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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 #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

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Case No. 2014SA151

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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 3,177 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

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CONSTITUTIONAL PROVISIONS

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 #143, 2013-2014 #144, and 2013-2014 #145 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 #143, 2013-2014 #144, and 2013-2014 #145 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 #143, 2013-2014 #144, and 2013-2014 #145 ("#143, #144, and #145), with the Colorado Secretary of State. The Title Board conducted a hearing on April 17, 2014, and set titles for the measures. On April 23, 2014, Petitioners submitted

motions for rehearing on each title. The Title Board denied the motions after a hearing on April 24, 2014. Petitioner filed the above-captioned appeals shortly thereafter.

III. Statement of the facts

#143, #144, and #145 each seek to amend Article XVIII of the Colorado Constitution by adding Section 20. With one minor exception, the three measures are identical. In general, they prohibit a "state agency" from "issu[ing] or renew[ing] a license to conduct casino-style gambling" for facilities that are within 1 (#143), 3 (#144), or 5 (#145) miles of a public elementary, middle, junior high, or high school. Under each initiative, distances are measured in a straight line between the most proximate real property boundaries of the school and the casino. #143-145, § (1)(a). In order to impact the issuance or renewal of a license, a school must have "ten or more students at the time the licensing or renewal decision is made." *Id.* § (1)(b). Each of the measures is prospective only; they exempt "jurisdictions that were authorized before January 1, 2014, for limited gaming by section 9 of article XVIII." *Id.* § 3.

Plaintiffs have challenged each proposed initiative on single-subject grounds. They have also challenged the titles.

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 #91,* 235 P.3d at 1076. 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 #143, #144, and #145 violate the single-subject rule, identifying six 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 the issuance or renewal of a license for a "casino-style gambling" facility that the proponents deem to be too close to a school.

Petitioners complain that many of the details of implementation involve additional subjects, among them "potentially nullifying" other ballot initiatives, an effective prohibition on casino-style gambling at Arapahoe Park[1] and other locations that may be approved in currently

[1] According to the Petitions, Arapahoe Park hosts pari-mutuel wagering, but not "casino-style gambling." Petitioners contend that the measure would bar licensure of "casino-style gambling" in Arapahoe

pending or future ballot initiatives, and "usurping the executive powers of the state" by limiting administrative licensing discretion.

Petitioners confuse the difference between a measure with multiple subjects and one that has multiple potential effects. 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 effectuate the purpose of the measure are properly included within its text." *No. 256*, 12 P.3d at 253. The fact that #143, #144, and #145 might have ancillary effects

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Park "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." *Pets. for Review* at 6. The plain language of the measures, however, applies to "an elementary school's, middle school's, junior high's, or high school's property line." #143-145, § (1)(a). They contain no reference to property or facilities that a school district owns but that do not host a school.

if certain events come to pass does not mean that the measures comprise multiple subjects.

#143, #144, and #145 do not pose 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 – ensuring that casino-style gambling is not located in close proximity to schools – is simple to discern. There is thus little risk that #143, #144, and #145 "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 three measures. They are not, in and of themselves, new subjects that will lead to voter confusion or misunderstanding. Accordingly, #143, #144, and #145 do not violate the

single-subject rule, and this Court should deny Petitioner's single-subject challenge to all three 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 three Petitions for Review. These challenges are addressed in order below.

1. The measures do not apply to property that is owned by a school district but that is not used for educational purposes.

Petitioners first argue that the title "does not inform voters that the references to public schools in the Initiative are not limited to property used for educational purposes and could include property used for non-educational purposes." Thus, they suggest, the title does not adequately inform voters that the measure would bar licensure of "casino-style gambling" near, for example, a district-owned bus depot, office building, or warehouse.

The text of #143-145 does not support Petitioners' interpretation. The measures refer to the property lines of elementary school, middle school, junior high, or high school. They contain no reference to "any

property owned by a school district" or any similar language. Adopting Petitioners' interpretation would thus not only be at odds with the plain language of the measures, but also would be contrary to their intent, which is clearly to ensure that casino-style gambling facilities are not located next door to students are in attendance.

Accordingly, the Title Board did not err by omitting reference to Petitioner's erroneous interpretation of #143, #144, and #145.

