

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #139 and #140</p> <p>Petitioners: VICKIE ARMSTRONG and BOB HAGEDORN</p> <p>v.</p> <p>Respondents: RICHARD EVANS and STEPHEN ROARK*</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; DAVID BLAKE AND SHARE EUBANKS</p>	<p style="text-align: right;">DATE FILED: May 29, 2014 4:12 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p>RESPONDENTS' ANSWER BRIEF</p>	

* The name of Stephen Roark, a designated representative of Initiative #138, was inadvertently omitted in the original caption.

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 2,117 words.

It does not exceed 30 pages.

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

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Mark G. Grueskin

Mark G. Grueskin

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<http://www.sos.state.co.us/pubs/elections/Results/2003/Abstract2003-2004.pdf>2

INTRODUCTION

Given the overwhelming caseload of ballot title appeals, the Proponents of Initiatives 2013-2014 #139 and #140 (concerning the requirement of a local vote in newly authorized gaming jurisdictions) will limit their Answer Brief to new points of law in support of the arguments raised in Respondents' Opening Brief.

Respondents will not restate that legal analysis or reexamine the legal authority that have already rebutted Respondents' claims in the Notice of Appeal.

LEGAL ARGUMENT

A. Initiatives #139 and #140 each comprise a single subject.

1. "Nullification" of proposed initiatives is not a second subject.

Armstrong claims that these measures will nullify one or more of her gambling expansion proposals. Petitioner's Opening Brief at 8-9.

The fact that measures may conflict is no reason that they cannot both be on the same ballot. A possible conflict with other existing laws does not comprise a single subject violation. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 255*, 4 P.3d 485, 496 (Colo. 2000). Certainly, a possible conflict with an initiative that may never qualify for the 2014 ballot is not a second subject. Armstrong argues otherwise, relying on *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 # 43*, 46 P.3d 438, 446 (Colo. 2002). But there is a critical difference between that case and this one:

voters there were considering “a seemingly innocuous initiative” that purported to “relax the procedural requirements” for a ballot measure’s qualification. *Id.* In fact, what that initiative did was eliminate the already-enacted single subject requirement, protection against measures that either deceived voters or amalgamated disparate groups that were concerned about unrelated issues in order to achieve a majority vote. *Id.*

In contrast, Armstrong’s measures are only proposals. She may never gather a single signature on any of them. She is apparently serious about only one, based on the Secretary of State’s website which indicates she obtained petition format approval for #135 but has done nothing with her other measures. *See Exhibit A* attached hereto. In light of the stunning loss suffered by racetrack casino proponents in 2003 on a similar gambling expansion measure,¹ embracing this political reality is more than a mere possibility. And given the speculative nature of pursuing their sole remaining proposal, there is certainly no reason to prevent the Petitioners from proceeding ahead with their concept.

If Armstrong is correct, an entire substantive field of political debate can be occupied by the first designated representatives who submit a proposal on that

¹ Amendment 33 received just 19% of the statewide vote (180,959 “yes” votes to 766,893 “no” votes). Colorado Secretary of State, *Official Publication of the Abstract of Votes Cast for the 2003 Coordinated, 2004 Primary, and 2006 General Elections* at 46.

<http://www.sos.state.co.us/pubs/elections/Results/2003/Abstract2003-2004.pdf>

topic. The right of initiative and referendum is a fundamental right to be liberally construed, *No. 255, supra*, 4 P.3d at 492, and a “first in” construction is plainly inconsistent with the exercise of that right. Armstrong’s single subject argument is unsustainable.

2. The measure’s effective date is not a separate subject.

Armstrong complains that the initiative’s effective date is different than the typical constitutional amendment. Petitioner’s Opening Brief at 10. The measure’s effective date is simply a detail of implementation, not a separate subject. “Implementation provisions tied to an initiative's central focus do not violate the single-subject requirement.” *In re Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 246(e)*, 8 P.3d 1194, 1196 (Colo. 2000).

3. A non-existent expansion of the initiative right is not a separate subject.

Armstrong argues that the expanded right of initiative and referendum at the county level is a separate subject. Petitioner’s Opening Brief at 10-12. As such an expanded right does not exist under either #139 or #140, this invented problem does not violate the single subject requirement.

