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| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: May 15, 2014 5:27 PM |
| Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #141 and #142<br><br>**Petitioners:**<br><br>Vickie L. Armstrong and Bob Hagedorn,<br>v.<br><br>**Respondents:**<br><br>Richard Evans and Stephen Roark, and<br><br>**Title Board:**<br><br>Suzanne Staiert, David Blake, and Jason Gelender | ▲ COURT USE ONLY ▲<br><br>Case No. 2014SA149 and 2014SA150 |
| Lino S. Lipinsky de Orlov, No. 13339<br>Amy M. Siadak, No. 43702<br>McKenna Long & Aldridge LLP<br>1400 Wewatta Street, Suite 700<br>Denver, Colorado 80202<br>Telephone: (303) 634-4000<br>Facsimile: (303) 634-4400<br>E-mails: llipinsky@mckennalong.com<br>asiadak@mckennalong.com | |

Marcy G. Glenn, No. 12018
Douglas L. Abbott, No. 18683
Holland & Hart, LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
E-mails: mglenn@hollandhart.com
dabbott@hollandhart.com

William A. Hobbs, No. 7753
1745 Krameria Street
Denver, Colorado 80220
Telephone: (303) 345-5541
Email: bill.hobbs@me.com

**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 #141 ("Initiative #141) and Initiative 2013-2014 #142 ("Initiative #142") (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 initiatives;

(c) The Titles use the undefined, vague, and misleading words and phrases "monopoly," "gambling" (Initiative #141), "legalized gambling" (Initiative #141), "casino-style gambling" (Initiative #142), and "video lottery terminals" (Initiative #142), and the prohibited catch phrases "monopoly," "gambling," (Initiative #141), "legalized gambling" (Initiative #141), and "casino-style gambling" (Initiative #142); and

(d) The Titles fail to disclose that, although the Proposed Initiatives purport to apply to all forms of "legalized gambling" or "casino-style gambling" within the State of Colorado, the Proposed Initiatives could not prohibit or regulate

any form of gambling conducted on “Indian lands,” as defined in 25 U.S.C. § 2703(4).

## 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.

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). On April 24, 2014, the Title Board granted the Motions, in part, to address

one deficiency in the original Titles; however, the Title Board denied the Motions in other respects. As amended on rehearing, the title set for Initiative #141 reads:

> An amendment to the Colorado constitution prohibiting the granting of a license to conduct legalized gambling if the granting of the license results in the licensee having a monopoly within any county on one or more types of gambling to be offered by the licensee other than bingo, live racing, and simulcast racing.

Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #141, at 10 (the "Title for Initiative #141").

As amended on rehearing, the title set for Initiative #142 reads:

> An amendment to the Colorado constitution prohibiting the granting of a license to conduct casino-style gambling, including video lottery terminals, if the granting of the license results in the licensee having a monopoly within any county on one or more types of casino-style gambling to be offered by the licensee.

Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #142, at 10 (the "Title for Initiative #142").

Petitioners timely commenced this appeal on May 1, 2014.

## STATEMENT OF THE FACTS

The Proposed Initiatives would prohibit any state agency from issuing a license to conduct "legalized gambling" (for Initiative #141) or "casino-style gambling" (for Initiative #142) "if the granting of the license results in the licensee having a monopoly within any county" on either "one or more types of gambling to be offered by the licensee other than bingo, live racing, and simulcast racing"

(Initiative #141), or "one or more types of casino-style gambling to be offered by the licensee" (Initiative #142).

The Proposed Initiatives, however, do not define "gambling," "legalized gambling," or "casino-style gambling." Moreover, the Proposed Initiatives do not disclose that, under the Supremacy Clause of the United States Constitution, they could not prohibit or regulate any form of gambling conducted on "Indian lands," as defined in 25 U.S.C. § 2703(4).

## 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 on that basis alone. In addition to their acknowledged subject – prohibiting gambling monopolies within any Colorado county – the Proposed Initiatives have two additional, and surreptitious, subjects: (1) the intended potential nullification of Petitioners' competing proposed initiatives to authorize video lottery terminals or limited gaming at authorized locations in three Colorado counties; and (2) ironically, the prohibition of any expansion of limited gaming in Colorado in order to maintain the monopolies currently enjoyed by the three authorized limited gaming towns. 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 fail to describe the measures' multiple subjects; the words and phrases

"monopoly," "gambling," "legalized gambling," "casino-style gambling," and "video lottery terminals" are vague, undefined, and misleading; "monopoly," "gambling," and "casino-style gambling" are prohibited catch phrases; and the Titles misleadingly fail to disclose that the Proposed Initiatives could not prohibit any form of gambling conducted on "Indian Lands."

