

SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203

DATE FILED: May 29, 2014 4:59 PM

Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2013-2014 #141 and #142

**Petitioners: VICKIE ARMSTRONG and
BOB HAGEDORN**

▲ COURT USE ONLY ▲

v.

**Respondents: RICHARD EVANS and
STEPHEN ROARK***

and

**Title Board: SUZANNE STAIERT;
DAVID BLAKE AND SHARE EUBANKS**

Attorneys for Respondents:

Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rechtkornfeld.com

**Case No. 2014SA 149 and
2014SA150**

RESPONDENTS' ANSWER BRIEF

* 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 2,214 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

Attorney for Respondent

TABLE OF CONTENTS

INTRODUCTION.....1

LEGAL ARGUMENT.....1

A. Initiatives #141 and #142 each comprise a single subject.....1

 1. “Nullification” of proposed initiatives is not a second subject.....1

 2. Conjectural impacts on limited gaming is not a separate subject.....3

B. The Title Board developed legally sufficient titles for #141 and #142.....4

 1. Potential “nullification” of other initiatives.....4

 2. “Monopoly” as misleading term and a catch phrase.....5

 3. “Casino-style gambling” and “legalized gambling”.....6

 4. “Video lottery terminals”.....9

CONCLUSION.....10

TABLE OF AUTHORITIES

Cases

<i>Cloverleaf Kennel Club v. Racing Com'n</i> , 277 P.2d 226, 231 (Colo. 1954) (Moore, J., dissenting).....	8
<i>Common Sense Alliance v. Davidson</i> , 995 P.2d 748, 754 (Colo.2000).....	7
<i>Estevanovich v. City of Riverside</i> , 81 Cal.Rptr.2d 684, 696 (Cal. App. 4th Dist. 1999).....	7
<i>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 255</i> , 4 P.3d 485, 496 (Colo. 2000).....	1, 3
<i>In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 # 43</i> , 46 P.3d 438, 446 (Colo. 2002).....	2
<i>In re Title, Ballot Title, Submission Clause for 1999-2000 No. 227 and No. 228</i> , 3 P.3d 1, 7 (Colo. 2000).....	5
<i>In re Title, Ballot Title, Submission Clause for 2007-2008 #62</i> , 184 P.3d 52, 59 (Colo. 2008).....	3
<i>Matter of Proposed Initiated Constitutional Amendment Concerning Unsafe Workplace Environment</i> , 830 P.2d 1031, 1034 (Colo. 1992).....	9
<i>Matter of Title, Ballot Title and Submission Clause and Summary for the Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment</i> , 873 P.2d 718, 722 (Colo. 1994).....	5
<i>Murphy v. People of State of California</i> , 225 U.S. 623, 629 (1912).....	7
<i>U.S. v. Southern Union Co.</i> , 2008 WL 2032097 fn. 1 (D.R.I. July 9, 2009).....	8
<i>Webb v. Black Hawk</i> , 295 P.3d 480, 484 (Colo. 2013).....	9

Statutes

C.R.S. § 1-40-106(3)(b).....4

Other Authorities

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>2

INTRODUCTION

As noted in the Respondents' Opening Brief, Initiatives #141 and #142 promote competition in the gambling industry where certain potential market entrants have proven remarkably unrepentant about writing themselves – and themselves alone – into the Colorado Constitution. Armstrong re-raises many of the issues she has raised in other matters now pending before this Court. With apologies to the Court for repeating the certain arguments raised in other Answer Briefs, this brief will attempt to minimize cross-references to legal arguments made earlier in this particular matter and case citations of which the Court is, by this point in the process, probably painfully aware. This Court should find that the Title Board correctly summarized these measures.

LEGAL ARGUMENT

A. Initiatives #141 and #142 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, each concerned about different issues, 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 proponents in 2003 on a similar gambling expansion measure,¹ embracing this political reality is more than a mere possibility. And given the conjectural nature of their sole

¹ The 2003 measure lost 180,959 “yes” votes to 766,893 “no” votes (19%-81%). 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>

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 topic. The right of initiative and referendum is a fundamental right to be liberally construed, and a “first in” construction is plainly inconsistent with the exercise of that right. Armstrong’s single subject argument is unsustainable.

