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SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

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 #141 and #142

Petitioners:
Vickie L. Armstrong and Bob Hagedorn

v.

Respondents:

Richard Evans and Stephen Roark

and

Title Board:

Suzanne Staiert, David Blake, and Jason Gelender

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Case No. 2014SA149

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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 2,371 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

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

TABLE OF AUTHORITIES

PAGE

Suzanne Staiert, David Blake, 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 #141 and 2013-2014 #142 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 #141 and 2013-2014 #142 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 #141 and #142 ("#141" and "#142"), 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 granted the motions in part

and set the titles after a hearing on April 24, 2014. Petitioner filed the above-captioned appeals shortly thereafter.

III. Statement of the facts

#141 and #142 both seek to amend Article XVIII of the Colorado Constitution by adding Section 20.

- #141 would prohibit a state agency from "issu[ing] a license to conduct legalized gambling if the granting of that license would give the licensee a monopoly within any county on one or more types of gambling to be offered by the licensee." #141 would apply "to all forms of legalized gambling other than bingo, raffles, live racing, and simulcast racing."
- #142 would prohibit a state agency from "issu[ing] a license to conduct casino-style gambling if the granting of that license would give the licensee a monopoly within any county on one or more types of casino-style gambling to be offered by the licensee."

Plaintiffs have challenged both proposed initiatives on single-subject grounds. They have also challenged the titles set by the Title Board.

IV. Summary of the argument

The proposed initiatives do not violate the single-subject rule. 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, 44 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[.]" *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 #141 and #142 violate the single-subject rule, identifying five purportedly distinct subjects, "among others," that the measures implicate. *Pets. for Review* at 5. But the text of the initiatives makes clear that they have only one central object or purpose: prohibiting a county-wide "monopoly" by a licensed gaming facility. Petitioners complain that many of the details of implementation involve additional subjects, among them the "potential nullification" of other ballot initiatives, an effective prohibition on expansion of gaming to new locations in Colorado,[1] and "reducing the

[1] Petitioners suggest that the initiatives would have this effect because the first license approved in any county would "necessarily constitute a prohibited monopoly" within the subject county. While "monopoly" is

authority of the executive branch. But these are no more than ancillary (and for the most part speculative) impacts that the measure might have if it were passed and judicially interpreted in the manner that Petitioners suggest. The possibility of secondary effects does not convert a measure that "tends to effect or carry out one general objective or purpose" into one that violates the single-subject rule. *In re Ballot Title 1999-2000 No. 256,* 12 P.3d 246, 253 (Colo. 2000) (internal quotation omitted). To the contrary, "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), and "minor provisions necessary to

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undefined in the initiative, Petitioners' interpretation is at odds with the actual meaning of the term. As defined by Black's Law Dictionary, a "monopoly" is "[a] privilege or peculiar advantage vested in one or more persons or companies, consisting in the exclusive right or power to carry on a particular business or trade[.]" Contrary to Petitioners' assertions, a gaming facility would only have a monopoly if state law or regulation granted it an exclusive license guaranteeing that no competing facilities would be approved. Absent such an agreement to suppress competition, however, a gaming facility would not have a monopoly, at least in the legal sense of the term, merely because it happened to be the first and/or only licensee in a particular county.

effectuate the purpose of the measure are properly included within its text." *No. 256*, 12 P.3d at 253.

Neither #141 nor #142 poses the primary risks that the single-subject rule is designed to mitigate. The proposals are not lengthy and complex. To the contrary, the effect of the initiatives – disallowing the grant of gambling monopolies in Colorado counties – is simple to discern. There is thus little risk that #141 or #142 "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." *Kemper v. Hamilton (2007-2008, #17*), 172 P.3d 871, 875 (Colo. 2007). Moreover, neither measure raises the possibility of logrolling, which involves gathering support by proposing a multiple-subject 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 validity of the titles should be affirmed.

In addition to their single-subject challenges to the initiatives, Petitioners raise similar challenges to the titles in each of the two Petitions for Review. These challenges are addressed in order below.

1. "Legalized gambling," "casino-style gambling, " and "monopoly" are not catchphrases.

Finally, Petitioners assert that "legalized gambling " (#141), "casino-style gambling" (#142), and "monopoly" are impermissible catchphrases or slogans. The challenged language, however, 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; moreover, all of them are in the text of the initiatives themselves. "Legalized gambling" and "casino-style gambling" are descriptive phrases, not slogans. They specifically identify the type of gaming to which #141 and #142 would apply. They are not 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 phrases do not contain value judgments, and appropriately balances the need for brevity in the title with the requirement of accuracy.

The term "monopoly" is likewise not a catchphrase. As with the language discussed above, the Title Board included "monopoly" in the title because it appears – undefined – in the text of the initiative itself.

Unlike slogans or catchphrases, use of the term does contribute to voter understanding. "Monopoly" is a commonly understood term, and while it might conceivably have negative connotations for some prospective voters, it is both descriptive and brief. Petitioners have not offered "convincing evidence," *In re Proposed Initiatives 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000), to show that "monopoly" is a catchphrase. The term's inclusion was well within the Title Board's discretion and should be affirmed.

2. Because "legalized gambling" and "casino-style gambling" are not defined in the text of the initiatives, the titles need not define them.

Next, Petitioners argue that the titles are misleading because the phrases "legalized gambling" (#141) and "casino-style gambling" (#142) have "no established meaning," and are therefore misleading. In other words, Petitioners appear to argue that the titles are misleading because they use terms that are undefined.

This argument fails at the threshold. Neither phrase is defined in the text of the initiatives themselves. Thus, what the Petitioners are in

fact asserting is that #141 and #142 are themselves vague and misleading. But that type of complaint is outside the scope of this Court's review under § 1-40-106(3). *In re Proposed Initiative 1997-1998 #10,* 943 P.2d 897, 901 (Colo. 1997). As this Court has held, the Title Board "performs its job in setting the title and summarizing the measure." *Id.* "Any problems in the interpretation of the measure or its constitutionality are beyond the functions assigned to the title board." *Id.* Thus, any attempt to supply definitions in the title would have therefore exceeded the Title Board's authority. *See In re Proposed Initiative 1996-6,* 917 P.2d 1277, 1282 (Colo. 1996) ("[t]he board is under no duty to define vague terms, even if the proponents intend the language to remain vague so that the courts could interpret its application") (internal quotation omitted).

Accordingly, it does not follow from Plaintiffs' assertions about undefined terms in the text of the *initiative* that the *title* set by the Title Board is vague or misleading. This Court should reject Petitioner's claim.

3. The title's lack of reference to the initiative's potential effect on Indian lands is not misleading.

Finally, Petitioners argue that the titles for #141 and #142 are misleading because they do not disclose that, in accordance with federal law, "the Proposed Initiative could not prohibit or regulate any form of gambling conducted on 'Indian lands[.]" This contention should also be rejected. Whether the new legal provisions created by the measure will, in turn, be subject to existing legal provisions is not relevant to title-setting. Indeed, this Court has repeatedly concluded that the Board is not required to discuss the interplay of a measure with existing laws. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 498 (Colo. 2000).

VI. CONCLUSION

Based on the foregoing reasoning and authorities, the Title Board respectfully requests that this Court approve the titles for #141 and #142.

Respectfully submitted this 15th day of May, 2014.

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CERTIFICATE OF SERVICE

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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