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.

The Title Board erred in setting titles for the Proposed Initiatives because the Proposed Initiatives contain multiple subjects in violation of article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5 (2013).

#### A. The Proposed Initiatives Would Prohibit Gaming Monopolies Within Any Colorado County.

The first subject of the Proposed Initiative, as reflected in the Title, is the prohibition against granting a license for "legalized gambling" (Initiative #141) or for "casino-style gambling" (Initiative #142) if doing so would give the licensee "a monopoly within any county on one or more types of gambling to be offered by the licensee." This is the only one of the three subjects of the Proposed Initiative that appears in the Titles, however.

### B. The Proposed Initiative, if Approved, May Nullify Proposed Initiatives #80, #81, #134, and #135.

The Proposed Initiative contains an improper second subject – 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. For example, if passed, the Competing Initiatives would authorize video lottery terminals (proposed initiatives #80 and #134) or limited gaming (Proposed Initiatives #81 and #135) at a single horse racetrack in each of Arapahoe, Mesa, and El Paso Counties. The Proposed Initiatives, however, may prohibit the subject horse racetracks from obtaining this very authorization under the guise of avoiding "monopolies."

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. The Proposed Initiative Would Surreptitiously Prohibit the Expansion of Limited Gaming in Colorado.

Beyond potentially nullifying the voters' wishes if a majority of the electorate approves any of the Competing Initiatives at the November 2014 election, the Proposed Initiatives have the surreptitious purpose and effect of prohibiting the future expansion of limited gaming beyond the three mountain towns in which limited gaming is currently allowed. That is another impermissible additional subject.

The Proposed Initiatives would forbid the expansion of limited gaming into any new county in Colorado, because they would prohibit the state authorities from ever granting a license to a single licensee within the county. The first licensee in any county not currently authorized to conduct limited gaming would, by definition, have a monopoly on "legalized gambling" or "casino-style gambling." Under the Proposed Initiatives, there could be no second licensee because the grant of the initial license would be prohibited. Therefore, by its terms, the Proposed Initiatives would limit "legalized gambling" or "casino-style gambling" to the mountain counties authorized to conduct limited gaming under article XVIII, section 9 of the Colorado Constitution, and thus would insulate those towns from

future competition. Yet the Titles fail to disclose this significant additional subject.

## II. THE TITLES ARE MISLEADING TO VOTERS.

The Titles do not fairly express the true meaning and intent of the Proposed Initiatives, in violation of C.R.S. §§ 1-40-106 and 1-40-107 (2013). The Titles (1) fail to disclose the multiple subjects set forth in the previous section; (2) use undefined, vague, and misleading words, phrases, and catch phrases; and (3) do not disclose the full extent of the Proposed Initiatives' prohibition on the expansion of "legalized gambling" or "casino-style gambling" to counties not currently authorized to engage in limited gaming.

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

Section I above describes the additional 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, or (b) would surreptitiously prohibit the expansion of limited gaming in Colorado. 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 Proposed Initiatives prohibit "a monopoly within any county on one or more types of ['gambling' (in Initiative #141) or 'casino-style gambling' (in

[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.

Initiative #142)]." It is not a coincidence that the Competing Initiatives authorize only one location in each of the counties of Arapahoe, Mesa, and Pueblo to conduct new gaming. Thus, the Proposed Initiatives have the potential to prevent any and all new gaming that would be authorized under the Competing Initiatives.

In addition, Proposed Initiative #142 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]

[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* *{footnote continued}*

### C. The Titles Use Undefined, Vague, and Misleading Words, Phrases, and Catch Phrases.

Either or both Titles use the following undefined, vague, and misleading words and phrases: (1) "monopoly," (2) "gambling," (3) "legalized gambling," (4) "casino-style gambling," and (5) "video lottery terminals." "Monopoly," "gambling," "legalized gambling," and "casino-style gambling" are also impermissible catch phrases.