4. A non-existent change in home rule authority is not a separate subject.

Armstrong argues that the measure fundamentally alters the relationship of home rule cities and their counties. Petitioner’s Opening Brief at 12-14. Any

change in this relationship is hypothetical and entirely restricted to the arena of gambling expansion. Given the current constitutional recognition that counties have more prominent impacts from gaming than do cities, *see* Colo. Const., art. XVIII, sec. 9(5)(b) (Gilpin and Teller Counties divide 12% of gaming revenues whereas Black Hawk, Central City, and Cripple Creek divide 10% of such revenues), allowing for a county vote is reasonable. In any event, affecting home rule powers as part of a targeted measure to address a single problem (here, the lack of local voter input when statewide voters approve a new gambling jurisdiction) is not a second subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 254-55 (Colo. 2000) (affecting home rule authority over land use decisions was an acceptable part of larger growth control initiative).

B. The Title Board developed a legally sufficient title for #139 and #140.

1. Potential “nullification” of other initiatives

Armstrong states, “The fact that, due to sloppy draftsmanship, certain of the Proposed Initiatives may not actually conflict with any of the Competing Initiatives does not alter Respondents’ intent that their eight measures invalidate the Competing Initiatives.” Petitioner’s Opening Brief at 15 fn.1.

Armstrong thus concedes that these measures “may not actually conflict” with her proposals. Why would the Board come to the conclusion that the

measures contain multiple subjects, given that Armstrong virtually admits they do not? And, as she raises this nullification issue as a matter of having a clear title, what useful information would be related by a statement that the measures **do** conflict when, according to Armstrong, some or all of them evidently do not? The Board's job is to summarize the text itself and "unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). Armstrong seeks to superimpose her own inchoate and unparticularized hunch about these initiatives, a matter best left to a campaign.

Armstrong incorrectly states that this Court has acknowledged that certain ballot titles "need to disclose the proponents' intent that their proposed initiative override another proposed initiative." Opening Brief at 17, fn.2. Armstrong evidently misread the case cited, because that decision says nothing of the sort. In fact, it specifically authorizes conflicting ballot measures as long as the respective ballot titles themselves do not conflict. For obvious reasons, Armstrong does not allege that the titles of the various gambling measures conflict, making the precedent cited uniquely inapplicable to support her position. *See Matter of Title, Ballot Title and Submission Clause and Summary for the Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 722 (Colo. 1994).

2. *The local voting process*

Armstrong states that the local vote requirement is unclear because the measure is “incomprehensible,” the product of “sloppy draftsmanship,” and plagued by “hopelessly confusing phraseology.” Petitioner’s Opening Brief at 18, 22. She interprets the language about a local vote, crafted to ensure that any municipal jurisdiction crossing county lines would involve voters in both counties, in ways that were expressly not intended by the proponents. Armstrong’s current confusion was never addressed at the Title Board rehearing. More importantly, the Board was not confused about how this measure would work. It was able to reflect the measure in clear title language. The interpretative exercise that Armstrong seeks to draw this Court into is beyond its scope of review in a matter such as these. *Fair Treatment of Injured Workers, supra*, 873 P.2d at 719 (Court will “not interpret the meaning of proposed language or suggest how it will be applied if adopted by the electorate”).

3. *“Casino-style gambling”*

Armstrong raises concerns about “casino-style” and “gambling.” Petitioner’s Opening Brief at 25-29. She asserts that “many voters will mistakenly assume that the Proposed Initiatives would prohibit only Las Vegas-style casino gaming, when, in fact, they would also prohibit the more limited scope of gaming within the Proposed Initiatives’ definition.” *Id.* at 27.

There is not a shred of proof that any voter would make this leap. And it is certainly not a legitimate legal presumption that this Court would adopt. The accurate legal presumption is just the contrary. “The electorate... must be presumed to know the existing law at the time they amend or clarify that law.” *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo.2000). Thus, Armstrong’s concern over “casino-style” is misplaced as a matter of law, as voters would be presumed to understand the existing legal parameters for such gambling.

As to the term “gambling,” Armstrong argues that it is a catch phrase and perceived by “many voters” to be on par with “drinking, drug use, and adultery.” Petitioner's Opening Brief at 27.

First of all, how does Armstrong know what “many voters” think? She certainly did not provide any proof in her presentations to the Title Board.

Second, the notion that voters view “gambling” in this way is quaint but dated. Compare *Murphy v. People of State of California*, 225 U.S. 623, 629 (1912) (“That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof”) with *Estevanovich v. City of Riverside*, 81 Cal.Rptr.2d 684, 696 (Cal. App. 4th Dist. 1999) (“We do not doubt that in 1909, there was ‘Trouble, right here in River City—that starts with “T,” and that rhymes with “P,” and that stands for Pool’” but “times are different today”). Without a century’s evolution of thought

on this topic, the mere mention of a racetrack might be viewed as a negative political statement in a ballot title.²

Third, Armstrong and Hagedorn are parties in several pending ballot title cases as well as this one. In fact, they have been proponents of multiple gambling expansion proposals this year (Initiatives 2013-2014 #80, #81, #95, #96, #134, and #135), which makes their claim about societal concerns over references to “gambling” seem situational at best. *Cf. U.S. v. Southern Union Co.*, 2008 WL 2032097 fn. 1 (D.R.I. July 9, 2009) (“I’m shocked, shocked to find that gambling is going on in here,” citing Captain Louis Renault in the classic movie, *Casablanca*).

