SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 5:40 PM
Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #143, #144, and #145 **Petitioners:** Vickie L. Armstrong and Bob Hagedorn, v. **Respondents:** Richard Evans and Stephen Roark, and **Title Board:** Suzanne Staiert, David Blake, and Jason Gelender	▲ COURT USE ONLY ▲ Supreme Court Case No. 2014SA151, 14SA152 and 14SA153
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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 #143 ("Initiative #143), Initiative 2013-2014 #144 ("Initiative #144"), and Initiative 2013-2014 #145 ("Initiative #145") (collectively, 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 phrases "casino-style gambling" and "video lottery terminals," and the prohibited catch phrase "casino-style gambling";

(d) The Titles fail adequately to inform the voters how the Proposed Initiatives' distance requirements would apply, including that the Proposed Initiatives could apply to school property used for non-educational purposes; they would prohibit "casino-style gambling" within the stated distance from a public school's property line rather than within the stated distance from an actual school;

and they would apply to property used to *support* "casino-style gambling," as well as property used for the *operation* of "casino-style gambling"; and

(e) The Titles fail to disclose that, although the Proposed Initiatives purport to apply to all forms of "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.

The title set for Initiative #143 reads:

> An amendment to the Colorado constitution to prohibit casino-style gambling, including video lottery terminals, within one mile of a public elementary, middle, junior high, or high school in jurisdictions other than those in

> which limited gaming was authorized prior to January 1, 2014.

Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #143, at 12 (the "Title for Initiative #143").

The titles set for Initiative #144 and Initiative #145 read identically except that they substitute, respectively, "three miles" and "five miles" for "one mile" in Initiative #143. Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #144, at 12 (the "Title for Initiative #144"); Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #145, at 12 (the "Title for Initiative #145").

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). The Title Board denied the Motions on April 24, 2014. Petitioners timely commenced this appeal on May 1, 2014.

STATEMENT OF THE FACTS

The Proposed Initiatives would prohibit state authorities from issuing or renewing a license to conduct "casino style gambling" if "any portion of the real property to be used as the site to conduct or support casino-style gambling is within one mile [(Initiative #143), or three miles (Initiative #144), or five miles (Initiative #145)] of the property line of a public elementary school, middle school, junior high, or high school. The school that owns the property must have "ten or more students at the time the licensing or renewal decision is made." The Proposed Initiatives would apply regardless of whether the school property consists of actual school buildings or merely auxiliary property such as a bus storage barn or open fields.

The distance is to be measured in a direct line "beginning at the point of the school property line that is nearest to the potential licensee's property, and without regard for natural or man-made obstacles or barriers of any kind." The relevant distance is not based on proximity to a building currently used as a school or to property accessed by children, such as a playground.

The prohibition does not apply to jurisdictions that were authorized to conduct limited gaming before January 1, 2014 pursuant to section 9 of article XVIII of the Colorado Constitution. For this reason, even if the voters were to approve the Proposed Initiatives, there would be no restrictions on the distance

between school property and the casinos that currently operate in Black Hawk, Central City, and Cripple Creek.

SUMMARY OF THE ARGUMENT

Because each of the Proposed Initiatives contains multiple subjects, the Title Board lacked jurisdiction to set any titles and this Court should reverse on that basis alone. In addition to their acknowledged subject – prohibiting gambling within a specified distance of schools – 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) the prohibition of any expansion of limited gaming in Colorado.

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 (1) fail to describe the Proposed Initiatives' multiple subjects; (2) fail to disclose the Proposed Initiatives' intent to nullify competing proposed initiatives; (3) use the vague, undefined, and misleading phrases "casino-style gambling" and "video lottery terminals"; (4) fail adequately to inform voters how the distance requirements would apply; and (5) 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 Prohibition of "Casino-Style Gambling" Within the Specified Distance of Public School Property.

The Titles reflect the Proposed Initiatives' prohibition of "casino-style gambling" within the specified distance from the property of a public school. This is the only one of the two subjects of the Proposed Initiatives that appears in the Titles, however.

B. Potential Nullification of the Four Ballot Measures for Which Respondents Are the Petitioners.

A second subject of the Proposed Initiatives is 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.

The Proposed Initiatives would prohibit "casino-style gambling" at Arapahoe Park, the only horse racetrack that has been conducting pari-mutuel wagering on horse races for a period of at least five years as of January 1, 2014 (as required for the operation of video lottery terminals under Competing Initiatives 2013-2014 #80 and #134, and for the operation of horse racetrack limited gaming under Competing Initiatives 2013-2014 #81 and #135), because property owned by the Cherry Creek School District for non-school purposes as a school bus depot is adjacent to Arapahoe Park's property. *See* Ex. A to Pet. for Review of Final Action of Ballot Title Setting Bd. Concerning Proposed Initiative 2013-2014 #143. For this reason, if the Proposed Initiatives were to prevail at the ballot box, Arapahoe Park could be barred from providing video lottery terminals (under Competing Initiatives #80 and #134) or operating limited gaming (under Competing Initiatives #81 and #135), even if those Competing Initiatives also were to prevail.

