SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 5:21 PM
Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #139 and #140 **Petitioners:** Vickie L. Armstrong and Bob Hagedorn, v. **Respondents:** Richard Evans and Stephen Roark, and **Title Board:** Suzanne Staiert, David Blake, and Jason Gelender	▲ COURT USE ONLY▲ Supreme Court Case No. 2014SA147 and 14SA148
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PETITIONERS' 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/ Lino S. Lipinsky de Orlov
Lino S. Lipinsky de Orlov

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STATEMENT OF THE ISSUES

Whether the Title Board erred in finding that Initiative 2013-2014 #139 ("Initiative #139) and Initiative 2013-2014 #140 ("Initiative #140") (jointly, the "Proposed Initiatives") each concerns a single subject.

Whether the titles (the "Titles") that the Title Board set for the Proposed Initiatives are impermissibly misleading for one or more of the following reasons:

(a) The Titles fail to disclose the various subjects of the Proposed Initiatives;

(b) The Titles do not express the intent of the Proposed Initiatives to nullify voter approval of certain competing proposed initiatives;

(c) The Titles cannot state the true intent and meaning of the Proposed Initiatives because the reference to "a county or counties' host community" in the Proposed Initiatives is incomprehensible; and

(d) The Titles use the undefined, vague, and misleading words and phrases (1) "local vote"; (2) "gambling" (Initiative #139); (3) "casino-style gambling" (Initiative #140); and (4) "video lottery terminals" (Initiative #140), and the prohibited catch phrases "local vote," "gambling," and "casino-style gambling."

STATEMENT OF THE CASE

Respondents, Richard Evans and Stephen Roark (jointly, "Proponents"), filed the Proposed Initiatives with the directors of the Legislative Council and the Office of Legislative Legal Services on March 21, 2014. The legislative staff provided Proponents with its review and comment memoranda for the Proposed Initiatives on April 2, 2014, and conducted the associated review and comment meetings on April 4, 2014.

Proponents filed amended versions of the Proposed Initiatives with the Secretary of State's office on April 4, 2014. At hearings conducted on April 17, 2014, the Title Board found that the Proposed Initiatives each contained a single subject and set the Titles.

The title set for Initiative #139 reads:

> An amendment to the Colorado constitution concerning a requirement for a local vote to approve gambling in a host community to the extent authorized by a statewide ballot measure that is adopted on or after November 4, 2014, and, in connection therewith, requiring the local vote within thirteen months after the effective date of the statewide vote and before the granting of a gambling license.

Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #139, at 11 (the "Title for Initiative #139").

The title set for Initiative #140 reads:

> An amendment to the Colorado constitution concerning a requirement for a local vote to approve casino-style

> gambling, including video lottery terminals, in a host community to the extent authorized by a statewide ballot measure that is adopted on or after November 4, 2014, and, in connection therewith; requiring the local vote within thirteen months after the effective date of the statewide vote and before the granting of a gambling license.

Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #140, at 11 (the "Title for Initiative #140").

On April 23, 2014, Petitioners filed motions for rehearing (the "Motions") regarding the Title Board's decisions as to the Proposed Initiatives and the Titles. In the Motions, Petitioners explained that (a) the Proposed Initiatives improperly address multiple subjects, in violation of article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 (2013), and (b) the Titles are misleading, do not fairly and correctly express the true meaning of the Proposed Initiatives, and will lead to voter confusion, in violation of C.R.S. §§ 1-40-106 and 1-40-107 (2013). The Title Board denied the Motions on April 24, 2014. Petitioners timely commenced this appeal on May 1, 2014.

STATEMENT OF THE FACTS

The Proposed Initiatives would require that "the voters of a county or counties' host community" vote to authorize any type of "gambling" (Initiative #139) or "casino-style gambling, including video lottery terminals" (Initiative #140) before any statewide vote to authorize such gambling in the "host

community" could take effect. However, the Proposed Initiatives do not define "host community," Initiative #139 does not define "gambling," and Initiative #140 does not define "video lottery terminals."

The Proposed Initiatives refer to their voting requirement as "local voter approval," even though, in some instances, a county, rather than a local community, would conduct the election. Moreover, the Proposed Initiatives do not explain when the voters of a "county" and when the voters of a "counties' host community" would be required to vote.

In addition, the Proposed Initiatives would mandate that the "local vote" occur "within thirteen months after the effective date of the statewide vote." If the required "local vote" were, in fact, a county-wide vote, the proponents of a limited gaming measure would be unable to rely on the initiative process to obtain the second vote. There is no right to initiative at the county level. The Proposed Initiatives would prohibit the issuance of licenses to conduct "gambling" or "casino-style gambling" prior to the "local vote."

Because the Proposed Initiatives would apply to "gambling" or "casino-style gambling" authorized by a statewide vote only on or after November 4, 2014, they would not apply to the limited gaming in Black Hawk, Central City, and Cripple Creek currently authorized under Colorado law. *See* Colo. Const. art. XVIII, § 9. The Proposed Initiatives state that they do "not replace, modify, limit, or duplicate

the requirements for *local voter approval* of limited gaming as provided in section 9(6) and (7) of Article XVIII." (Emphasis added.) These subsections of the Constitution require only that the city, town, or unincorporated portion of a county approve proposed limited gaming amendments. They make no mention of "the voters of a county or counties' host community." *See* Colo. Const. art. XVIII, § 9(6)-(7).

SUMMARY OF THE ARGUMENT

Because each of the Proposed Initiatives contains multiple subjects, the Title Board lacked jurisdiction to set titles and this Court should reverse. In addition to their acknowledged subject – requiring a second vote to authorize new gambling – the Proposed Initiatives include four additional subjects: (1) the intended potential nullification of competing proposed initiatives; (2) the modification of the constitutional requirements for timely implementation of initiatives; (3) the potential preclusion of the expansion of gambling; and (4) the radical alteration of the relationship between home rule cities and their counties.

The Title Board compounded its error by setting misleading titles that do not fairly express the true intent and meaning of the Proposed Initiatives. The Titles (1) fail to describe the Proposed Initiatives' multiple subjects; (2) fail to disclose the Proposed Initiatives' intent to nullify competing proposed initiatives; (3) fail

adequately to describe the jurisdiction required to conduct the second vote; and (4) use vague, undefined, and misleading words and phrases.

This Court should reverse because the Title Board set titles for the Proposed Initiatives even though the Proposed Initiatives address multiple subjects, in violation of Colorado law, and because the Titles suffer from critical, misleading omissions and text.

STANDARD OF REVIEW

The Title Board cannot set a title for a proposed initiative unless the initiative contains only "one subject, which shall be clearly expressed in its title." Colo. Const. art. V, §1(5.5); C.R.S. § 1-40-106.5 (2013). In evaluating titles, the Court ensures that the proposed initiative contains only a single subject and that the subject "is clearly expressed in its titles." *Garcia v. Chavez* (*In re Title, Ballot Title & Submission Clause, & Summ. for 1999–2000 No. 258(A))*, 4 P.3d 1094, 1097 (Colo. 2000) ("*Garcia I*").