Finally, that view is out of sync with Colorado's recent political reality. As noted by this Court, “a ballot initiative allowing limited stakes gambling... passed overwhelmingly (in 1990)... **Colorado voters continued to support gambling** and in 2008 voted in favor of a constitutional amendment allowing the towns (Black Hawk, Central City, and Cripple Creek) to increase” bet limits, games, and hours of operation. *Webb v. Black Hawk*, 295 P.3d 480, 484 (Colo. 2013) (emphasis added).

² "We are not dealing with the operation of a business which is inherently lawful, but, on the contrary, with one which, at least in Colorado, has been historically and inherently a gambling enterprise and legalized only by virtue of the Racing Act. It definitely involves the public morals and general welfare and calls for an exercise of the police power in the public interest." *Cloverleaf Kennel Club v. Racing Com'n*, 277 P.2d 226, 231 (Colo. 1954) (Moore, J., dissenting).

“Gambling” is not the negative catch phrase asserted by Armstrong.

4. “*Video lottery terminals*”

As to the clarity of “video lottery terminals,” *see* Respondents’ Opening Brief at 29-30, the Title Board does not need to, and cannot, define a term that is not defined in the initiative itself. “Video lottery terminals” is not used at all in #139 or its title, and thus her complaint about this phrase does not apply to this measure. “Video lottery terminals” is not defined in #140, as even Armstrong points out. *Id.* Thus, the Board would have erred if it had developed a definition outside the terms of #140 itself.

Proponents may deliberately leave a measure’s phrase “vague so that the courts interpret its application.” *Matter of Proposed Initiated Constitutional Amendment Concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1034 (Colo. 1992). Armstrong chose to define this phrase in her initiatives, and the Board correctly used those definitions to clarify her intent. There is no issue with having an undefined or even vague term in the title as long as that lack of definition or vagueness is true to the measure itself, and that is the case here.

CONCLUSION

Colorado voters have been able to evaluate the local vote requirement in past years. *See* Colo. Const., art. XVIII, sec. 9(6). In adopting that local approval requirement that could apply in counties, cities, or towns, the parade of horrors

that dominates Respondents' Opening Brief was never encountered. The same will happen for Initiatives #139 or #140, whichever measure ultimately is placed on the ballot due to popular support. Armstrong's single subject complaints and clear title objections are insubstantial.

Respectfully submitted this 29th day of May, 2014.

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CERTIFICATE OF SERVICE

I, Mark G. Grueskin, hereby affirm that a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF** was sent this day, May 29, 2014, via ICCES to the Petitioners' counsel and to counsel for the Title Board at:

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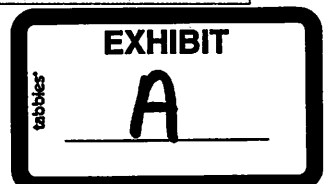
/s Mark G. Grueskin _____

Petition Format Approved

Initiative designated representatives contact list

* Unofficial caption assigned by legislative staff for tracking purposes.

