COLORADO SUPREME COURT 2 E. 14th Ave. Denver, CO 80203	DATE FILED: May 15, 2014 4:24 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #139 and #140 **Petitioners:** Vickie L. Armstrong and Bob Hagedorn v. **Respondents:** Richard Evans and Stephen Roark **and** **Title Board:** Suzanne Staiert, Daniel Domenico, and Jason Gelender	▲ **COURT USE ONLY** ▲ Case No. 2014SA147
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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).

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It contains 2,645 words.

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For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Or

The opponent did not address standard of review or preservation. The brief contains statements concerning both the standard of review and preservation of the issue for appeal.

/s/ Matthew D. Grove

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Suzanne Staiert, Daniel Domenico, 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 Initiatives 2013-2014 #139 and 2013-2014 #140 are consistent with the single subject rule?

Do the title and ballot title and submission clause set by the Title Board for Proposed Initiative 2013-2014 #139 and 2013-2014 #140 correctly and fairly express the true intent and meaning of the proposed initiatives?

II. Statement of the case

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

On March 21, 2014, proponents Richard Evans and Stephen Roark filed Proposed Initiatives 2013-2014 #139 and #140 ("#134" and "#135"), with the Colorado Secretary of State. The Title Board conducted a hearing on April 17, 2014, and set titles for both measures. On April 23, 2014, Petitioners submitted motions for rehearing on both titles. The Title Board denied the motions after a

hearing on April 24, 2014. Petitioner filed the above-captioned appeals shortly thereafter.

III. Statement of the facts

#139 and #140 both seek to amend Article XVIII of the Colorado Constitution by adding Section 19. #139 provides that a statewide vote to "legalize or authorize any type of gambling" may not be given effect "unless the voters of a county or counties' host community, named in the statewide ballot measure, also vote to authorize that type of gambling," and do so within thirteen months after the effective date of the statewide vote and before any license is granted. #140 is almost identical, but applies only to "casino-style gambling" that has been subject to a statewide vote rather than, as in #139, "any type of gambling."

Both measures provide that they would have prospective effect, applying to "any statewide vote, beginning with the general election conducted on November 4, 2014, and including each statewide election thereafter." #139, §2; #140, §3. Each measure also states that it is "effective notwithstanding any other provision of law," but that it is not

intended to have any effect on preexisting limited gaming provisions contained in §§9(6) and 9(7) of Colo. Const. art. XXVIII.

IV. Summary of the argument

The titles and submission clauses meet the single subject and clear title standards established by this Court. They fairly and accurately set forth the major elements of the measures.

V. Argument

A. Standard of review

The titles must clearly express the single subject of the proposal. The Title Board does not have authority to set the title for any initiative where the proposed "measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject . . . ." *See* Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106.5(1). It is axiomatic that "in order to pass constitutional muster, a proposed initiative must concern only one subject—that is to say it must effect or carry out only one general object or purpose." *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 238-39 (Colo. 2006).

The language of the titles cannot obscure the meaning of the measure. The titles must enable all citizens, whether familiar or unfamiliar with the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45,* 234 P.3d 642, 648 (Colo. 2010) (*#45*). The Title Board must "consider the confusion that might be caused by misleading titles" and "avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." § 1-40-106(3)(a), C.R.S. (2013). Ballot titles shall be brief. *Id.* The title need not discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance,* 877 P.2d 311, 314, 315 (Colo. 1994) ("*Political Finance*").

The Court has set forth the following directive for ballot titles:

> We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of

> informing the voter of the major import of the proposal but need not include every detail.

In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22, 4 P.3d 213, 222 (2002) (*#21 and #22*).

When the Court reviews a challenge to the clear title requirement of a ballot title setting, it employs all legitimate presumptions in favor of the propriety of the Board's decision. *#45*, 234 P.3d at 645. The Court will examine the text to determine whether the titles and submission clause are consistent with the standards established in statute. The Court will not determine the efficacy, construction or future application of the proposal, if passed. *Id.*

The Court has recognized that the Title Board has the difficult task of balancing the competing interests of the proponents against concerns raised by opponents and other members of the public. *In re Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives Nos. 67, 68 and 69*, 2013 CO 1, 293 P.3d 551, 554 (Colo. 2013). The Title Board's decisions are presumptively valid. The Title Board has considerable discretion in setting ballot titles. The Court

does not demand that the Title Board set the best possible titles. It will reverse the Title Board's action only if the titles are insufficient, unfair or misleading. *In re Ballot Title 2011-2012 No. 45,* 2012 CO 26, 274 P.3d 576, 582 (2012) (*#45*).

