Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: April 14, 2016 3:40 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board	▲COURT USE ONLY▲
In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2015-2016 #93 ("Threshold for Voter Approval of Initiated Constitutional Amendments") **Petitioners**: Timothy Markham and Chris Forsyth; v. **Respondents**: Greg Brophy and Dan Gibbs; and **Title Board**: Suzanne Staiert, Frederick Yarger and Jason Gelender.	Supreme Court Case No.: 2016SA103
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RESPONDENTS' 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:

This brief complies with C.A.R. 28(g).

☒ It contains 3,167 words.

This brief complies with C.A.R. 28(a)(7)(A).

☒ 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, 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. 28 and C.A.R. 32.

s/ Dee P. Wisor
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Respondents Greg Brophy and Dan Gibbs (the "Proponents"), by and through their undersigned counsel, hereby submit their Opening Brief:

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board had jurisdiction to set a title for Proposed Ballot Initiative #93 ("Initiative #93" or the "Initiative") concerning the threshold for voter approval of initiated constitutional amendments.

2. Whether the Initiative contains a single subject.

3. Whether, pursuant to COLO.REV.STAT. § 1-40-106, the title correctly and fairly expresses the true intent and meaning of the Initiative.

STATEMENT OF THE CASE

The Proponents seek to circulate Initiative #93, which would make it more difficult to amend the Colorado constitution by increasing the percentage of votes needed to pass a proposed constitutional amendment from a majority to at least 55% of the votes cast, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution. The Proponents serve both as proponents and as designated representatives of the proponents of the Initiative.

In compliance with the requirements set forth in Article V, Section 1 of the Colorado constitution and in Title 1, Article 40 of the Colorado Revised Statues, the Proponents submitted a draft of the proposed Initiative to the Colorado

Legislative Council ("Legislative Council") and the Office of Legislative Legal Services ("Legal Services") for review and comment. Based on comments from Legislative Council and Legal Services, the Proponents revised the text of the Initiative and submitted a final version to the Secretary of State for consideration by the Title Board. After holding a hearing, the Title Board found that it had jurisdiction to set a title for the Initiative and that the Initiative did not violate the single subject requirement. Accordingly, the Title Board set a title for the Initiative. On March 9, 2016, Petitioners filed motions for rehearing. During a rehearing on March 16, 2016, the Title Board granted Petitioners' motions only to the extent that the Title Board made changes to the title. The Title Board unanimously confirmed the title, ballot title and submission clause.

Included in the title is the phrase "making it more difficult to amend the Colorado constitution," which tracks the language in the Initiative, "[i]n order to make it more difficult to amend this constitution." This phrase merely describes the purpose of the Initiative, and therefore does not constitute a catch phrase. Furthermore, the title succinctly and accurately describes to voters the purpose and effect of the Initiative.

The language set by the Title Board is entitled to great deference and may be rejected only in a clear case. There is no basis on which reversal is warranted here. Accordingly, the Court should uphold the title as set by the Title Board.

STATEMENT OF FACTS

In accordance with COLO.REV.STAT. § 1-40-106, the Proponents submitted a draft of the Initiative to Legislative Council and Legal Services on February 2, 2016. Legislative Council and Legal Services reviewed the Initiative and provided written comments to the Proponents in a Review and Comment Memorandum dated February 12, 2016 (the "Memorandum"). On February 16, 2016, both of the Proponents met with Legislative Council and Legal Services to further discuss the questions raised in the Memorandum. On February 19, 2016, the Proponents filed a final draft of the Initiative with the Secretary of State[1], along with their original draft and a version reflecting changes made in response to comments from Legislative Council and Legal Services.

On March 2, 2016, both of the Proponents attended a title setting meeting with the Title Board, during which the Title Board unanimously determined that the Initiative contained only a single subject and set a title, ballot title and submission clause for the Initiative. Petitioners Chris Forsyth ("Forsyth") and

[1] *See* Proposed Initiative 2015-2016 #93, attached hereto as **Exhibit A**.