#### 1. "Monopoly."

The Proposed Initiatives prohibit the granting of a license to conduct one of several articulations of gambling if the licensee will "hav[e] a monopoly within any county[.]" Neither the Proposed Initiatives nor the Titles define a "monopoly," and other authorities confirm that the word has multiple meanings.

On the one hand, and relatively less offensively, a "monopoly" can mean "a special or exclusive privilege." *Barrows v. McMurtry Mfg. Co.*, 54 Colo. 432, 131 P. 430, 436 (1913). But a "monopoly" also has a far more pejorative meaning: an

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

"ability to lessen or destroy competition" in a relevant market through intentional, predatory, monopolistic conduct. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). One need only read popular newspapers and magazines, or surf the Internet, to see the negative, anti-competitive connotation of the word "monopoly." *See, e.g.*, John Cassidy, "We Need Real Competition, Not a Cable-Internet Monopoly," *The New Yorker* (Feb. 13, 2014), *available at* http://www.newyorker.com/online/blogs/comment/2014/02/comcast-time-warner-acquisition-competition-cable-internet-monopoly.html; Adam Davidson, "Are We in Danger of a Beer Monopoly," *New York Times* (Feb. 26, 2013), *available at* http://www.nytimes.com/2013/03/03/magazine/beer-mergers.html?pagewanted=all&action=click&module=Search&region=searchResults&mabReward=relbias%3Ar&url=http%3A%2F%2Fquery.nytimes.com%2Fsearch%2Fsitesearch%2F%3Faction%3Dclick%26region%3DMasthead%26pgtype%3DHomepage%26module%3DSearchSubmit%26contentCollection%3DHomepage%26t%3Dqry491%23%2Fmonopoly%2Bcompetition%2F; Tellis Demos, "America's New Monopoly-Buster," *CNN Money* (May 14, 2009), *available at* http://money.cnn.com/2009/05/14/news/economy/christine_varney_monopoly_buster.fortune/?postversion=2009051412.

The Proposed Initiatives necessarily use the word "monopoly" in its relatively more innocuous sense of having an exclusive privilege. That is so

because whenever Colorado law permits any form of gambling, that law also determines the profits that a licensee may retain, *see, e.g.*, 12 C.R.S.§ 12-60-702 (2013) (setting authorized proceeds from pari-mutuel racing); C.R.S. § 12-47.1-601 (2013) (setting maximum gaming tax on limited gaming proceeds, and authorizing Limited Gaming Commission to set the actual tax by rule), so there is no potential for anti-competitive monopoly pricing. Nevertheless, voters generally do not know that state law protects them against the anti-competitive exercise of monopoly power, and so they could easily be misled by the use of the word "monopoly" in the Proposed Initiatives.

The Titles' use of the word "monopoly" is misleading in another, far more surreptitious respect. Far from protecting against *future monopolies* by gambling licensees, the Proposed Initiatives actually secure the *existing monopolies* enjoyed by the three mountain towns in which limited gaming is currently authorized. That is so because, as a practical matter, the Proposed Initiatives would make it impossible for new gambling ever to be authorized in any county – because the first new licensee would, by definition, obtain a monopoly. While opponents of the Proposed Initiatives can advertise and take other steps to educate the public about this hidden feature of the measures, they will face a far more difficult job revealing the truly anti-competitive nature of the Proposed Initiatives if this Court

approves titles that, ironically and misleadingly, describe the measures as protecting the public against monopolies.

For the reasons outlined above, "monopoly" is also an improper catch phrase. Because it has multiple meanings, and one of them carries a highly negative connotation, the use of the word "monopoly" in the Titles "could form the basis of a slogan for use by" opponents of the Proposed Initiatives. *Rice v. Brandon (In re Title, Ballot Title, Submission Clause, & Summ. for 1997-1998 #105 (Payments by Conservation Dist. to Pub. Sch. Fund & Sch. Districts))*, 961 P.2d 1092, 1100 (Colo. 1998). It is easy to anticipate advertisements that will urge voters to cast their ballots "against monopoly," and in favor of competition. But Colorado law wisely prohibits this sort of sloganeering.