Furthermore, the intent and purpose of the Competing Initiatives could be frustrated with respect to authorized horse racetracks that may be located in Mesa County or Pueblo County because, at any time, any person could obtain nearby

property, by lease or by purchase, for use as a school to block the operation of "casino-style gambling." The Proposed Initiatives would allow a school to purchase property within the specified distance of an existing facility that had engaged in "casino-style gaming" for years, thereby forcing the business to close its doors.

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 approved 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 such 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 it is a virtual certainty that any new location for "casino-style gambling" would be within one, three, and certainly five miles of public school property. This is particularly true given the Initiatives' provisions for measuring distance as the crow flies and from the nearest possible school property line rather than from the school building itself, and for extending the prohibition to property used merely "to support" "casino-style gambling." *See infra* at 20. Therefore, the Proposed Initiatives would surreptitiously limit "casino-style gambling" to the mountain counties currently 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.

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 could potentially nullify the Competing Initiatives or that, as a practical matter, the Proposed Initiatives would preclude the expansion of limited

gaming to any new jurisdiction. 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

[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.

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 the issuance or renewal of a license to conduct casino-style gambling at a site within a stated distance of a school's property line. It is not a coincidence that the only facility, other than the mountain-town casinos, currently qualified to obtain a license to operate video lottery terminals or to conduct limited gaming under the Competing Initiatives, Arapahoe Park, is adjacent to property owned by the Cherry Creek School District. Thus, the Proposed Initiatives have the potential to nullify the Competing Initiatives until horse racetracks located in Mesa County and in Pueblo County could qualify for operation of video lottery terminals or limited gaming starting in 2019. *See supra* p. 9.

In addition, as explained above, the Proposed Initiatives would allow any person, at any time, to lease or to sell property within the stated distance of a facility conducting, or planning to conduct, "casino-style gambling" to block all "casino-style gambling" in new jurisdictions. This could have the effect of permanently frustrating the purpose of the Competing Initiatives.

Moreover, the Proposed Initiatives define "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 the Proposed Initiatives specifically target 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]

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

The Titles state that the Proposed Initiatives would "prohibit casino-style gambling, including video lottery terminals," within specified distances of public

[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 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. C (statements indicating that the Proposed Initiatives were a response to the gaming measures proposed for the 2014 ballot).

schools. Because "casino-style gambling" is undefined in the Titles, it is impermissibly misleading; it is also a prohibited catch phrase. The phrase "video lottery terminals" is also undefined and misleading, as even counsel for Respondents and the Title Board have acknowledged.

1. "Casino-style gambling."

The Proposed Initiatives define "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 Titles omit the Proposed Initiatives' definition of "casino-style gambling," and this leads to multiple problems. *First*, the undefined phrase is misleading because 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. Specifically, voters would not know that the Proposed Initiatives would prohibit gaming subject to a $100 bet limit (as distinguished from the unlimited bets in true "casino-style gambling"), and that they would prohibit gaming venues that offer a limited choice of games (as distinguished from the

fuller array of games available in true "casino-style gambling").[3] The Titles' tendency to mislead on this issue is critical because the electorate would not understand what the Proposed Initiatives 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" is a catch phrase: "words which 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 v. Brandon (In re Title, Ballot Title, Submission Clause, & Summ. for 1997-1998 #105)*, 961 P.2d 1092, 1100 (Colo. 1998). "Gambling" alone 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, "gambling" is a crime in Colorado. C.R.S. § 18-10-103 (2013).

[3] 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.

By pairing "gambling" with "casino-style," the Titles ratchet 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] the substantive debate surrounding the issue to be submitted to the electorate" through its use of the Proposed Initiatives' charged language, particularly without including the definition of that phrase, the Titles are neither fair nor balanced. *Id.*

By pairing "gambling" with "casino-style," the Titles would permit opponents of the Proposed Initiative to appeal (misleadingly) to fears of Las Vegas casinos, "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. Because "the Title Board tip[ped] the substantive debate surrounding the issue to be submitted to the electorate" through its use of the Proposed Initiative's charged language, particularly without including the definition of that phrase, the Titles are neither fair nor balanced. *Id.*

Nor is it any excuse that the catch phrase also appears in the Proposed Initiatives themselves. *See, e.g.*, *Garcia I*, 4 P.3d 1094 (holding that the Title

Board's inclusion in the Title of the phrase "requiring all children in Colorado public schools to be taught English as rapidly and effectively as possible" was an impermissible catch phrase and slogan, even though the proposed initiative itself contained that language). That is especially true here, where the proponents deliberately and unnecessarily used a catch phrase in the Proposed Initiatives. For example, they defined "casino-style gambling" to consist of limited gaming as defined in Article XVIII, section 9 of the Colorado Constitution, plus video lottery terminals. Yet they deliberately avoided using the more neutral and constitutionally-recognized term "limited gaming" in favor of the emotion-laden and politically useful term "casino-style gambling."