The single-subject requirement is violated when a proposed initiative joins "two distinct and separate purposes that are not dependent upon or connected with each other." *Id.* While the Court typically "will not interpret or construe the future legal effects of a proposed initiative . . . , [the Court] will engage in a limited inquiry if necessary to ascertain whether the single-subject requirement has been violated." *Garcia v. Montero (In re Title, Ballot Title & Submission Clause for*

Proposed Initiatives 2001-2002 #21 & #22) ("English Language Educ."), 44 P.3d 213, 215-16 (Colo. 2002) ("*Garcia II*").

In addition, the Court must ensure the titles "fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *Dibble v. Bruce (In re Title, Ballot Title & Submission Clause, & Summ. Adopted Feb. 3, 1993)*, 852 P.2d 28, 32 (Colo. 1993). In setting titles, the Title Board has a statutory duty to "consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106 (2013). Titles must "correctly and fairly express the true intent and meaning" of a proposed initiative. *Id.* In addition, titles must be brief and cannot conflict with the titles set for any petitions previously filed in the same election. *Id.*

When the Title Board's statutory duty to be brief conflicts with its duty to fairly describe a proposed initiative, "the decision must be made in favor of full disclosure to the registered electors." *Dibble*, 852 P.2d at 33. When a proposed initiative is complex, the title "cannot be abbreviated by omitting references to the measure's salient features." *Id.* While titles are not required to state every detail

of a proposed initiative, an omission that would mislead or confuse voters is a fatal defect. *See Garcia I*, 4 P.3d at 1099.

A title does not fairly express a proposed initiative by merely including the language used in the proposed initiative. *See Garcia II*, 44 P.3d at 221. Rather, the title must inform voters of the intention of the proposed initiative when all provisions of the proposed initiative are taken into consideration. *Id.*

ARGUMENT

I. THE TITLE BOARD ERRED IN FINDING THAT THE PROPOSED INITIATIVES EACH CONCERNS A SINGLE SUBJECT.

A. The Requirement for a Second Vote on "Gambling" or "Casino-Style Gambling" Following the Statewide Vote.

The Titles reflect the Proposed Initiatives' requirement that statewide elections legalizing or authorizing "gambling" or "casino-style gambling" would be invalid "unless the voters of a county or a counties' host community, named in the statewide ballot measure also vote to approve that type of gambling or casino-style gambling in the named host community." This is the only one of the five subjects of the Proposed Initiatives that appears in the Titles, however.

B. Potential Nullification of the Four Ballot Measures for Which Respondents Are the Petitioners.

A second subject of the Proposed Initiatives is the potential nullification of proposed initiatives 2013-2014 #80, #81, #134, and #135 (the "Competing Initiatives") if the Proposed Initiatives were to obtain more votes than did the

Competing Initiatives. This feature of the Proposed Initiatives is a discrete and separate subject, not expressed in the Titles. A voter could approve both the Proposed Initiatives and the Competing Initiatives without realizing that the Proposed Initiatives could prevent the Competing Initiatives from taking effect.

There is an inherent conflict between the requirement of a single statewide vote set forth in the Competing Initiatives and the second vote by "a county or a counties' host community" mandated in the Proposed Initiatives. Furthermore, the requirement that the second vote occur within thirteen months of the original vote could invalidate the critical deadlines built into the Competing Initiatives, *see* Proposed Initiative 2013-2014 #80 Final Text at § 17(3)(b); Proposed Initiative 2013-2014 #81 Final Text at § 17(3); Proposed Initiative 2013-2014 #134 Final Text at § 17(6)(a); Proposed Initiative 2013-2014 #135 Final Text at § 17(6).

This Court has stricken ballot titles containing as a second subject the invalidation of another measure. For example, in *Jones v. Polhill (In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43)*, 46 P.3d 438, 446 (Colo. 2002), the Court found that the proposed initiative at issue contained more than a single subject because, by voting for the "seemingly innocuous initiative," the voters could "inadvertently nullify" a constitutional amendment the voters had recently approved. As in *Jones*, the Proposed Initiatives

contain as an improper second subject the possible nullification of the Competing Initiatives.

C. Modification of the Constitutional Requirement That Initiatives Take Effect Not Later Than Thirty Days Following a Statewide Election.

The Proposed Initiatives contain the further subject of overriding the constitutional requirement that measures initiated or referred to the people must take effect "not later than thirty days after the vote has been canvassed." Colo. Const. art. V, § 1(4). This measure serves the important purpose of ensuring that the will of the people, as expressed through the initiative process, is not thwarted through delays in implementation of an initiative. The Proposed Initiatives, however, would prohibit statewide initiatives or referenda authorizing or legalizing "gambling" or "casino-style gambling" from taking effect until after a "local vote," in conflict with article V, section 1(4).

D. The Potential Preclusion of Expansion of "Gambling" or "Casino-Style Gambling" at the County Level.

The Proposed Initiatives would potentially preclude future initiatives or referenda to expand "gambling" or "casino-style gambling" at the county level. The Proposed Initiatives would require the voters of a "county or counties' host community" to approve the expansion of "gambling or casino-style gambling," even though there is no right to initiative or referendum in counties. If the subject

entity were not a city, town, or municipality, which have the right to initiative and referendum, the proponents of the measure could not obtain the second vote.

The Colorado Constitution does not extend to counties the right of initiative and referendum that the state and cities possess. Colo. Const. art. V § 1(9) ("The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every *city, town, and municipality* as to all local, special, and municipal legislation of every character in or for their respective municipalities") (emphasis added). Colorado counties have no independent powers of initiative or referendum. Colo. Const. art. V, § 1(9); *see Bd. of Cnty. Comm'rs v. Cnty. Road Users Ass'n*, 11 P.3d 432, 436 (Colo. 2000) ("this court has not recognized any constitutional initiative powers reserved to the people over countywide legislation"). Instead, counties are permitted to submit to their voters only those ballot measures addressing the limited issues specifically allowed under state law. Colorado Legislative Council Staff, *2013 Colorado Local Government Handbook* 54 (Jan. 2013). Those issues do not include "gambling" or "casino-style gambling."

While an amendment to the Colorado Constitution could grant additional powers to counties, the Proposed Initiatives do not purport to do so. Accordingly, unless the Proposed Initiatives are read to impliedly grant counties the authority to conduct the required "local votes," the Proposed Initiatives concern the separate

subject of effectively prohibiting the expansion of "gambling" or "casino-style gambling" at the county level. And, of course, if the Proposed Initiatives *were* read to impliedly grant counties new authority to conduct the required "local votes," that would be yet another separate subject.