**2. "Gambling" and "Legalized Gambling."**

Initiative #141 describes the conduct it prohibits as "legalized gambling" and "gambling," except for bingo, raffles, live racing, and simulcast racing. Neither Initiative #141 nor the Title for Initiative #141 defines "legalized gambling" or "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 #141, if on the ballot and approved by the electorate.

Yet the Title for Initiative #141 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]

### 3. "Casino-style gambling."

Initiative #142 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 #141 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 #141 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 #141 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-

[3] The adjective "legalized" before "gambling" does not avoid this result, in part because Initiative #141 uses "legalized gambling" and "gambling" interchangeably.

style gambling").[4] The tendency of the Title for Initiative #141 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 #141. *Rice*, 961 P.2d at 1100. By pairing "gambling" with "casino-style," the Title for Initiative #141 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[.]" *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]

[4] 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.

the substantive debate surrounding the issue to be submitted to the electorate" through its use of Initiative #141's charged language, particularly without including the definition of that phrase, the Title for Initiative #141 is neither fair nor balanced. *Id.*

**4. "Video lottery terminals."**

Neither Initiative #141 nor its Title defines "video lottery terminals." Nor is the phrase used, much less defined, in any existing 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. A. 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 #141.

### D. The Titles Fail to Disclose That the Proposed Initiatives Could Not Prohibit Any Form of Gambling Conducted on "Indian Lands."

The Titles describe a blanket prohibition on the issuance of licenses to conduct "legalized gambling," "gambling," or "casino-style gambling" in any county. They are misleading because the federal Indian Gaming Regulatory Act (the "IGRA") protects federally recognized Indian tribes that wish to conduct gambling on "Indian Lands," as defined in the IGRA. See 25 U.S.C. § 2701, *et seq*. More specifically, federally recognized Indian tribes in Colorado that wish to conduct gambling on their Indian lands within the State can do so pursuant to the IGRA to the extent the State has not, as a matter of criminal law and public policy, prohibited such gaming. See 25 U.S.C. § 2701(5).[5]

[5] The IGRA provides, in part, that: "An Indian tribe may engage in, or license and regulate, class II gaming [essentially, bingo (whether or not utilizing electronic, computerized or other technological aids) and card games other than "banked" card games that are (i) authorized by State law, or (ii) not prohibited and played at any

*{footnote continued}*

## CONCLUSION

Petitioners respectfully request that this Court determine that (a) no titles may be set for the Proposed Initiatives because 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) alternatively, the Titles are neither fair not accurate, and remand the Proposed Initiative to the Title Board with

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*{continued from previous page}*
location in the State] on Indian lands within such tribe's jurisdiction, if – (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and (B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman [of the National Indian Gaming Commission]." *See* 25 U.S.C. § 2710(b)(1). Such ordinance or resolution shall be approved if, in general, it – (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, [and] (ii) requires (a) audits, (b) that the gaming revenues be used only for certain purposes, (c) adequate protections in respect of the environment, public health and public safety, (d) suitability investigations of certain persons involved in the gaming activity, and (e) that the Indian tribe have the sole proprietary interest in and responsibility for the gaming. *See* 25 U.S.C. § 2710(b)(2). The law further provides that Class III gaming – i.e., all gaming that is not Class II or Class I (social games for prizes of minimal value or traditional forms of Indian gaming engaged in as part of tribal ceremonies) – shall be lawful on Indian lands if such activities are "(A) authorized by an ordinance or resolution that – (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands, (ii) meets the requirements [set forth in the prior sentence], and (iii) is approved by the Chairman [of the National Indian Gaming Commission], (B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." *See* 25 U.S.C. § 2710(d)(1).

instructions to redraft the Titles to represent the text of the Proposed Initiatives accurately and fairly.

Respectfully submitted this 15th day of May, 2014.

