amend Article XVIII of the Colorado Constitution by adding a new Section 18, which would, beginning with the November 2014 general election, prohibit "a state licensing authority" from granting "an exclusive license to conduct casino-style gambling at a specific geographic site which is identified, by discrete location or existing license type, in any statewide initiated or referred ballot measure." The title and submission clause set by the Title Board is straightforward, stating in its entirety: "Shall there be an amendment to the Colorado Constitution prohibiting the granting of an exclusive license to conduct casino-style gambling including video lottery terminals, at any specific geographic site identified in a statewide ballot measure adopted on or after November 4, 2014?"

IV. Summary of the argument

#138 does not involve multiple subjects. The title and submission clause meet the clear title standards established by this Court. They fairly and accurately set forth the major elements of the measure.

V. Argument

A. Standard of review

A title 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, 44 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. #138 does not violate the single-subject rule.

Petitioners first assert that #138 violates 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.*

Petitioners maintain that #138 covers the following distinct subjects:

1) prohibition of casino-style gambling at any specific geographic site named in a ballot measure;

2) limiting the scope of future initiatives;

3) potentially nullifying several initiatives (Nos. 80, 81, 134, and 135) that the Petitioners have proposed; and

4) prohibiting casino-style gambling anywhere outside of "the three mountain towns already approved for limited gaming." *Pet. for Review* at 5.

Petitioners are simply incorrect about the first and fourth subjects identified above. #138 does not prohibit licensing of casino-style gambling anywhere, either at specific geographic sites or outside of Black Hawk, Central City and Cripple Creek. Instead, it prohibits the granting of an "*exclusive* license to conduct casino-style gambling at a specific geographic site[.]" #138, §1 (emphasis added). That prohibition is the measure's single subject; the fact that it could affect initiatives that may be on the 2014 ballot as well as in future elections does not expand its reach. As this Court held in *Herpin v. Head*, 4 P.3d 485, 496 (Colo. 2000), "the fact that the provisions of a measure may affect more

than one other statutory provision does not itself mean that the measure contains multiple subjects." Here, even crediting Petitioners' speculation that #138 could affect future initiatives, that type of potential future effect does not convert a measure into one that violates the single subject rule. This Court should thus reject Petitioner's single-subject challenge.

C. The title board set clear titles.

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

1. The title is not vague or misleading by virtue of its failure to define words and phrases that are not defined in the text of the initiative itself.

Petitioner asserts that several words and phrases in the title are vague and misleading: "exclusive," "specific geographic site," "existing license type,"[1] "casino-style gambling," and "video lottery terminals." *Pet. for Review* at 6.

[1] The phrase "existing license type" does not appear in the title.

None of these words and phrases is defined in the text of the initiative itself. Thus, what the Petitioners are in fact asserting is that #138 itself is vague and misleading. But that type of complaint is outside the scope of this Court's review under § 1-40-106(3). *In re Proposed Initiative 1997-1998 #10,* 943 P.2d 897, 901 (Colo. 1997). As this Court has held, the Title Board "performs its job in setting the title and summarizing the measure." *Id.* "Any problems in the interpretation of the measure or its constitutionality are beyond the functions assigned to the title board." *Id.* Thus, any attempt to supply definitions in the title would have therefore exceeded the Title Board's authority. *See In re Proposed Initiative 1996-6,* 917 P.2d 1277, 1282 (Colo. 1996) ("[t]he board is under no duty to define vague terms, even if the proponents intend the language to remain vague so that the courts could interpret its application") (internal quotation omitted).

Accordingly, it does not follow from Plaintiffs' assertions about undefined terms in the text of the initiative that the title set by the Title Board is vague or misleading. This Court should reject Petitioner's claim.

2. "Casino-style gambling" is not a catchphrase.

Petitioners next assert that "casino-style gambling" is an impermissible catchphrase or slogan. But this language does not run afoul of this Court's admonition to avoid "words that work in favor of a proposal without contributing to voter understanding." *#45*, 234 P.3d at 649. The purpose of the rule against catchphrases and slogans "is to prevent prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and to avoid distracting voters from consideration of the proposed initiative's merits." *Id.* Use of "a descriptive term that straight-forwardly presents the issue to voters" is acceptable, but "catch phrases" or "slogans" are not. *Id.* Petitioner bears the burden of language included in the title amounts to a "catch phrase" or "slogan." *Id.* at 650.