E. The Radical Alteration in the Relationship Between Home Rule Cities and Their Counties.

The Titles fail to reveal the further undisclosed subject of fundamental alteration of the relationship between home rule cities and their counties. "[W]hen provisions seeking to accomplish one purpose are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative, the initiative violates the single-subject rule." *Howes v. Brown (In re Title, Ballot Title & Submission Clause for 2009-2010 No. 91)*, 235 P.3d 1071, 1077 (Colo. 2010). The Proposed Initiatives contain the subject of allowing counties to overrule home rule cities' decisions relating to "gambling" and "casino-style gambling."

Article XX, section 6, of the Colorado Constitution grants home rule cities considerable autonomy. Home rule cities' ordinances supersede conflicting state statutes pertaining to matters of local concern. *McCarville v. City of Colo. Springs*, 2013 COA 169 at ¶ 8, 2013 WL 6354439, at *2 (Colo. App. Dec. 5, 2013). Home rule cities may legislate in matters of mixed state and local concern, so long as their legislation does not conflict with state statutes. *Id.*

All Colorado municipalities, whether home rule or not, possess the police power to "protect the safety, health, welfare, and morals of the community" and to "prohibit offensive or unwholesome businesses within municipal limits." Colorado Legislative Council Staff, *2013 Colorado Local Government Handbook* 18 (Jan. 2013). Home rule cities also possess the authority to prohibit within their boundaries forms of gambling authorized by the state.

The Proposed Initiatives, however, would strip this authority from home rule cities. Under the Proposed Initiatives, Colorado counties, for the first time, could override a home rule city's decisions relating to "gambling" and "casino-style gambling." Even if the majority of voters in the state, and even the majority of voters in the subject home rule city, approved a form of "gambling" or "casino-style gambling," the voters' will could be overridden through a county-wide vote.

In *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #95)*, 960 P.2d 1204, 1208-09 (Colo. 1998), this Court found that an initiative violated the single subject requirement by proposing to deprive home rule cities of certain powers. In that case, the initiative would have changed the qualifications for judicial officers. The court found that, to the extent the initiative would apply to municipal court judgeships within home rule cities and towns, it violated the single subject rule by furthering a purpose unrelated to the qualifications of judicial officers. *See id*. at 1209. Similarly, here, the

Proposed Initiatives contain the hidden subject of transferring powers from home rule cities to counties under certain (unspecified) circumstances.

II. THE TITLES ARE MISLEADING TO VOTERS.

A. The Titles Fail to Disclose the Multiple Subjects of the Proposed Initiatives.

Section I above describes the four subjects of the Proposed Initiatives that are absent from the Titles. The Titles do not disclose to voters that the Proposed Initiatives (a) could potentially nullify the Competing Initiatives, (b) modify the section of the Colorado Constitution requiring that initiatives take effect not later than thirty days following the election, (c) potentially preclude the expansion of "gambling" or "casino-style gambling" at the county level, and (d) radically alter the relationship between home rule cities and their counties. These are salient features of the Proposed Initiatives that should have been included in the Titles. *Dibble*, 852 P.2d at 33. Even if the Court does not strike down the Proposed Initiatives on single subject grounds, at the very least, the Title Board erred in failing to disclose these additional features in the Titles.

B. The Titles Do Not Express the Intent of the Proposed Initiatives To Nullify Voter Approval of the Competing Initiatives.

The Titles fail to disclose that the intent of the Proposed Initiatives is to nullify potential voter approval of the Competing Initiatives. The Proposed Initiatives represent a thinly-disguised effort by the opponents of expanded limited gaming to squash any attempt to allow horse racetracks to use video lottery

terminals or to engage in limited gaming themselves. For this reason alone, the Titles violate the statutory requirement that titles must "correctly and fairly express the true intent" of initiatives. *See* C.R.S. § 1-40-106 (2013).[1]

Had the Titles complied with the law, they would have informed the voters that the Proposed Initiatives are intended to override the Competing Initiatives. Respondents hastily cobbled together the Proposed Initiatives (together with Respondents' six other "gambling," "legalized gambling," and "casino-style gambling" measures) a mere fourteen days after Respondents filed Competing Initiatives #80 and #81, barely in time for a title setting at the very next Title Board hearing.

The statements of Respondents' counsel before the Title Board underscore that Respondents drafted the Proposed Initiatives with the intent to defeat the Competing Initiatives, which would authorize either the operation of video lottery terminals (for Competing Initiatives #80 and #134) or horse racetrack limited gaming (for Competing Initiatives #81 and #135) without requiring a second vote. At the rehearing on the Proposed Initiatives, Respondents' attorney conceded that the intent of the Proposed Initiatives was "so you get a vote, and for you not to get

[1] 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.

a vote would mean nobody gets a vote, and they've crafted these measures—certain measures so that no one gets a vote." Tr. of Reh'g on Initiatives #138-145, #134, and #135, at 26:8-11, Apr. 24, 2014, Ex. A. This evidence demonstrates Respondents' intention that the Proposed Initiatives counter the Competing Initiatives.

In addition, it is no coincidence that the Proposed Initiatives use the identical terms of art that appear in the Competing Initiatives, some of which are new to Colorado. For example, the Proposed Initiatives refer to a "host community," which the Competing Initiatives define as the jurisdiction that issues the permits and approvals necessary for a facility to operate video lottery terminals (for #80 and #134) or to conduct horse racetrack limited gaming (for #81 and #135).

To Petitioners' knowledge, "host community" is currently undefined in the Colorado Constitution and statutes. During the Title Board hearing on Initiative #139, Title Board member David Blake remarked that the term "host community" was "odd," and asked whether it was a term of art. Tr. of Title Board Hearing on Initiative #139, at 3:6-7, Apr. 17, 2014, Ex. B. Board member Suzanne Staiert responded that "host community" had become a term of art in other titles the board had set, presumably referring to the Competing Initiatives. *Id.* at 3:8-9. The Proposed Initiatives' use of a term that Petitioners introduced only two weeks

before underscores that Respondents intend that the Proposed Initiatives serve as "poison pills" for the Competing Initiatives.

Similarly, Proposed Initiative #140 defines "casino-style gambling" expressly to include "video lottery terminals," which Competing Initiatives #80 and #134 would authorize for the first time in Colorado. Video lottery terminals are not currently permitted in this state, and the term "video lottery terminal" appears nowhere in the Colorado Constitution or statutes. This is further evidence that Proposed Initiative #140 specifically targets Competing Initiatives #80 and #134.

The voters would have no idea from reading the Titles, however, that the Proposed Initiatives are a direct attack on the Competing Initiatives. Because the Title Board failed in drafting proper titles for the Proposed Initiatives, unwitting voters will not realize that the Proposed Initiatives could nullify the Competing Initiatives, and may therefore vote for both. The Titles must be stricken because they do not express the intent of the Proposed Initiatives, an essential element for voters to understand the import of their vote. *See* C.R.S. § 1-40-106 (2013).[2]

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[2] In *O'Toole v. Walker (In re Title, Ballot Title & Submission Clause, and Summary Approved January 19, 1994 & February 2, 1994 for the Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 721-22 (Colo. 1994), this Court acknowledged that, under certain circumstances, a ballot title would need to disclose the proponents' intent that their proposed initiative override another proposed

{footnote continued}

C. The Titles Cannot State the True Intent and Meaning of the Proposed Initiatives Because the Reference to "a County Or Counties' Host Community" in the Proposed Initiatives Is Incomprehensible.

