

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #143, #144, and #145</p> <p><b>Petitioners: VICKIE ARMSTRONG and BOB HAGEDORN</b></p> <p>v.</p> <p><b>Respondents: RICHARD EVANS and STEPHEN ROARK*</b></p> <p><b>and</b></p> <p><b>Title Board: SUZANNE STAIERT; DAVID BLAKE AND SHARE EUBANKS</b></p>	<p style="text-align: right;">DATE FILED: May 29, 2014 4:18 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>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: <a href="mailto:mark@rechtkornfeld.com">mark@rechtkornfeld.com</a></p>	<p><b>Case No. 2014SA151, 2014SA152, and 2014SA153</b></p>
<p style="text-align: center;"><b>RESPONDENTS' ANSWER BRIEF</b></p>	

\* 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 2,160 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*

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Mark G. Grueskin

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## INTRODUCTION

Initiatives #143, #144, and #145 ensure minimum distances between public schools and gambling establishments. Armstrong and Hagedorn (“Armstrong”) raise a variety of issues that read a great deal into the measure. The Title Board avoided these gymnastics and set a fair title based on the simple single subject of each measure. Most of the issues in the Petitioners’ Opening Brief were anticipated in the Respondents’ Opening Brief and are not readdressed here. The Court should uphold the Board’s decisions.

## LEGAL ARGUMENT

### **A. Initiatives #143, #144, and #145 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 8-10.

This measure does not prohibit anything other than gaming within 1/3/5 miles of an elementary, middle, junior high, or high school. Armstrong’s measures address two counties where there is no qualifying facility at present (Pueblo and Mesa Counties). Presumably, racetracks will be developed in these counties outside of the distance in the measure ultimately presented to voters. As to the Arapahoe County site, Armstrong maintains only that this facility “could be” barred from developing casino-style gambling. *Id.* at 9. Evidently, even

Armstrong is unsure about this. Yet, the Court is being urged to decide this matter on this conjecture, hardly a substantive basis for an appellate court decision.

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 that were concerned about unrelated issues in order 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 staggering loss suffered by racetrack casino proponents in 2003 on a similar gambling expansion measure,<sup>1</sup> the possibility that Armstrong may never pursue any of these initiatives is real. Given the speculative nature of Armstrong's concerns, this 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, *No. 255, supra*, 4 P.3d at 492, and a "first in" construction is plainly inconsistent with the exercise of that right. Armstrong's single subject argument is unsustainable.

Regardless, Armstrong seeks what this Court has expressly stated it would not do. "[W]here a title or ballot title incorporates completely the same words used in the text of an initiative, the inquiry into their clarity will not anticipate possible legal arguments as to their meaning." *In re Title, Ballot Title, and Submission Clause for 2009-2010, No. 24*, 218 P.3d 350, 355 (Colo.2009). Armstrong is looking for a pre-election legal determination that the various measures conflict.

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<sup>1</sup> Amendment 33 received just 19% of the statewide vote (180,959 "yes" votes to 766,893 "no" votes). 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>



This relief is far afield from the Court’s obligations in reviewing a ballot title for its sufficiency and should be denied.

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. Petitioner’s Opening Brief at 10-11. In truth, the only end achieved by #143, #144, and #145 is an assurance that gaming regulators will not license casinos in the immediate vicinity of schools. 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 sufficient titles for #143, #144, and #145.**

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. “Casino-style gambling”

Armstrong raises concerns about “casino-style” and “gambling.”

Petitioner’s Opening Brief at 15-19. 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 15.

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 16.

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 political stereotype that is out of sync with the 21<sup>st</sup> century. 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.<sup>2</sup>

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

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<sup>2</sup> “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 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).

is going on in here,” citing Captain Louis Renault in the classic movie, *Casablanca*).

Finally, that view is a giant step away from 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.

### 3. “Video lottery terminals”

As to the clarity of “video lottery terminals,” *see* Respondents’ Opening Brief at 18-19, 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 defined in any of these measures, as even Armstrong points out. *Id.* Thus, the Board would have erred if it had developed a definition outside the terms of the initiatives themselves.

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.

4. *Measuring distances from casinos*

Armstrong complains that the titles do not describe how their respective distances will be calculated. Further, she believes the titles should have stated that the measures apply to facilities where casino gambling is conducted and supported. Petitioners' Opening Brief at 19-20.

The first concern is misplaced. Voters would have no reason to think that distances under the initiatives will be calculated in any way other than in straight lines, which is what these three measures require. As to the precise types of functions that are subject to these initiatives, Armstrong's concern addresses "possible degrees of difference between the expectations of voters and the ultimate efficacy of the Initiatives; it does not strike at the fundamental operations or purpose of the Initiatives." #24, *supra*, 218 P.3d at 356. The fact that the title does not focus on details of the measure does not mean it fails to communicate the central purpose of the measure: keeping a fair distance between gambling operations and schools. The omission of a detail of the measure does not invalidate a ballot title. *Id.* (definition of "political subdivision" that encompassed

some private entities did not need to be included in the title). The Board's title is sufficient for these purposes.