B. The initiatives do not violate the single-subject rule.

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

To evaluate whether an initiative effectuates or carries out only one general object or purpose, a court looks first to the text of the proposed initiative. *In re #74*, 136 P.3d at 239. The single-subject requirement is met if the "matters encompassed are necessarily or properly connected to each other rather than disconnected or

incongruous." *Id.* On the other hand, purposes are separate and distinct when they bear "no necessary or proper connection to the initiative's subject[.]" *Howes v. Brown (In re 2009-2010 #91),* 235 P.3d 1071, 1076 (Colo. 2010). Separate provisions of a measure must be "directly tied to the initiative's central focus" to satisfy the single-subject requirement. *Id.*

Petitioners argue that #139 and #140 violate the single-subject rule, identifying no fewer than nine purported subjects, "among others," that the measures implicate. *Pets. for Review* at 5-6. But the text of the initiatives makes clear that they have only one central object or purpose: providing a degree of local control to communities that are affected by a statewide vote that would authorize gambling in their jurisdictions. While approval of the measures would expand what a county may refer to local voters under the particular circumstances contemplated by #139 and #140, it does not follow from that expansion that the measures involve multiple subjects. Because #139 and #140 relate only to statewide votes on "any type of gambling" (#139) or "casino-style gambling" (#140), there is no risk that they have hidden

provisions that would allow local communities to opt out of statewide ballot initiatives as a general matter. *Cf. Kemper v. Hamilton (2007-2008, #17*), 172 P.3d 871, 875 (Colo. 2007) (measures with multiple subjects "pose the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative").

While the Petitioners complain that many of the details of implementation involve additional subjects, this court has held that "a proposed measure that tends to effect or to carry out one general objective or purpose presents only one subject," and that "minor provisions necessary to effectuate the purpose of the measure are properly included within its text." *In re Ballot Title 1999-2000 No. 256,* 12 P.3d 246, 253 (Colo. 2000) (internal quotation omitted). Moreover, "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," *Herpin v. Head*, 4 P.3d 485, 496 (Colo. 2000). In short, it does not follow from the possibility that the measures

could conceivably have several effects that they also have multiple subjects.

Neither #139 nor #140 poses the primary risks that the single-subject rule is designed to mitigate. First, the proposals are not lengthy and complex. To the contrary, the effect of the initiatives – allowing local communities to vote before permitting gambling purportedly authorized by a statewide election – is simple to discern. Second, neither measure raises the possibility of logrolling, which involves gathering support by proposing a measure that appeals to two disparate groups, each of whom supports the amendment only for their particular purpose. At most, all of the multiple "subjects" identified in the Petitions for Review are subsidiary effects of the two measures. They are not, in and of themselves, new subjects that will lead to voter confusion or misunderstanding. Accordingly, #139 and #140 do not violate the single-subject rule, and this Court should deny Petitioner's single-subject challenge to both measures.

C. The title board set clear titles.

Petitioners also complain that the titles set by the Title Board are unclear and misleading. They raise similar challenges to the titles in each of the two Petitions for Review. These challenges are addressed in order below.

a. The phrase "local vote" is not misleading.

Petitioners argue in both petitions that "[t]he use of the phrase 'local vote' is misleading because the Proposed Initiative provides that 'a county or counties' host community,' and not necessarily a 'local' community, would conduct the vote."

#139 and #140 do involve a "local vote," particularly when that vote is compared to the statewide approval of a ballot initiative that would necessarily precede it. In fact, "local vote" is used in the Colorado Constitution itself. Article XVIII, §9(6) is captioned "Local vote on legality of limited gaming – election required." The text of §9(6) describes an approval scheme that is similar in many ways to what #139 and #140 contemplate.

While the Title Board could have conceivably drafted a title that specifically adopted the text of the initiative itself, the phrase that it did choose is sufficiently descriptive and not misleading. The language encapsulates the idea that, if a gambling expansion is favored by a statewide vote, host communities will have an opportunity to approve or disapprove of placing gambling facilities in their communities. At the same time a general reference to "local vote" avoids confusion that could arise about municipalities or proposed facilities whose boundaries might cross county lines.

Given the "great deference" accorded to the Title Board "in the exercise of its drafting authority," *#45,* 274 P.3d at 582, the Title Board's selection of the phrase "local vote" is adequately descriptive of the effect of the measure. Petitioner's argument should be rejected.

b. The phrase "casino-style gambling" in #140 is not confusing or misleading.

Petitioners next argue (with respect to #140 only) that the title is misleading because it does not explain or define the phrase "casino-style gambling."

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.*

The phrase "casino-style gambling" is commonly understood as distinct from other types of gambling (such as lotteries, raffles, and racing) and thus does not need an additional definition within the title. *See Herpin,* 4 P.3d at 497 (relying on "commonly understood" meanings of words in ballot title). The phrase reflects the "essential concept" of the proposed amendment, and should thus be approved. *In re Proposed Initiative on Water Rights,* 877 P.2d 321, 327 (Colo. 1994).

c. The phrases "local vote," "gambling," and "casino-style gambling" are not catchphrases.

Finally, Petitioners assert that the phrases "local vote" (in both titles), "gambling" (#139), and "casino-style gambling" (#140) are impermissible catchphrases or slogans. But the challenged 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.

None of the identified language raises concerns about sloganeering. To the contrary, all of the challenged words and phrases are entirely descriptive. "Local vote" describes exactly what the

measures would do in a way that directly contributes to a voter's understanding. "Gambling" is likewise entirely descriptive and accurate.

Finally, "casino-style gambling" is a descriptive phrase, not a slogan. It specifically identifies the type of statewide gaming initiative to which #140 would apply and distinguishes it from other types of gambling, such as 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 implicitly 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.

CONCLUSION

Based on the foregoing reasoning and authorities, the Title Board respectfully requests that this Court approve the titles for #139 and #140.

Respectfully submitted this 15th day of May, 2014.

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

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