The reference in the Proposed Initiatives to the jurisdiction that must conduct the required "local vote" is incomprehensible. As noted above, the Proposed Initiatives require a second vote by "the voters of a county or counties' host community, named in the statewide ballot measure" before a measure to legalize or to authorize "gambling" or "casino-style gambling" can take effect. It is impossible to discern from this language what jurisdiction must conduct the second vote.

There are several possible ways to interpret "a county or counties' host community." If "a county" means "a county's," then the Proposed Initiatives would require that the "host community" always conduct the vote. If so, the reference to "a county or counties'" would be superfluous, because the Proposed Initiative could have stated, "the voters of the host community named in the statewide ballot measure." But, critically, the Proposed Initiatives *do not say* "a county's" and, therefore, they cannot be read as if they do.

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initiative. This is such a case. *See* Tr. of Title Board Hearing on Initiative #138, at 2:21-9:23, Apr. 17, 2014, Ex. D (statements indicating that the Proposed Initiatives were a response to the gaming measures proposed for the 2014 ballot).

Nonetheless, it appears that this is precisely how counsel for Respondents and the Title Board interpreted the Proposed Initiatives. At the Title Board rehearing on Initiative #139, Respondents' attorney said he had previously suggested the phrase "a vote of the host community" instead of "local vote" in the Titles. Ex. A, at 26:23-24. If the Title Board had made this change, the Titles would have read, "[a]n amendment to the Colorado constitution concerning a requirement for a vote of the host community to approve ['gambling' or 'casino-style gambling'] in a host community." As explained above, however, the Proposed Initiatives, as written, do not call for a vote of the "host community" under all circumstances. At times, the Proposed Initiatives seem to require a county-wide vote.

Later, Mr. Blake proposed that "local vote" could be replaced by "something like, [a] voter within the jurisdiction of the host community." *Id.* at 27:18-19. With this change, the Titles would have read, "[a]n amendment to the Colorado constitution concerning a requirement that voters within the jurisdiction of the host community approve ['gambling' or 'casino-style gambling'] in a host community." This also would have been an incorrect summary of the Proposed Initiatives, because it would (a) have required that the word "county" in the Proposed Initiatives be read as "county's," or (b) have failed to acknowledge that, in some

circumstances, a county, rather than "a counties' host community" would conduct the vote.

Mr. Gelender then suggested replacing "local vote" with "[c]onsidering a requirement for the voters of a host community to approve gambling in the host community." *Id.* at 29:1-3. Yet again, this would have been an incorrect summary of the Proposed Initiatives, as it would have assumed that the voters of the host community, rather than those of the county, would always be the relevant voters.

The Title Board's inability to find a means of describing the jurisdiction conducting the vote, without resorting to the generic "local vote," demonstrates that the Proposed Initiatives are incomprehensible and inherently confusing. As described in Section II.D.1. below, the use of the catch phrase "local vote" is likely to confuse voters into believing the vote would occur within a neighborhood or city, rather than an entire county or "counties' host community." Because the Proposed Initiatives do not clearly identify the jurisdiction in which the "local vote" would occur, it would be impossible to draft titles that clearly explained this essential feature of the Proposed Initiatives.

The Proposed Initiatives could also be read to require the approval of the voters within each county affected by the proposed gambling. This would be consistent with the original draft of the Proposed Initiatives, which required a vote "of the county or counties in which a host community is to be located . . . ." Ex. A

to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #139, at 2; Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #140, at 2. If this was the intent underlying the Proposed Initiatives, they could have referred to "the county or counties containing each host community named in the statewide ballot measure." Again, the Proposed Initiatives *do not* say this, and cannot be read as if they do.

Another interpretation is that the Proposed Initiatives would require (a) a countywide vote if the "host community" were located within a single county and (b) a vote within the "host community" if the "host community" were located within multiple counties. If this was Respondents' intent, the Proposed Initiatives should have referred to a vote of "the voters of a county or, if a host community is located in multiple counties, a vote of the counties' host community." But Respondents did not elect this language either. As it stands, the Proposed Initiatives are incomprehensible because they do not state when the voters of a county would vote, and when the voters of a "counties' host community" would vote.

Even if the Proposed Initiatives could be properly read to have this meaning, the Proposed Initiatives would call for a "local vote" only if the "host community" were located within more than one county. In all other circumstances, the vote

would be county-wide. This interpretation makes no sense if the purpose of the Proposed Initiatives were truly to require votes at the local level, as the Titles state.

Regardless of how one attempts to parse "a county or counties' host community," the reference to "local vote" in the Titles is materially misleading. The sloppy draftsmanship of the Proposed Initiatives prevented the Title Board from setting titles that satisfy the statutory standard of clarity. A title cannot be set for a proposed initiative "if the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title" or if the proposed initiative contains "a surreptitious measure, such that the voters cannot comprehend what is being proposed or could be misled or surprised." *Hayes v. Ottke*, 2013 CO 1, 293 P.3d 551, 555 (Colo. 2013); *Aisenberg v. Campbell (In re Title, Ballot Title, & Submission Clause, & Summ. for 1999-2000 No.29)*, 972 P.2d 257, 261 (Colo. 1999).

The Title Board's attempt to address Respondents' hopelessly confusing phraseology through reliance on the generic term "local vote" does not redeem the Titles, even though the reference to "local" came from one section of the Proposed Initiatives.[3] *See Lipinsky de Orlov v. Mathers (In re Title, Ballot Title, Submission*

[3] Section (2) of the Initiative #139 and section (3) of Initiative #140 refer to "local voter approval," although section (1) of both Proposed Initiatives makes no mention of a "local vote." Instead, section (1) contains the problematic "a county or counties' host community" language.

Clause, & Summ. by Title Bd. Pertaining to a Proposed Initiative on "Obscenity"), 877 P.2d 848, 850-51 (Colo. 1994). Also, the first section of the Proposed Initiatives, which describes the jurisdiction that must conduct the vote, makes no reference to "local." For these reasons, no title can be set for the Proposed Initiatives because "a county or counties' host community" is inherently vague and confusing.[4]

D. The Titles Impermissibly Use Undefined, Vague, and Misleading Terms and Catch Phrases.

The Titles use four undefined, vague, and misleading words and phrases: (1) "local vote"; (2) "gambling" (Initiative #139); (3) "casino-style gambling" (Initiative #140); and (4) "video lottery terminals" (Initiative #140). "Local vote," "gambling" and "casino-style gambling" are also impermissible catch phrases.