2. The titles adequately inform voters of the nature of the proximity requirement.

Next, Petitioners assert that the titles are inadequate because they do not inform voters that the distance limitations apply to real property used to "support" casino-style gambling, and not just to "conduct" it. The initiatives prohibit an agency from issuing or renewing a license if "any portion of the real property to be used as the site to conduct or support casino-style gambling" is within a certain radius of a school. The titles state refer to a prohibition "on casino-style gambling…within [1,3, or 5] miles of a public elementary middle, junior high, or high school[.]"

Petitioners also complain that the title fails to specify that the radius measurement begins at the "public school's property line that is nearest to the potential licensee's property, rather than within [1, 3, or 5] miles of the school building itself."

The titles adequately describe both of these provisions. As this Court held in *Political Finance,* 877 P.2d at 314, 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. To the contrary, "[i]t is well-established that the titles and summary need not spell out every detail of a proposed initiative in order to convey its meaning accurately and fairly." *Howes v. Hayes (1997-1998, #74),* 962 P.2d 927, 930 (Colo. 1998). This is because "the point of the titles is to identify the proposal succinctly." *Id.*

Here, the titles very clearly communicate the primary focus of the initiative: to ensure that casino-style gambling facilities will not be located within a certain distance of public schools. The fine details of the measure – precisely where measurements start and stop, for example – are unnecessary in order to adequately describe for voters

what effect the measure would have if passed. To the contrary, the inclusion of too many technical details of that type would have the potential to confuse voters about the effect of the measure. This Court should thus affirm the Title Board's description of the proximity requirement.

3. "Casino-style gambling" is not a catchphrase.

Petitioners next assert that "casino-style gambling" is an impermissible catchphrase or slogan. But this language 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.

"Casino-style gambling" is a descriptive phrase, not a slogan. It distinguishes the type of gaming that #138 seeks to regulate from, for example, bingo, raffles, lotteries, and pari-mutuel wagering. Other courts have recognized that "casino-style gambling" is distinct from these categories. In *Christian Civic Action Comm. v. McCuen,* 884 S.W.2d 605, 609 (Ark. 1994), for example, the Supreme Court of Arkansas evaluated a challenge to a ballot title for an amendment that would authorize: 1) "a state lottery," 2) "bingo games," 3) raffles," 4) "pari-mutuel wagering, and 5) "additional racetrack wagering." The court rejected the ballot title based in part on the fact that its reference to "additional racetrack wagering" was insufficiently descriptive of the activities actually authorized. As the opinion put it, "'additional racetrack wagering' summons up, if anything, images of alternative methods of 'playing the horses' or 'running the dogs' – not casino-style gambling." *Id.* The court rejected the title because it was concerned that "voters favoring or opposing the inauguration of casino-style gambling may well be unaware that this is precisely what Amendment 4 seeks to accomplish." *Id.*

Thus, while the Arkansas Supreme Court did not engage in a catchphrase analysis in *McCuen,* it did implicitly acknowledge the descriptive value of the phrase "casino-style gambling," and in fact rejected a proponent's attempt to replace it with a less specific term. Building on this analysis, this Court should reject any suggestion that "casino-style gambling" is 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 phrase does not contain value judgments, and appropriately balances the need for brevity in the title with the requirement of accuracy.

4. "Casino-style gambling" is not undefined, vague or misleading; "video lottery terminals" is undefined in the text of the initiative and thus need not be defined in the title.

Next, Petitioners argue that the phrases "casino-style gambling" and "video lottery terminals," as used in the titles, are undefined, vague, and misleading to voters.

"Casino-style gambling" is defined in the text of the initiative. No additional definition is required in the title, however, because it is a commonly understood term, and one that is used to distinguish activities like table games and slot machines from other types of gaming, like raffles, bingo, and pari-mutuel wagering. The Title Board's omission of a definition for this term was within its discretion.

The Title Board likewise did not err by failing to define "video lottery terminals" in the title. That phrase is not defined in the text of the initiative itself. Thus, what the Petitioners are in fact asserting is that #138 itself is 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.* 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).

5. 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 #143, #144, and #145.

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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