2. "Video lottery terminals."

Neither the Proposed Initiatives nor the Titles define "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 Competing Initiative #80 ("Competing 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 Competing Initiative #80, at 21:21-23, Apr. 2, 2014, Ex. A. As one member of the Title Board

stated in setting the title for Competing 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 titles set for Competing 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 Competing Initiative #80, it should have required one in the Titles.

D. The Titles Fail To Adequately Inform the Voters How the Proposed Initiatives' Distance Requirements Would Apply.

The Titles purport to state a simple distance requirement, but are fraught with misleading omissions. Initially, by describing the distance requirement as no closer than "one [three, or five] mile[s] of a public . . . school," the Titles do not disclose that the Proposed Initiatives actually preclude siting of "casino-style gambling" within the designated distance "of a public . . . school's . . . *property line*" (emphasis added), rather than within the designated distance of an actual *school building*. In fact, at the rehearing for Initiative #143, Ms. Eubanks indicated it was her understanding that the Proposed Initiatives referred to the distance from

"the property that a school is located on." Tr. of Reh'g on Initiatives #138-145, #134, & #135, at 49:7-12, Apr. 24, 2014, Ex. B. Nor do the Titles disclose that the Proposed Initiatives require the distance to be measured "beginning at the point of the school property line that is nearest to the potential licensee's property." And they do not reveal that the distance must be measured as the crow flies, *i.e.*, "in a direct line," rather than based on normal routes of travel. Lastly, the Titles do not inform the voters that the Proposed Initiatives would allow a school to acquire property within the specified distance from an existing facility operating "casino-style gambling," even one that had been on the premises for decades, and throw it out of business.

Equally important, the Proposed Initiatives' distance requirements apply to "real property to be used as the site to conduct *or support* casino-style gambling," meaning, for example, that a gaming business's administrative offices, as well as the actual gaming venue, would need to maintain the required distance from school property. However, the Titles misleadingly suggest that they apply only to property where casino-style gambling occurs: "An amendment . . . to prohibit casino-style gambling . . . within one [or three or five] mile[s] . . . ."

Each of these omissions in the Titles' description of the Proposed Initiatives' distance provisions, standing alone, warrants finding the Titles misleading. Cumulatively, the misleading effect is even greater and more improper**.**

E. 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).[4]

[4] 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 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

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

Respectfully submitted this 15th day of May, 2014.

{continued from previous page}
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).

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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:

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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 15, 2014 5:40 PM
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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

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

---

Richard Evans, Objector

vs.

Vicki Armstrong and Bob Hagedorn, Proponents.

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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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EXHIBIT B
TO
PETITIONERS' OPENING BRIEF

INITIATIVE TITLE SETTING REVIEW BOARD

MEETING ON

INITIATIVES 138, 139, 140, 141, 142,

143, 144, 145, 134 AND 135

Colorado Secretary of State's Office

Blue Spruce Room

April 24, 2014

currently before us or forthcoming --

MS. STAIERT: They are subjects like the age of voting, school uniforms, junk food in school. There are some good ones.

MS. EUBANKS: Some important ones. Sorry for the distraction. I was just surprised.

So I do think that there's a difference between the terminology in the measure and some of the arguments made in the motion for rehearing because I don't believe that school district property is boundaries of a school, the property that a school is located on. And so I don't find those arguments in the motion for rehearing to apply.

So I just wanted to make those comments for the record.

MS. STAIERT: Do you want to make a motion?

MS. EUBANKS: I would move that we deny the motion for rehearing on Proposed Initiative 143.

MR. BLAKE: Second.

MS. STAIERT: All those in favor?

THE BOARD MEMBERS: Aye.

MS. STAIERT: That takes us to Initiative 2013-2014, Required Distances from Schools in Certain Casino Gambling Jurisdictions. And, Mr. Zakhem, if you want to come up.

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EXHIBIT C
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

2013-2014 #138 - Naming of Gambling Locations

Richard Evans and Stephen Roark, Proponents.

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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?