1. "Local vote."

The Proposed Initiatives contain the phrase "local voter approval" in their section titles and later refer to the "local voter approval of limited gaming" as provided in article XVIII, section 9(6) and (7) of the Colorado Constitution. Although voters are likely to interpret "local voter approval" to mean approval by the voters of the smallest possible political subdivision, and Section 9 requires only

[4] To the extent this Court may find that the term "county or counties' host community" has a discernible meaning, that meaning was not communicated through the Titles, and the Titles should be remanded to the Title Board for redrafting.

that the city, town, or unincorporated portion of a county approve limited gaming amendments, the Proposed Initiatives require a vote by either "a county or counties' host community." As explained in Section C above, that term, while hopeless confusing, is not equivalent to "local."

The Titles use a slightly different phrase, "local vote," stating that the Proposed Initiatives concern "a requirement for a local vote to approve gambling in a host community[.]" However, the phrase "local vote" is a vague and misleading term, and an improper catch phrase.

At the outset, as discussed above, the language used in the Proposed Initiatives to describe local voter approval – based on the votes of "voters of a county or counties' host community" – is incomprehensible or, at the very least, ambiguous. Even if the grammatical mismatches within the phrase "voters of a county or counties' host community" did not render that language unintelligible, describing the required approval here as a "local vote" is inherently misleading because "local" can have a range of meanings, including "neighborhood," "community," "town," "city," "county," or "region." Voters reading the Titles will have no idea within which jurisdiction the "local vote" must occur. Therefore, "the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106 (2013).

In addition, "local vote" is an improper catch phrase. Campaigns are regularly waged over the power of the federal or state government as contrasted with power at the relatively more local level. As such, "local vote" are "words that could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment." *Rice v. Brandon (In re Title, Ballot Title, Submission Clause, & Summary for 1997-1998 #105 (Payments by Conservation Dist. to Pub. Sch. Fund & Sch. Districts))*, 961 P.2d 1092, 1100 (Colo. 1998). The Title Board should not have set the Titles using a shorthand phrase that will appeal to people's emotions. It should have required the Titles to fully and accurately describe the "local vote," as set forth in the Proposed Initiatives (however flawed their language is). *See, e.g.*, title for Ref. C (1992) (describing the referendum that added section 6 to article XVIII as prohibiting an expansion of limited gaming "unless first approved by an affirmative vote of the electorate of such city, town, or unincorporated portion of a county"), *available at* http://www.law.du.edu/images/uploads/library/CLC/369.pdf, at 4.

2. "Gambling."

Initiative #139 carves out an exception for limited gaming under article XVIII, but otherwise deems ineffective any statewide vote to authorize "any type of gambling" that was not already authorized in a county on January 1, 2014, unless the "gambling" is also approved through a "local vote" (whatever that

means). Neither Initiative #139 nor the Title for Initiative #139 defines "gambling."

The criminal statutes define "gambling," with certain exceptions, as "risking any money, credit, deposit, or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device, or the happening or outcome of an event, including a sporting event, over which the person taking a risk has no control[.]" C.R.S. § 18-10-102(2) (2013). This Court has applied that broad definition in contexts outside criminal prosecutions, for example, under the Colorado Liquor Code, *see Charnes v. Central City Opera House Ass'n*, 773 P.2d 546, 548 (Colo. 1989). In all likelihood, that broad definition would also apply to Initiative #139, if on the ballot and approved by the electorate.

Yet the Title for Initiative #139 does not even hint at the breadth of the amendment it purports to describe. It does not refer voters to the definition in C.R.S. § 18-10-102(2) (2013), or summarize that definition. Because most voters think of "gambling" in Colorado as limited to existing forms of legal gaming, including lotteries and limited gaming under, respectively, sections 2 and 9 of article XVIII of the Constitution, the absence of a definition is bound to be misleading.

Moreover, the word "gambling" is a prohibited catch phrase. It is a word that "could form the basis of a slogan for use by those who expect to carry out a

campaign for or against an initiated constitutional amendment." *Rice*, 961 P.2d at 1100. "Gambling" is right up there with drinking, drug use, and adultery in the eyes of many voters. Unless specifically authorized by law or subject to another exception in the statutory definition, it is a crime in Colorado. C.R.S. § 18-10-103 (2013). The use of the word "gambling" in the Title for Initiative #139 will permit opponents to appeal to the electorate "based not on the content of the proposal itself, but merely on the wording of the catch phrase." *Garcia I*, 4 P.3d at 1100. Colorado law forbids that result.

3. "Casino-style gambling."

Initiative #140 defines "casino-style gambling" as "the use of slot machines, poker, blackjack, craps, roulette, or video lottery terminals, or any combination thereof, as those terms are used in article XVIII of the Colorado constitution." This definition is flawed inasmuch as it assumes that "video lottery terminals" is a "term[ ] used in article XVIII of the Colorado constitution." It is not.

In any event, the Title for Initiative #140 omits the definition of "casino-style gambling," and this leads to multiple problems. *First*, the undefined phrase is misleading because many voters will mistakenly assume that Initiative #140 would prohibit only Las Vegas-style casino gaming, when in fact it also would prohibit the more limited scope of gaming within the measure's definition. Specifically, voters would not know that Initiative #140 would prohibit gaming subject to a

$100 bet limit (as distinguished from the unlimited bets in true "casino-style gambling"), and that it would prohibit gaming venues that offer a limited choice of games (as distinguished from the fuller array of games available in true "casino-style gambling").[5] The tendency of the Title for Initiative #140 to mislead on this issue is critical because the electorate would not understand what the measure would actually prohibit. *See In re Title, Ballot Title & Submission Clause Adopted April 4, 1990, Pertaining to the Proposed Initiative on Parental Notification of Abortion for Minors*, 794 P.2d 238, 242 (Colo. 1990) (reversing the Title Board where the title did not include the initiative's definition of "abortion," and "[w]ithout this definition, [the title and summary] do not fully inform the signors of the initiative petition and the persons voting on the initiative").

Second, "casino-style gambling," like "gambling," is a catch phrase because of the ease with which it could be used in a political campaign's slogan against Initiative #140. *Rice*, 961 P.2d at 1100. By pairing "gambling" with "casino-style," the Title for Initiative #140 ratchets up the prejudice to the opponents of the Proposed Initiatives. The proponents could campaign based "merely on the wording of the catch phrase" rather than "on the content of the proposal itself[.]"

[5] For example, Las Vegas casinos offer Baccarat, Sports Book, Keno, Bingo, and Pai Gow Tiles. *See, e.g.*, https://www.bellagio.com/casino/table-games.aspx.

Garcia I, 4 P.3d at 1100. The title and text of the 1990 ballot measure that turned historic buildings in three mountain towns into flashy casinos used the innocuous term "limited gaming," undoubtedly because such language was more palatable to the voters than the loaded term, "casino-style." Because "the Title Board tip[ped] the substantive debate surrounding the issue to be submitted to the electorate" through its use of Initiative #140's charged language, particularly without including the definition of that phrase, the Title for Initiative #140 is neither fair nor balanced. *Id.*

4. "Video lottery terminals."