MCKENNA LONG & ALDRIDGE LLP

*/s/ Lino S. Lipinsky de Orlov*

Lino S. Lipinsky de Orlov, No. 13339
Amy M. Siadak, No. 43702
1400 Wewatta Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 634-4000
Facsimile: (303) 634-4400
Emails: llipinsky@mckennalong.com
asiadak@mckennalong.com

HOLLAND & HART LLP

*/s/ Marcy G. Glenn*

Marcy G. Glenn, No. 12018
Douglas L. Abbott, No. 18683
555 Seventeenth Street, Suite 3200
Denver, Colorado 80202
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
Emails: mglenn@hollandhart.com
dabbott@hollandhart.com

WILLIAM A. HOBBS

*/s/ William A. Hobbs*
William A. Hobbs, No. 7753
1745 Krameria Street
Denver, Colorado 80220
Telephone: (303) 345-5541
Email: bill.hobbs@me.com

CO-COUNSEL FOR PETITIONERS, VICKIE L. ARMSTRONG AND BOB HAGEDORN

## 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:

Mr. Richard Evans
1724 S. Uinta Way
Denver, CO 80231

Mark Grueskin, Esq.
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202

Mr. Stephen Roark
2732 S. Fillmore St.
Denver, CO 80210

Matthew D. Grove, Esq.
Office of the Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

*/s/ Lisa F. King*
Lisa F. King

DN 32268643.4

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|---|---|
| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: May 15, 2014 5:27 PM |
| Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #141 and #142<br><br>**Petitioners:**<br><br>Vickie L. Armstrong and Bob Hagedorn,<br>v.<br><br>**Respondents:**<br><br>Richard Evans and Stephen Roark, and<br><br>**Title Board:**<br><br>Suzanne Staiert, David Blake, and Jason Gelender | ▲ COURT USE ONLY ▲<br><br>Case No. 2014SA149 and 2014SA150 |
| Lino S. Lipinsky de Orlov, No. 13339<br>Amy M. Siadak, No. 43702<br>McKenna Long & Aldridge LLP<br>1400 Wewatta Street, Suite 700<br>Denver, Colorado 80202<br>Telephone: (303) 634-4000<br>Facsimile: (303) 634-4400<br>E-mails: llipinsky@mckennalong.com<br>asiadak@mckennalong.com | |

Marcy G. Glenn, No. 12018
Douglas L. Abbott, No. 18683
Holland & Hart, LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
E-mails: mglenn@hollandhart.com
dabbott@hollandhart.com

William A. Hobbs, No. 7753
1745 Krameria Street
Denver, Colorado 80220
Telephone: (303) 345-5541
Email: bill.hobbs@me.com

**EXHIBIT A**
**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

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

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Richard Evans, Objector

vs.

Vicki Armstrong and Bob Hagedorn, Proponents.

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APPEARANCES:
SUZANNE STAIERT
Deputy Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

SHARON EUBANKS
Office of Legislative Legal Services
200 E. Colfax Avenue, Suite 091
Denver, Colorado 80203

DAN DOMENICO
Solicitor General
1700 Broadway, Suite 270
Denver, Colorado 80290

For the Proponents:
WILLIAM A. HOBBS, ESQ.
Director of Special Projects, SIPA
1300 Broadway, Suite 11010
Denver, CO 80203

For the Objector:
MARK GRUESKIN, ESQ.
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202

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.

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| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: May 15, 2014 5:27 PM |
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| Lino S. Lipinsky de Orlov, No. 13339<br>Amy M. Siadak, No. 43702<br>McKenna Long & Aldridge LLP<br>1400 Wewatta Street, Suite 700<br>Denver, Colorado 80202<br>Telephone: (303) 634-4000<br>Facsimile: (303) 634-4400<br>E-mails: llipinsky@mckennalong.com<br>asiadak@mckennalong.com | |

Marcy G. Glenn, No. 12018
Douglas L. Abbott, No. 18683
Holland & Hart, LLP
555 17th Street, Suite 3200
Denver, Colorado 80202
Telephone: (303) 295-8000
Facsimile: (303) 295-8261
E-mails: mglenn@hollandhart.com
dabbott@hollandhart.com

William A. Hobbs, No. 7753
1745 Krameria Street
Denver, Colorado 80220
Telephone: (303) 345-5541
Email: bill.hobbs@me.com

**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

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2013-2014 #138 - Naming of Gambling Locations

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Richard Evans and Stephen Roark, Proponents.

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APPEARANCES:
SUZANNE STAIERT
Deputy Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

JASON GELENDER
Office of Legislative Legal Services
200 E. Colfax Avenue, Suite 091
Denver, Colorado 80203

DAVID BLAKE
Deputy Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203

For the Proponents:
MARK GRUESKIN, ESQ.
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202

For Proponents in Related Initiatives:
WILLIAM A. HOBBS, ESQ.
1745 Krameria Street
Denver, CO 80220

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?