Timothy Markham ("Markham" and collectively, the "Petitioners") each filed Motions for Rehearing[2] with the Title Board on March 9, 2016. In support thereof, both Petitioners argued that the Initiative contained more than a single subject and that the title as set was unclear and misleading. Petitioners also argued that the title contained an impermissible catch phrase. Specifically, Forsyth asserted that "more difficult to amend the constitution" was a catch phrase, while Markham argued that "making it more difficult to amend the constitution" was a catch phrase. Forsyth further argued that the Title Board lacked jurisdiction to set the title. The Title Board held a rehearing on March 16, 2016, during which the Title Board granted Petitioners' motions only to the extent that the Board made changes to the titles. The Title Board denied the motions in all other respects.

Markham filed his Petition for Review by the Court on March 23, 2016. Forsyth filed his own Petition for Review on March 24, 2016. The Court granted the Petitions on March 25, 2016.

SUMMARY OF THE ARGUMENT

The Proponents are both proponents and designated representatives of the proponents of the Initiative. The Proponents have followed all required procedures

[2] Forsyth also filed an Amended Motion for Rehearing on March 9, 2016. Because the original motion and amended motions are substantially similar, we do not describe the motions individually.

pertaining to the initiative process, including meeting with Legislative Council and Legal Services, and attending two hearings of the Title Board.

The Initiative contains a single subject, which is to make it more difficult to amend the Colorado constitution. The Initiative describes how it will make it more difficult to amend the constitution, namely, by increasing the threshold for voter approval of proposed constitutional amendments, except those that repeal, in whole or in part, any provision of the constitution. This proposed requirement is reflected in the title, which accurately reflects the intent and meaning of the Initiative.

Included in the title is the phrase "making it more difficult to amend the Colorado constitution," which tracks the language in the Initiative, "[i]n order to make it more difficult to amend this constitution." This phrase merely describes the purpose of the Initiative, and therefore does not constitute a catch phrase. Furthermore, the title and the Initiative clearly state the purpose of the Initiative, and describe how the Initiative would make it more difficult to amend the constitution.

For all of these reasons, the Court should uphold the decision of the Title Board.

STANDARD OF REVIEW

In reviewing a challenge to the Title Board's decision, the Court employs all legitimate presumptions in favor of the propriety of the Title Board's actions. *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 155, 158 (Colo. 2014). Because the Title Board has considerable discretion in setting the title, the ballot title and the submission clause, the Court should reverse the Title Board's decision only if the title is insufficient, unfair or misleading. *See id.* at 159.

Furthermore, the Court does not "determine the initiative's efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal." *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 645 (Colo. 2010). The Court need only examine the wording of the titles and the initiative to determine whether they comport with the single subject and clear title requirements. *Cordero*, 328 P.3d at 159. Only in a clear case should the decision of the Title Board be held invalid. *In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Tobacco Tax Amendment 1994*, 872 P.2d 689, 694 (Colo. 1994).

ARGUMENT

I. The Title Board had Jurisdiction to Set a Title for the Initiative.

Article V, Section 1(2) of the Colorado constitution reserves the right of citizen initiative to the people of the State of Colorado. The initiative process begins when proponents of an initiative submit a draft of the proposed petition to Legislative Council and Legal Services. COLO.REV.STAT. § 1-40-105. At the time of filing, proponents must designate the names and addresses of two persons, or "designated representatives," who shall represent the proponents in all matters affecting the petition and to whom all notices or information concerning the petition shall be mailed. COLO.REV.STAT. § 1-40-104. In order to ensure that the Title Board has access to the information it needs to resolve the substantive issues concerning a proposed initiative, each designated representative is required to appear at all Title Board meetings and hearings concerning the proposed measure. *See, e.g., Hayes v. Ottke (In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69)*, 293 P.3d 551, 558 (Colo. 2013); COLO.REV.STAT. § 1-40-106(4). The Title Board may not set a title if either designated representative fails to attend all Title Board meetings pertaining to the proposed initiative. *Hayes*, 293 P.3d at 558.