Proposed Initiative #	Caption *	Filings (PDF)	Agenda & Meeting Summary	Result	Timeline
3	Prohibit Cannabis Possession Penalties	<ul style="list-style-type: none"> Original text Amended text Final text 	January 15, 2014, 9:30 AM Commenced 9:30 AM; single subject approved; staff draft amended; titles set; adjourned 9:45 AM	Title set View full result	View timeline
12	Right to Health Care	<ul style="list-style-type: none"> Original text Amended text Final text 	April 17, 2013, 9:30 AM Commenced 3:38 PM; single subject approved; staff draft amended, titles set; adjourned 4:00 PM.	Title set View full result	View timeline
38	Right to Purchase and Possess Ammunition Storage and Feeding Devices	<ul style="list-style-type: none"> Final text Motion for rehearing 	April 17, 2013, 10:00 AM Commenced April 18, 2013, 10:20 AM; single subject approved; staff draft amended, titles set; adjourned 10:31 AM April 26, 2013, 9:00 AM - rehearing Commenced 11:15 AM; Motion for Rehearing denied except to the extent that the Board made changes to the title; adjourned 11:39 AM	Title set View full result	View timeline
41	Repeal Prohibition of Large-Capacity Ammunition Magazines	<ul style="list-style-type: none"> Original text Amended text Final text Motion for rehearing 	April 2, 2014, 9:30 AM Single subject approved; staff draft amended; titles set; adjourned 3:12 PM. April 16, 2014, 8:00 AM - rehearing Motion for rehearing granted; titles amended. Hearing adjourned 12:12 PM.	Title set View full result	View timeline
43	Marriage	<ul style="list-style-type: none"> Original text Amended text Final text 	August 7, 2013, 1:00 PM Commenced 1:05 PM; single subject approved; staff draft amended; titles set; adjourned 1:20 PM.	Title set View full result	View timeline
48	Labeling Genetically Modified Food	<ul style="list-style-type: none"> Original text Amended text Final text Motion for rehearing 	December 4, 2013, 1:00 PM Commenced 1:00 PM; single subject approved; staff draft amended; titles set; adjourned 1:40 PM December 18, 2013, 9:30 AM - rehearing Commenced 9:30 AM; Motion for Rehearing granted to the extent that the Board made changes to the title; denied in all other respects; adjourned 12:22 PM	Title set View full result	View timeline



49	Carrying Restrictions for Concealed Handguns on Campuses	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	January 2, 2014, 1:30 PM Commenced 1:37 PM; single subject approved; staff draft amended; titles set; adjourned 2:10 PM	Title set View full result	View timeline
79	Election of Justices and Judges	<ul style="list-style-type: none"> • Waiver • Final text • Motion for rehearing 	March 19, 2014, 9:30 AM Commenced 9:32 AM; single subject approved; staff draft amended; titles set; adjourned 9:42 AM. April 2, 2014, 9:30 AM - rehearing Motion for Rehearing denied. Hearing adjourned 9:56 AM.	Title set View full result	View timeline
106	Yes or No Elections	<ul style="list-style-type: none"> • Letter • Final text 	April 2, 2014, 9:30 AM Single subject approved; staff draft amended; titles set; adjourned 4:18 PM	Title set View full result	View timeline
107	Marijuana Tax Revenue to Establish Housing for Disabled	<ul style="list-style-type: none"> • Original text • Final text 	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 8:45 AM.	Title set View full result	View timeline
111	State Representative Districts	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 5:39 PM.	Title set View full result	View timeline
112	Two-Stage Election System	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	April 17, 2014, 8:30 AM Single subject approved; staff drafts amended; titles set. Hearing adjourned 9:11 AM.	Title set View full result	View timeline
113	Provisions for Reapportionment and Redistricting	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 9:26 AM.	Title set View full result	View timeline
114	Appointment of Nonpartisan Secretary of State	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 9:40 AM.	Title set View full result	View timeline
121	Distribution of Oil and Gas Revenue	<ul style="list-style-type: none"> • Original text • Amended text • Final text • Motion for rehearing 	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; title set. Hearing adjourned 9:42 AM. April 24, 2014, 8:30 AM - rehearing Motion for Rehearing denied except to the extent that the Board made changes to the titles. Hearing adjourned 2:42 PM.	Title set View full result	View timeline
122	Local Regulation of Oil and Gas Development	<ul style="list-style-type: none"> • Original text • Amended text • Final text • Motion for rehearing 	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 5:10 PM. April 25, 2014 - rehearing Motion for Rehearing denied except to the	Title set View full result	View timeline

			extent that the Board made changes to the titles. Hearing adjourned 12:03 PM.		
124	School Board Open Meetings	<ul style="list-style-type: none"> • Original text • Amended text • Final text • Motion for rehearing 	<p>April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 4:34 PM.</p> <p>April 24, 2014, 8:30 AM - rehearing Motion for Rehearing granted only to the extent that the Board made changes to the titles; denied in all other respects. Hearing adjourned 4:35 PM.</p>	Title set View full result	View timeline
135	Horse Racetrack Limited Gaming Proceeds for K-12 Education	<ul style="list-style-type: none"> • Original text • Amended text • Final text • Motion for rehearing 	<p>April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 12:02 PM.</p> <p>April 24, 2014, 8:30 AM - rehearing Motion for Rehearing denied except to the extent that the Board made changes to the titles. Hearing adjourned 10:23 AM.</p>	Title set View full result	View timeline
137	Fiscal Impact of Ballot Measures	<ul style="list-style-type: none"> • Original text • Amended text • Final text 	<p>April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 1:20 PM.</p>	Title set View full result	View timeline