Neither Initiative #140 nor its Title defines "video lottery terminals." Nor is the phrase used, much less defined, in any other constitutional provision, or by statute. Respondent Evans opposed the originally set title for 2013-2014 Proposed Initiative #80 ("Proposed Initiative #80"), which used the phrase "video lottery terminals." According to his counsel, who also represents him in this appeal, "most people don't really know what a lottery terminal would be, other than a device where you buy tickets[,]" and "frankly, a video lottery terminal isn't descriptive at all." Tr. of Reh'g on Proposed Initiative #80, at 21:21-23, Apr. 2, 2014, Ex. C. As one member of the Title Board stated in setting the title for 2013-2014 Proposed Initiative #80, "video lottery terminal, undefined, is I think probably misleading." *Id.* at 22:1-2. That member explained that "the typical

voter would think it has something to do with playing the lottery on a computer, which is not what it is." *Id.* at 22:3-5; *see id.* at 19:19-21 (the phrase "video lottery terminal" is "not something I really think most people understand"); *id.* at 19:23-24 (voters "might think of it [video lottery terminals] as something different from what it actually is").

For that reason, the title set for Proposed Initiative #80 defined "video lottery terminals" as "electronic game machines." For the same reason that the Title Board required a definition in the title for Proposed Initiative #80, it should have required one in the Title for Initiative #140.

CONCLUSION

Petitioners respectfully request that this Court determine that (a) no titles may be set for the Proposed Initiatives because (i) the Proposed Initiatives improperly address multiple subjects, in violation of article V, section 1(5.5) of the Colorado Constitution and C.R.S § 1-40-106.5 (2013), and (ii) the reference to "a county or counties' host community" in the text of the Proposed Initiatives is so incomprehensible that no clear titles can be set for the Proposed Initiatives, or (b) alternatively, that the Titles are neither fair not accurate, and remand the Proposed Initiative to the Title Board with instructions to redraft the Titles to represent the text of the Proposed Initiatives accurately and fairly.

Respectfully submitted this 15th day of May, 2014.

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CERTIFICATE OF SERVICE

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

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DN 32267915.9

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 5:21 PM
Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #139 and #140 **Petitioners:** Vickie L. Armstrong and Bob Hagedorn, v. **Respondents:** Richard Evans and Stephen Roark, and **Title Board:** Suzanne Staiert, David Blake, and Jason Gelender	▲ COURT USE ONLY▲ Supreme Court Case No. 2014SA147 and 14SA148
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EXHIBIT A
TO
PETITIONERS' OPENING BRIEF

INITIATIVE TITLE SETTING REVIEW BOARD

MEETING ON

INITIATIVES 138, 139, 140, 141, 142,

143, 144, 145, 134 AND 135

Colorado Secretary of State's Office

Blue Spruce Room

April 24, 2014

MR. GRUESKIN: No, no, no. Fair enough. Your tax dollars are going to be required to sustain this facility. It's going to be your tax dollars that are going to pay for the police service or the sheriff's that respond. It's going to be your tax dollars that pay for the roads that go to and from this facility, and on, and on, and on.

And so you get a vote, and for you not to get a vote would mean nobody gets a vote, and they've crafted these measures -- certain measures so that no one gets a vote.

That particular reference doesn't apply. The spanning of jurisdictions doesn't even apply to this facility. They don't have to worry about that. But if someone were to build on a site that did span a municipal or county line, then that's when this would come in.

MS. STAIERT: So if Aurora annexed out 500 yards, then only people in Aurora would vote on it?

MR. GRUESKIN: That's correct. That's correct. Which is why a local vote, I think, is accurate. But I think the language that I had suggested was something like, A vote of the host community, and the Board didn't find that descriptive, and I understand that. And so I don't

have a problem with local vote. Thank you.

MR. BLAKE: Well, again, for making a record here, I agree with Mr. Grueskin. If we change it in the constitution regarding the local ballots, then we change it in the constitution. So we can do that -- whether or not we're not expanding it or restricting it, I think that can be done by constitutional initiative.

Also, as far as gambling versus casino-style gambling, I think they are different terms and I think a voter can differentiate appropriately.

I'm more sympathetic to the argument regarding local vote. I don't think that it's so confusing or misleading, but I'm sympathetic to the argument. So I throw out a suggestion to see whether or not you guys like it or not -- and my suggestion may be more confusing for all I know -- would be something like, A voter within the jurisdiction of the host community.

MS. STAIERT: I just don't know if people are going to understand -- because if I'm in Aurora, but I'm still in Arapahoe County, where is the jurisdiction? Where is the distinction between -- I don't know. I just --

MR. BLAKE: The jurisdiction of where this

is going to appear on is going to be a decision made by the clerk, right, for these purposes?

MS. STAIERT: Right.

MR. BLAKE: And so I don't know what those decisions are that are going to be made by the clerk and recorder, but it's going to be the jurisdiction. And I'm trying to come up with a kind of legally accurate term, since local vote, I don't think, is a legally -- is a legal term of art of any kind.

I do think it's descriptive. And I think we're -- and I don't want to go away from host community, because I believe that was the term of art that we used throughout these.

MS. STAIERT: So what was yours?

MR. BLAKE: It was, A voter within the jurisdiction of the host community. To your point, then it really becomes the ambiguity of host community, as opposed to voter within the host community. And so I think that was the term of art we ended up using. I don't think local vote is so misleading as to bring the title down, but maybe that's a more descriptive or legally accurate way to go about it.

MS. STAIERT: Any comments?

MR. GELENDER: I think if we were going to

go in that direction, I might say, Considering a requirement for the voters of a host community to approve gambling in the host community, if we were going to go in that direction, but I'm also fond of leaving it as it is.

MS. STAIERT: I am, too. I'm not sure it's the language of our question that's confusing. I think it's just the operation of the law that's potentially confusing. And I don't know that we can do anything about that other than attempt to describe what it is.

MR. BLAKE: I agree. Maybe that's really for the Blue Book, right?

MS. STAIERT: And the clerk's -- what is your host -- what is your local vote jurisdiction?

MR. BLAKE: I will not make a motion to modify the language. I only would have -- trying to improve it if there were concerns by either of you.

MR. GELENDER: No, I don't think there are.

MS. STAIERT: Okay. All right. Do you want to make a motion?

MR. GELENDER: I would move that we deny the motion for rehearing on Proposed Initiative 2013-'14, No. 139.

MR. BLAKE: Second.

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EXHIBIT B
TO
PETITIONERS' OPENING BRIEF

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD
Secretary of State Aspen Conference Room
1700 Broadway
Denver, Colorado
Thursday, April 17, 2014

2013-2014 #139 - Local Voter Approval for Gambling

Richard Evans and Stephen Roark, Proponents.