In compliance with COLO.REV.STAT. §§ 1-40-104 and -105, the Proponents submitted their proposed Initiative to Legislative Council and Legal Services on February 2, 2016. The Proponents were listed as designated representatives of the proponents of the Initiative. Both of the Proponents attended the meeting with Legislative Council and Legal Services on February 16, 2016, the Title Board hearing on March 2, 2016, and the Title Board rehearing on March 16, 2016. Because the Proponents attended all meetings with Legislative Council and Legal Services and with the Title Board, nothing barred the Title Board from setting a title for the Initiative.

Forsyth's argument that a representative of the proponents failed to meet with Legislative Council and Legal Services is without merit. In his Petition for Review, Forsyth cites Article V, Section 1(5) of the Colorado constitution, which provides that Legislative Council and Legal Services "shall render their comments to the proponents of the proposed measure at a meeting open to the public." There is nothing that specifies the number of proponents that must be in support of a proposed measure or who may serve as a proponent of a proposed measure.

Furthermore, there is nothing that requires a proponent to be present at a review and comment meeting.[3]

In addition, Article V, Section 1(5) cannot be read independently of COLO.REV.STAT. § 1-40-104, which requires proponents' designated representatives to represent them in all matters concerning the proposed initiative, including meetings and hearings. As previously stated, the Proponents attended all meetings and hearings in connection with the Initiative as designated representatives of the proponents and as proponents themselves.

Notwithstanding the foregoing, even if one were to construe Article V, Section 1(5) as requiring the attendance of two proponents at meetings before Legislative Council and Legal Services, there is nothing that prohibits the Proponents from serving in their dual roles as proponents and as designated representatives. To the contrary, "[d]esignated representatives are often the proponents themselves." *See* Colorado Department of State, Initiative Procedures & Guidelines: A Citizen's Guide to Placing an Initiative on the Ballot, (July 27, 2015), http://www.sos.state.co.us/pubs/elections/Initiatives/files/PetitionManual

[3] Effective March 26, 2016, designated representatives of the proponents of a measure must attend all review and comment meetings. *See* Colorado HB 15-1057 (adding subsection 1.5 to COLO.REV.STAT. § 1-40-105). The review and comment meeting for the Initiative was held on February 16, 2016. Thus, there was no requirement for proponents of the Initiative to attend any review and comment meeting.

.pdf. Therefore, the Proponents' attendance at meetings with Legislative Council and Legal Services in their capacity as proponents and as designated representatives of the proponents satisfied the requirement of Article V, Section 1(5).

II. The Initiative Contains a Single Subject.

A measure proposed by a petition must contain a single subject which must be clearly expressed in its title. COLO. CONST. Article V, Section 1(5.5); COLO.REV.STAT. § 1-40-106.5(1). If an initiative "tends to effect or to carry out one general object or purpose, it is a single subject under the law." *Kemper v. Leahy (In re Title, Ballot Title)*, 328 P.3d 172, 177 (Colo. 2014). Provided that the subject matter is "necessarily or properly connected," an initiative will meet the single subject requirement. *Id.* In *Kemper*, an objector challenged on the basis of the single subject rule a title for an initiative to add a new provision to the state constitution creating a public right to the state's environment. The title was set as follows:

> An amendment to the Colorado constitution concerning a public right to Colorado's environment, and, in connection therewith, declaring that Colorado's environment is the common property of all Coloradans; specifying that the environment includes clean air, pure water, and natural and scenic values and that state and local governments are trustees of this resource; requiring state and local governments to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs.

On appeal, the Court noted that the initiative had three distinct subsections, the first of which created a public right to the environment, while the second and third subsections provided mechanisms for carrying out the objective of the first section. Collectively, all three subsections constituted a single subject, or "the creation of a public right to Colorado's environment." Accordingly, the initiative did not violate the single subject rule.

The title for the Initiative reads as follows:

> An amendment to the Colorado constitution making it more difficult to amend the Colorado constitution by increasing the percentage of votes needed to pass any proposed constitutional amendment from a majority to at least fifty-five percent of the votes cast, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution.