### **CONCLUSION**

The Title Board did not err. A prompt decision by this Court will still make petition circulation for the 2014 election cycle possible. It is therefore urged that the Board's actions be affirmed with all due haste.

Respectfully submitted this 29<sup>th</sup> day of May, 2014.

*/s/ Mark G. Grueskin*

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**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:

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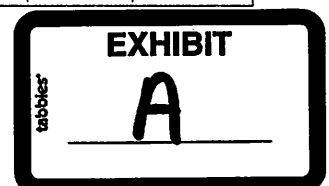


**Petition Format Approved**

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"> <li><a href="#">Original text</a></li> <li><a href="#">Amended text</a></li> <li><a href="#">Final text</a></li> </ul>	January 15, 2014, 9:30 AM Commenced 9:30 AM; single subject approved; staff draft amended; titles set; adjourned 9:45 AM	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
12	Right to Health Care	<ul style="list-style-type: none"> <li><a href="#">Original text</a></li> <li><a href="#">Amended text</a></li> <li><a href="#">Final text</a></li> </ul>	April 17, 2013, 9:30 AM Commenced 3:38 PM; single subject approved; staff draft amended, titles set; adjourned 4:00 PM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
38	Right to Purchase and Possess Ammunition Storage and Feeding Devices	<ul style="list-style-type: none"> <li><a href="#">Final text</a></li> <li><a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>
41	Repeal Prohibition of Large-Capacity Ammunition Magazines	<ul style="list-style-type: none"> <li><a href="#">Original text</a></li> <li><a href="#">Amended text</a></li> <li><a href="#">Final text</a></li> <li><a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>
43	Marriage	<ul style="list-style-type: none"> <li><a href="#">Original text</a></li> <li><a href="#">Amended text</a></li> <li><a href="#">Final text</a></li> </ul>	August 7, 2013, 1:00 PM Commenced 1:05 PM; single subject approved; staff draft amended; titles set; adjourned 1:20 PM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
48	Labeling Genetically Modified Food	<ul style="list-style-type: none"> <li><a href="#">Original text</a></li> <li><a href="#">Amended text</a></li> <li><a href="#">Final text</a></li> <li><a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>



49	Carrying Restrictions for Concealed Handguns on Campuses	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	January 2, 2014, 1:30 PM Commenced 1:37 PM; single subject approved; staff draft amended; titles set; adjourned 2:10 PM	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
79	Election of Justices and Judges	<ul style="list-style-type: none"> <li>• <a href="#">Waiver</a></li> <li>• <a href="#">Final text</a></li> <li>• <a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>
106	Yes or No Elections	<ul style="list-style-type: none"> <li>• <a href="#">Letter</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 2, 2014, 9:30 AM Single subject approved; staff draft amended; titles set; adjourned 4:18 PM	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
107	Marijuana Tax Revenue to Establish Housing for Disabled	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 8:45 AM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
111	State Representative Districts	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 16, 2014, 8:00 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 5:39 PM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
112	Two-Stage Election System	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 17, 2014, 8:30 AM Single subject approved; staff drafts amended; titles set. Hearing adjourned 9:11 AM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
113	Provisions for Reapportionment and Redistricting	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 9:26 AM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
114	Appointment of Nonpartisan Secretary of State	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 9:40 AM.	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>
121	Distribution of Oil and Gas Revenue	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> <li>• <a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>
122	Local Regulation of Oil and Gas Development	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> <li>• <a href="#">Motion for rehearing</a></li> </ul>	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 <a href="#">View full result</a>	<a href="#">View timeline</a>

			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"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> <li>• <a href="#">Motion for rehearing</a></li> </ul>	<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 <a href="#">View full result</a>	<a href="#">View timeline</a>
135	Horse Racetrack Limited Gaming Proceeds for K-12 Education	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> <li>• <a href="#">Motion for rehearing</a></li> </ul>	<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 <a href="#">View full result</a>	<a href="#">View timeline</a>
137	Fiscal Impact of Ballot Measures	<ul style="list-style-type: none"> <li>• <a href="#">Original text</a></li> <li>• <a href="#">Amended text</a></li> <li>• <a href="#">Final text</a></li> </ul>	<p>April 17, 2014, 8:30 AM Single subject approved; staff draft amended; titles set. Hearing adjourned 1:20 PM.</p>	Title set <a href="#">View full result</a>	<a href="#">View timeline</a>