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MR. GELENDER: Aye.

MR. BLAKE: Aye.

MS. STAIERT: Aye.

MR. BLAKE: I have two comments or proposed changes. The first one relates to Line 2, "host community." I didn't know if that was a term of art or not. If it is not a term of art, I think it's odd.

MS. STAIERT: It's become a term of art in the other ones we did.

MR. BLAKE: It has? Okay.

MS. STAIERT: Yeah. So I think it's better to leave it in --

MR. BLAKE: That's fine.

MS. STAIERT: -- because we have stuff about the host community in the other question.

MR. BLAKE: That's fine. It seemed it was either a term of art or it wasn't.

And the second one is the clause "type of gambling" that appears at least in a couple of different places. And I think I would just suggest, looking at Line 3, "statewide ballot measure to authorize gambling in that location," something along those lines. I keep getting caught up with that "type of gambling."

MS. STAIERT: I mean, it says, "any type," so that's everything. So we could just strike "any type of"

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EXHIBIT C
TO
PETITIONERS' OPENING BRIEF

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD
Secretary of State Aspen Conference Room
1700 Broadway
Denver, Colorado
Wednesday, April 2, 2014

Motion for Rehearing
2013-2014 #80 - Proceeds from Video Lottery Terminals for K-12 Education

---

Richard Evans, Objector

vs.

Vicki Armstrong and Bob Hagedorn, Proponents.

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that are in their future, but not really.

Secondly, as a matter of public service, if you wanted to change the -- if you want save some words and take out the names of the towns, you could just put Gilpin and Pueblo counties, because you referred to the other three counties by their locations by county as well.

MS. EUBANKS: I think I'm fine with the town names with the limited gaming --

MS. STAIERT: Yeah. I think the voters are going to recognize the town names more than they're going to recognize what county they're in necessarily.

MS. EUBANKS: That's all I had.

MS. STAIERT: Do you want to talk about the 95 percent, or are you okay with that?

MR. DOMENICO: Yeah. Well, like I said, I wouldn't have added all of that, but -- no, I'm not going to make you guys debate it anymore.

We can talk about the 95 percent. Or the one other thing I thought was worth discussing was whether video lottery terminals needed a little more explanation. That's not something I really think most people understand.

To the extent they read it, Mr. Grueskin might have a point, that they might not -- that they might think of it as something different from what it actually is. You know, it's not just lottery, which is a phrase people

connect with the government.

MS. EUBANKS: And I understand that, but, I mean, going back to limited gaming, when the limited gaming measure was first proposed for the three towns, it just said "limited gaming" in the title. It didn't specify what games it had or bet limits or anything else.

It just said, "Shall there be limited gaming?" And so I think that's one of those features that if people want more information, then there's other information, and the blue book gives them that detail.

MR. GRUESKIN: This is a matter of clarification. Actually, in Amendment 50, where there were new games that were being introduced to an existing gaming facility, we specified -- you specified the games.

MS. EUBANKS: With the original.

MR. GRUESKIN: Right. But this is more analogous to Amendment 50. This is taking a facility where gaming of some sort already occurs and expanding the kind of gaming that it does. And it is adding games to, assuming that they continue to operate as a racetrack, their pari-mutuel wagering.

As I said, I'm not sure the measure requires that. But that's neither here nor there. This is much more analogous to Amendment 50 where you listed what was being added to the existing gaming activity at facilities that

were licensed and operating.

MS. STAIERT: And you don't think we do that by saying "video lottery"? Don't we say what is going to be added?

MR. GRUESKIN: If all the people who were here on fracking were polled of what video lottery was, I doubt very few of them -- or very many of them would know that it was virtual slot machines and virtual poker, black jack, and craps.

That's what's written in the measure. Not my take on it. That's what's written in the measure.

MS. STAIERT: But when we get to fracking, do you really think we're going to describe what that is? Are we going to describe that it's pumping hydraulic -- I mean, we're at the other side of that same issue, right? Don't people know what fracking is, or don't they need to go to the blue book?

MR. GRUESKIN: Please don't make me weigh in on the fracking. Please.

All I can tell you is that video lottery terminal, most people don't really know what a lottery terminal would be, other than a device where you buy tickets. And, frankly, a video lottery terminal isn't descriptive at all.

MR. DOMENICO: That's more my problem with it. It's not necessarily that we need an extensive definition,

but that video lottery terminal, undefined, is I think probably misleading.

I mean, the typical voter would think it has something to do with playing the lottery on a computer, which is not what it is.

MS. STAIERT: Do you want to say "electronic gaming"?

MR. DOMENICO: Well, yeah, or a video slot machine or something like that. I mean, the lottery is the key problem I have, I think, with it.

MS. STAIERT: Well, I mean, the initiative itself uses electronic game machine. It doesn't --

MR. DOMENICO: Right. That's probably not misleading in the same way, but it's also not helpful.

MR. HOBBS: Madame Chair.

MS. STAIERT: Yeah.

MR. HOBBS: I don't know that I can add to the discussion very much, but, you know, I'm surprised that there would be that much difficulty with knowing what a video lottery terminal is.

I understand lottery may be a stumbling block for you, but video lottery terminal, I'm not sure it's that difficult, and especially because video lotteries are permitted in a number of states. It's actually a fairly common term.

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 5:21 PM
Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #139 and #140 **Petitioners:** Vickie L. Armstrong and Bob Hagedorn, v. **Respondents:** Richard Evans and Stephen Roark, and **Title Board:** Suzanne Staiert, David Blake, and Jason Gelender	▲ COURT USE ONLY▲ Supreme Court Case No. 2014SA147 and 14SA148
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EXHIBIT D
TO
PETITIONERS' OPENING BRIEF

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD
Secretary of State Aspen Conference Room
1700 Broadway
Denver, Colorado
Thursday, April 17, 2014

2013-2014 #138 - Naming of Gambling Locations

Richard Evans and Stephen Roark, Proponents.

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P R O C E E D I N G S

(The matter commenced in open session with all parties present at the hour of 10:46 a.m. on Thursday, April 17, 2014.)

MS. STAIERT: That takes us to Proposed Initiative 2013-2014 #138.

MR. GRUESKIN: Good morning, Madame Chair. My name is Mark Grueskin. I'm representing Richard Evans and Stephen Roark, the two proponents, both of whom are here and have executed their designated representative affidavits.

And they are the proponents for Initiatives 138 through 145 and have so indicated on their affidavits.

MS. STAIERT: Starting with 138, can you tell us the single subject, in your mind?

MR. GRUESKIN: Yes. The single subject is the prohibition on exclusive licensing of casino-style gambling licensees.

MS. STAIERT: Is there anybody who wishes to comment on this issue as it pertains to single subject?

Go ahead.