This title is similar to the title that the Court reviewed in *Kemper* in that it states the primary purpose of the Initiative along with a subsection detailing how the purpose will be achieved. Specifically, the Initiative seeks to amend the Colorado constitution in order to make it more difficult to amend the constitution. The Initiative proposes that in order to pass any proposed constitutional amendment, at least fifty-five percent of the votes cast must be in favor of adding the amendment, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution. Increasing the number of electors required to

approve a proposed measure is a mere mechanism by which the purpose of the Initiative—to make it more difficult to amend the constitution—will be achieved. Accordingly, the title as set by the Title Board constitutes a single subject.

III. The Title for the Initiative Correctly and Fairly Expresses the True Intent and Meaning Thereof.

A. The Title properly reflects the true intent and meaning of the Initiative.

Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *Earnest*, 234 P.3d at 648. In setting a title, the Title Board must "consider the public confusion that might be caused by misleading titles and to avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." *Id.* The title must "correctly and fairly express the true intent and meaning" of the initiative. *Id.* (citing COLO.REV.STAT. § 1-40-106(3)(b)).

Here, the title as set by the Title Board makes clear that the Initiative seeks to make it more difficult to amend the Colorado constitution and clearly describes the way it purports to do so. By reading the title, an elector can determine that a "yes" vote in favor of the Initiative would increase the voter approval threshold for constitutional amendments (except those that repeal, in whole or in part, any provision of the constitution), and, in the alternative, that a "no" vote would not

change the existing threshold. Because the title is clear and will not mislead voters, the Title Board's decision should be upheld.

B. <u>The Title does not contain a catch phrase.</u>

It is well established that the Title Board must avoid using catch phrases or slogans when setting a title. *See, e.g. Earnest*, 234 P.3d at 649; *Garcia v. Chavez*, 4 P.3d 1094, 1100 (Colo. 2000). Catch phrases are words that work in favor of a proposal without contributing to voter understanding. *Earnest*, 234 P.3d at 649. Words that merely describe a proposal are not impermissible catch phrases. *Kemper*, 328 P.3d at 180 (holding that "including clean air, pure water, and natural and scenic values" was not a catch phrase because it defined the word "environment" as it was used in the proposal); *see also Earnest*, 234 P.3d at 642 ("right of health care choice" not a catch phrase); *In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008) ("just cause" and "mediation" not catch phrases); *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008) ("criminal conduct" not a catch phrase); *In re Ballot Title & Submission Clause & Summary for 2005-2006 #75*, 138 P.3d 267, 269-70 (Colo. 2006) ("term limits" not a catch phrase); *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #227 & #228*, 3 P.3d 1, 7 (Colo. 2000) ("preserve . . . the social institution of marriage" not a catch phrase); *In re Title, Ballot Title & Submission*

Clause & Summary for 1999-00 #256, 12 P.3d 246, 257 (Colo. 2000) ("management of growth" not a catch phrase); *In re Title, Ballot Title & Submission Clause & Summary for 1997-1998 #105*, 961 P.2d 1092, 1100 (Colo. 1998) ("refund to taxpayers" not a catch phrase).

Petitioners argue that "making it more difficult to amend the Colorado constitution" constitutes a catch phrase. However, this phrase is merely descriptive of the increased voter approval threshold to amend the constitution as it is set forth in the proposed amendment. The Initiative would add a requirement to increase the percentage of votes needed to pass any proposed constitutional amendment to at least fifty-five percent of the votes cast, unless the proposed constitutional amendment only repeals, in whole or in part, any provision of the constitution. By increasing the voter approval threshold to amend the constitution (except those that repeal, in whole or in part, any provision of the constitution), the Initiative makes it more difficult to amend the constitution. Therefore, the phrase "making it more difficult to amend the Colorado constitution" is merely descriptive of the Initiative, aids voter understanding of the Initiative, and does not constitute a catch phrase.