2. Conjectural impacts on limited gaming is not a separate subject.

Armstrong argues that these initiatives will foreclose any gaming development outside of the existing towns. In truth, the only end achieved by #141 and #142 is an assurance that every gaming jurisdiction will offer competition to the consumer. Armstrong simply cannot know whether this will mean more or fewer gaming jurisdictions. “Petitioner speculates about the effects of the measure, postulating that if the measure is interpreted in a way that fits his conclusions, then the measure will have multiple effects. This approach is erroneous.” *In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008). Multiple subjects are not to be found in “mere speculation about the potential effects of the Initiative.” *Id.*

Thus, the Board correctly found these initiatives each comprised a single subject.

B. The Title Board developed legally sufficient titles for #141 and #142.

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 12 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 apparently believes 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 14, 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. “Monopoly” as misleading term and a catch phrase

Armstrong gets into the interpretative weeds when addressing the appropriateness of the Title Board’s use of “monopoly.” Her analysis is fraught. She engages in a tortured definitional exercise. Petitioners’ Opening Brief at 14-16. She projects the effects of the measure to state that #141 and #142 “would make it impossible for new gambling ever (sic) to be authorized in any county.” *Id.* at 16. And she concludes that “monopoly” is a political slogan. *Id.* at 15, 17.

Taking the catch phrase issue first, the political nature of a word or phrase must be determined in the context of “contemporary political debate.” *In re Title, Ballot Title, Submission Clause for 1999-2000 No. 227 and No. 228*, 3 P.3d 1, 7 (Colo. 2000). Armstrong cites a *New York Times* article about beer, a *New Yorker* article about cable and the internet, and a CNN article about international antitrust enforcement. No evidence was presented to the Title Board, and three random

articles that do not address contemporary political debate are the only evidence before this Court. This paltry showing supports Respondents' position; there is nothing in the modern political lexicon to suggest that "monopoly" would have the effect that Armstrong asserts. Further, the use of "monopoly" serves to "fairly and adequately reflect[] the intent" of the two initiatives. *Id.*

Armstrong's definitional see-saw and projections about how the gaming industry will adapt is a level of interpretation and application in which this Court will not engage, at least until the measure is adopted by voters. *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"). Thus, there is no merit to Armstrong's "monopoly" arguments.

3. "Casino-style gambling"

Armstrong raises concerns about "casino-style" and "gambling." Petitioner's Opening Brief at 17-21. 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 19.

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 legal parameters for such existing 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 a throwback to a time long since passed. 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

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

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).

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

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).

4. “Video lottery terminals”

As to the clarity of “video lottery terminals,” *see* Respondents’ Opening Brief at 21-22, 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 #141 or its title, and thus her complaint about this phrase does not apply to this measure. “Video lottery terminals” is not defined in #142, as even Armstrong points out. *Id.* Thus, the Board would have erred if it had developed a definition outside the terms of #142 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

These measures promote competition. Armstrong states she opposes #141 and #142, in part, because she seeks to advance her measures that she admits allow for non-competitive environments. Armstrong is certainly entitled to advocate for

regional gambling monopolies, but her political concerns, disguised as legal objections, are not serious indictments of the ballot titles set.

Respectfully submitted this 29th day of May, 2014.

/s Mark G. Grueskin

Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rechtkornfeld.com

ATTORNEYS FOR RESPONDENTS

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:

Matthew Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Marcy Glenn
Holland & Hart
555 17th St., #3200
Denver, CO 80202

Lino Lapinsky D'Orlov
McKenna Long & Aldridge
1400 Wewatta St., #700
Denver, CO 80202

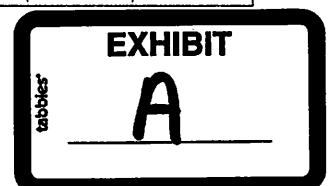
/s Mark G. Grueskin

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