MR. HOBBS: Good morning, Members. My name is Bill Hobbs, and I'm here on behalf of Vicki Armstrong and Bob Hagedorn, who are proponents of gaming-related measures, including 134 and 135, which are on your agenda a little later today.

I do have a comment about 138, and I don't know whether really it relates so much to single subject or title setting or both. But I thought I better go ahead and offer it now for whatever you decide it's worth.

And I'm just going to make a general comment that applies not only to 138, but also to the entire series, 138 to 145. And I'm aware that Ms. Eubanks I think is probably going to be sitting for the last three of those on the Board, 142 to 145. But in the interest of saving the Board time, I figured if I just make one comment on all of the measures, perhaps that will be helpful.

My comment is about the relationship between these measures and the measures proposed by Vicki Armstrong and Bob Hagedorn.

By way of background, the measures proposed by them, as some of you may recall, would authorize either limited gaming or video lottery terminals at one location in three counties around the state for the purpose of raising funds for education.

So what I want to just call to your attention is that these measures, 138 through 145, are intended in varying ways to overcome, nullify, restrict, limit, condition the effect of voter approval of the measures that are proposed by Vicki Armstrong and Bob Hagedorn.

How do I know that? How do you know that? Well,

they were all submitted by the same proponents at the same time after Vicki Armstrong and Bob Hagedorn submitted their Proposals 80 and 81, which were predecessor measures.

All of them would impose new limitation on measures that would expand gaming, such as the measures proposed by Vicki Armstrong and Bob Hagedorn. None of them, I think -- I'm hoping my generalizations here apply, but there are some variations among those measures. But I think none of them would apply to limited gaming that's already been approved.

All of them would apply to gaming measures that are on the ballot this November. I think in most cases, those measures expressly say so. And then I would suggest that none of them, 138 to 145, actually apply for measures on the ballot after this November because, as you know, anyone who wanted to propose a measure for the ballot after this November, if these measures passed, they would simply write in an exception. Because just like you can't bind future legislatures with legislation, I don't think an initiative can bind or prohibit future initiatives.

So I think it's fair to say that they would apply just to gaming measures that are on the ballot this November. And so, therefore, I would just -- I just want to call to your attention -- and this is not an unusual situation for you. I think you had this yesterday in a

little different situation. But these measures are targeted at the proposals by Vicki Armstrong and Bob Hagedorn.

MS. STAIERT: And did you have any kind of different interpretation of that section of 1-40 about the conflicting --

MR. HOBBS: 123?

MS. STAIERT: 1-40-106 that has to do with conflicting titles. That's sort of what we were talking about yesterday. And our take on it was we had to be clear that we weren't setting a title that would cause confusion but that if the title was actually in conflict, the statute didn't prohibit us from setting.

It just -- the remedy for that was whichever one had the most votes would win essentially, if one passed by a majority.

MR. HOBBS: And I heard some of the discussion. I didn't hear it all. I don't know that I would disagree with anything. I have never quite understood 1-40-106.3(b).

In the past, where I have seen the Title Board apply it was when proponents had differing versions of basically the same proposal and they ended up setting essentially the same title.

And I think, as you probably discussed yesterday, the Board would invoke that provision to ensure that the titles were not in conflict by actually being the same,

which is kind of counterintuitive.

MS. STAIERT: Right. I mean, the actual language is, "Ballot Titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question."

So depending on how you read "shall not conflict," there's no case law that would support that. But I just didn't know if you had a different interpretation.

MR. HOBBS: I don't know that you're facing a situation where the ballot titles will conflict. And there's certainly nothing wrong with ballot proposals conflicting. That's perfectly fine.

But where I think the potential concern is -- that I want to raise is that this could be -- in this case, 138 to 145 raised potential single subject concerns, or, at the very least, title setting concerns, because the intent of the proponents of 138 to 145 to target the Hagedorn/Armstrong measures is something that does not appear on the face.

I mean, each of these measures, 138 to 145, in varying ways restrict future gaming measures. But no one reading those measures, I think, would know on the face that they would adversely affect the Hagedorn/Armstrong measures.

So either I think you could conclude that that is a second hidden subject that might constitute separate

subject, or, at the very least, I think probably in setting clear titles you need to somehow -- and it would vary for each of these -- you need to somehow disclose the true meaning and intent of the proponents of 138 through 145.

As you know -- and you probably get tired on long days like this of hearing people talk about what the law provides -- but with respect to single subject, you know, the statute that the general assembly enacted when they proposed a single subject amendment to the constitution did say that one of the purposes of the single subject provision was to prevent surreptitious measures.

And I think that is -- and I don't mean surreptitious in a derogatory way or in any kind of way at all, other than the fact that the reader of the measures cannot tell that a purpose or the major purpose is to affect the Armstrong/Hagedorn proposals or any gaming measures that are on this ballot this November, but it's only theirs that may be on the ballot.

MS. STAIERT: Well, that kind of therein lies the problem, doesn't it? "May be on the ballot." So you're writing a question. This one might get on. That one might not. So you can't directly refer to some other measure.

MR. HOBBS: You might be able to refer generically.

MS. STAIERT: Right.

MR. HOBBS: That kind of goes to the title setting. If you accept that the purpose of 138 to 145 is to overcome or condition or restrict the effect of voter approval of any other -- let's just say any other measures on the ballot this November, then there probably are some generic ways that you can describe that.

And I'm just tying this to the fact that the statute and the case law is so clear that the Title Board's obligation is to fairly and accurately express the true meaning and intent.

And like I say, I think in this case, the intent is unmistakable. So I don't know how you do it exactly. And I don't think there's going to be one phrase that works. I would just urge you to consider the possibility that it is something at the very least that in a title setting you need to consider.

Thank you.

MS. STAIERT: Hi.

MR. GRUESKIN: If I could, I won't take you through, unless you would like to go through, the case law about conflicting ballot titles, because it seems like that's not at issue. This is a jurisdictional discussion.

But let me give you a little bit of history about gaming measures in Colorado. I can think of, including the ones that have been referenced by Mr. Hobbs, at least four

that have been presented -- excuse me -- three that have been presented to the voters of Colorado that have specifically identified a location for gaming purposes.

There was the 1994 Manitou Springs limited gaming measure. There was the 2003 measure where there were five specifically named racetracks. There was the 2012 measure with the specifically named racetracks. This seems to be an accelerating habit.

Whether or not this will be a source of exemption at some future point, we don't know. But we do know that there is also -- and I think the Board can take notice of the fact that there's presently discussion of at least two referred measures, one for De Beque and one for Kiowa County, both of which would have some form of gaming.

We don't know what those are going to look like now. We don't know whether they will specifically name locations for the gaming or not.

I understand Mr. Hobbs' concern. It's simply not accurate. This has been a historical issue. This is a prospective issue. It's a current issue. And it is appropriate for the Board to set a title that reflects when this will be effective. Voters will be able to process that. It is not a second subject.

MS. STAIERT: Anyone have any questions on the single subject issue?