Furthermore, the title phrase "making it more difficult to amend the Colorado constitution" tracks the language of the proposed constitutional amendment, "in order to make it more difficult to amend this constitution." *See*

Proposed Initiative 2015-2016 #93, attached hereto as **Exhibit A**. Because the phrase is descriptive of the Initiative and is taken directly from the language of the proposed amendment, it does not constitute a catch phrase. *See, e.g., In re Title, Ballot Title, Submission Clause and Summary Pertaining to the Branch Banking Initiative Adopted on March 19, 1980*, 612 P.2d 96, 100 (Colo. 1980); *In re Title, Ballot and Submission Clause and Summary Pertaining to the Workers Comp Initiative Adopted on January 6, 1993*, 850 P.2d 144, 147 (Colo. 1993); *Kemper*, 328 P.3d at 180. Accordingly, the Court should uphold the Title Board's decision.

CONCLUSION

For the reasons stated herein, the Proponents respectfully request that the Court uphold the title, ballot title and submission clause for Initiative #93.

Respectfully submitted this 14th day of April, 2016.

s/ Dee P. Wisor
Dee P. Wisor

s/ Martina Hinojosa
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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I filed a true and correct copy of the foregoing RESPONDENTS' OPENING BRIEF using the ICCES electronic filing system and served electronic copies to the following:

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EXHIBIT A

Proposed Initiative 2015-2016 #93

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BE IT ENACTED BY THE PEOPLE OF THE STATE OF COLORADO:

SECTION 1. In the constitution of the state of Colorado, Section 1(4) of article V of is amended to read:

Section 1. General assembly - initiative and referendum

(4) (a) The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures initiated by or referred to the people of the state shall be held at the biennial regular general election, and all such measures shall become the law or a part of the constitution, when approved by a majority of the votes cast thereon OR, IF APPLICABLE THE NUMBER OF VOTES REQUIRED PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION (4), and not otherwise, and shall take effect from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed. This section shall not be construed to deprive the general assembly of the power to enact any measure.

(b) IN ORDER TO MAKE IT MORE DIFFICULT TO AMEND THIS CONSTITUTION, AN INITIATED CONSTITUTIONAL AMENDMENT SHALL NOT BECOME PART OF THIS CONSTITUTION UNLESS THE AMENDMENT IS APPROVED BY AT LEAST FIFTY-FIVE PERCENT OF THE VOTES CAST THEREON; EXCEPT THAT THIS PARAGRAPH (b) SHALL NOT APPLY TO AN INITIATED CONSTITUTIONAL AMENDMENT THAT IS LIMITED TO REPEALING, IN WHOLE OR IN PART, ANY PROVISION OF THIS CONSTITUTION.

SECTION 2. In the constitution of the state of Colorado, Section 2(1) of article XIX is amended to read:

Section 2. Amendments to constitution - how adopted

(1) (a) Any amendment or amendments to this constitution may be proposed in either house of the general assembly, and, if the same shall be voted for by two-thirds of all the members elected to each house, such proposed amendment or amendments, together with the ayes and noes of each house thereon, shall be entered in full on their respective journals. The proposed amendment or amendments shall be published with the laws of that session of the general assembly. At the next general election for members of the general assembly, the said amendment or amendments shall be submitted to the registered electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon OR, IF APPLICABLE THE NUMBER OF VOTES REQUIRED PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION (1), shall become part of this constitution.

(b) IN ORDER TO MAKE IT MORE DIFFICULT TO AMEND THIS CONSTITUTION, A CONSTITUTIONAL AMENDMENT SHALL NOT BECOME PART OF THIS CONSTITUTION UNLESS THE AMENDMENT IS APPROVED BY AT LEAST FIFTY-

FIVE PERCENT OF THE VOTES CAST THEREON; EXCEPT THAT THIS PARAGRAPH (b) SHALL NOT APPLY TO A CONSTITUTIONAL AMENDMENT THAT IS LIMITED TO REPEALING, IN WHOLE OR IN PART, ANY PROVISION OF THIS CONSTITUTION.