"Casino-style gambling" is a descriptive phrase, not a slogan. It distinguishes the type of gaming that #138 seeks to regulate from, for example, bingo, raffles, lotteries, and pari-mutuel wagering. Other courts have recognized that "casino-style gambling" is distinct from these categories. In *Christian Civic Action Comm. v. McCuen,* 884

S.W.2d 605, 609 (Ark. 1994), for example, the Supreme Court of Arkansas evaluated a challenge to a ballot title for an amendment that would authorize: 1) "a state lottery," 2) "bingo games," 3) raffles," 4) "pari-mutuel wagering, and 5) "additional racetrack wagering." The court rejected the ballot title based in part on the fact that its reference to "additional racetrack wagering" was insufficiently descriptive of the activities actually authorized. As the opinion put it, "'additional racetrack wagering' summons up, if anything, images of alternative methods of 'playing the horses' or 'running the dogs' – not casino-style gambling." *Id.* The court rejected the title because it was concerned that "voters favoring or opposing the inauguration of casino-style gambling may well be unaware that this is precisely what Amendment 4 seeks to accomplish." *Id.*

Thus, while the Arkansas Supreme Court did not engage in a catchphrase analysis in *McCuen,* it did acknowledge the descriptive value of the phrase "casino-style gambling," and in fact rejected a proponent's attempt to replace it with a less specific term. Building on this analysis, this Court should reject any suggestion that "casino-style

gambling" is the sort of "brief, striking phrase[ ] designed for use in advertising or promotion" that this Court has held creates the potential for "distracting voters from consideration of the proposed initiative's merits." *#45,* 234 P.3d at 649. The phrase does not contain value judgments, and appropriately balances the need for brevity in the title with the requirement of accuracy.

3. The title's lack of references to "discrete locations" and "existing license type" will not mislead voters.

Petitioners next complain that the title for #138 does not disclose that the initiative "not only prohibits the granting of an exclusive license to conduct 'casino-style gambling' based on the identification of a discrete location, but also based on the identification of an 'existing license type.'" *Pet. for Review* at 6.

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 primary focus of the initiative is to prohibit the grant of exclusive licenses at specific geographic sites in the state of Colorado. The Title Board did not need to include the additional identifying descriptors in the initiative's text – "discrete location or existing license type" – in order to adequately inform the electorate of the nature of what they would be voting for. To the contrary, the inclusion of too many technical details of that type would have the potential to confuse voters about the effect of the measure.

4. The title's reference to "video lottery terminals" is not misleading.

Finally, Petitioner asserts that the title for #138 "misleadingly states that the Proposed Initiative prohibits the granting of a license 'to conduct…video lottery terminals,' which is a physical impossibility and not what the Proposed Initiative states." *Pet. for Review* at 6.

It is not entirely clear what Petitioner mean by "a physical impossibility," but it may be a reference to the lack of a verb in the dependent clause "including video lottery terminals." In context, the phrase reads "…prohibiting the granting of an exclusive license to conduct casino-style gambling, including video lottery terminals, at any specific geographic site…." Whether or not a verb was grammatically necessary here, the meaning of this language is clear in context. The Title Board was simply making clear that "casino-style gambling" includes "video lottery terminals."

This is entirely consistent with the text of the initiative itself, which defines "casino-style gambling" as "the use of slot machines, poker, blackjack, craps, roulette, or video lottery terminals, or any combination thereof…." While slot machines and table games have long been featured in casinos, video lottery terminals are a more modern addition. The phrase does not appear in the Colorado Constitution or in the Colorado Revised Statutes. Thus, by including it in the title, the Title Board was simply providing additional clarity as to the measure's

effects. This Court should affirm the Title Board's inclusion of the challenged language.

VI. CONCLUSION

Based on the foregoing reasoning and authorities, the Title Board respectfully requests that this Court affirm the title for # 138.

Respectfully submitted this 15th day of May 2014.

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CERTIFICATE OF SERVICE

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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