ORIGINAL

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SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203	FILED IN THE SUPREME COURT MAR 14 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board **IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006, #75** **Petitioners**: BENNETT S. AISENBERG and FEDERICO C. ALVAREZ, Objectors, v. **Respondents**: JOHN K. ANDREWS, JR. and KATHLEEN A. LeCRONE, Proponents, and **Title Board**: WILLIAM A. HOBBS, JASON DUNN, and DAN CARTIN	▲ **COURT USE ONLY** ▲
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PETITIONERS' OPENING BRIEF

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STATEMENT OF ISSUES PRESENTED

Whether the ballot title is misleading because it does not communicate that justices and appellate judges now in office are retroactively subject to the limitations on terms established by this measure.

Whether the ballot title is misleading because it does not communicate that the initiative converts the terms served by all currently sitting justices and appellate judges to four-year terms.

Whether the ballot title is misleading because it implies that this initiative imposes, rather than changes, terms of office for justices on the Supreme Court and judges on the Court of Appeals

Whether "term limits" is a prohibited catch phrase, given the way it has been used by initiative proponents in political messages sent through so-called "push polls," on the Internet, and in the press.

STATEMENT OF THE FACTS

John K. Andrews, Jr. and Kathleen A. LeCrone ("proponents") are the two registered electors who have proposed Initiative 2005-2006 #75 which limits the terms of service for all justices on the Colorado Supreme Court and all appellate judges on the Court of Appeals. As submitted to the Secretary of State on January

20, 2006, this measure creates a new section 27 to Article XI of the Colorado Constitution that provides:

> Terms of office for the Court of Appeals and Supreme Court shall be four years. At each level, no one shall serve more than three terms of office. A provisional term shall be a term of office. Anyone who has served twelve years or more at one court level shall not be eligible for another term at that level.

The measure also repeals section 7 of Article VI, which provides, "The full term of office of justices of the Supreme Court shall be ten years."

The title set by the Title Board for #75 reads as follows:

> An amendment to the Colorado constitution concerning term limits for appellate court judges, and, in connection therewith, providing four-year terms of office for justices of the supreme court and judges of the court of appeals, prohibiting a justice of the supreme court or a judge of the court of appeals from serving more than three terms, and making any justice or judge who has served more than twelve years at one court level ineligible for another term at that level.

The ballot title and submission clause contains the same language, except that it is preceded by the words, "Shall there be," and the punctuation at the end of the title is changed to a question mark.

STATEMENT OF THE CASE

The Title Board met on February 1, 2006 to set a title for this measure. Transcript of February 1, 2006 of Meeting of Initiative Title Setting Review Board (hereafter "Feb. 1 Tr.") at 19:4-9. On February 8, 2006, Bennett S. Aisenberg and

Federico C. Alvarez submitted a Motion for Rehearing, which was heard at the Board's February 15 meeting. The Board granted in part and denied in part the Motion for Rehearing. Transcript of February 15, 2006 of Meeting of Initiative Title Setting Review Board (hereafter "Feb. 15 Tr.") at 63:23-64:10.

SUMMARY

The title set by the Board is deficient in several respects. First, it fails to inform voters that the tenure of currently sitting judicial personnel will be governed by this measure. Those justices and judges will be required to stand for retention at the next general election, unless they will have served twelve or more years, in which case they will be ineligible for continued service on that court. Second, it fails to inform voters that current judicial terms are shortened, treating them as if they had been made for four years rather than the existing ten-year terms for Supreme Court justices and eight-year terms for Court of Appeals judges. Third, it fails to inform voters that a partial term counts as a full term for purposes of the maximum amount of time one person can spend on the appellate bench. Fourth, it erroneously implies that #75 imposes term limits when it merely modifies them. And finally, the proponents persuaded the Board to use "term limits" in the ballot title, notwithstanding the fact that this phrase has never been

used in a ballot title on this topic and it is one that the proponents use for political leverage.

As such, the titles should be returned to the Board for correction.

LEGAL ARGUMENT

A. A ballot title must inform voters of all key provisions contained in the initiative, and any title that fails to do so is misleading.

The Title Board is charged with crafting a brief yet accurate title that "fairly express[es] the true meaning and intent of the proposed state law or constitutional amendment." § 1-40-106(3), C.R.S. The title must summarize the key elements of an initiative so that voters can appropriately evaluate it. Properly crafted, a ballot title ensures the integrity of the election process for initiated measures. "The Board must simultaneously consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion." Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25, 974 P.2d 458, 469 (Colo. 1999).

The ballot title is no mere formality. It is included on petitions, § 1-40-110(2), C.R.S., so that voters know what they are being asked to refer to a public vote. The title is the only information on the ballot itself that voters see when they vote on a proposed measure. As such, the Board's titles must "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." In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1123 (Colo. 1984). And after the election, the title will be reviewed by the courts to help discern what voters considered – or did not consider – in voting for the measure. City of Wheat Ridge v. Cerveny, 913 P.2d 1110, 1115 (Colo. 1996).

A ballot title must be concise. § 1-40-106(3)(b), C.R.S. However, the price of being succinct cannot be the omission of significant elements of an initiative. "[I]f a choice must be made between brevity and a fair description of the essential features of a proposal, the decision must be made in favor of full disclosure to the registered electors." In re Matter of Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment, 852 P.2d 28, 32 (Colo. 1993) (hereafter "Election Reform Amendment"). The question for the Court is, then, whether full disclosure of an initiative's important aspects has been made.

The Court presumes that the Title Board has fulfilled its duties and provided the voting public with an accurate title. The Court will not revise a title merely because it could have been drafted differently or even more artfully. Nor will the Court analyze the meaning of the measure, beyond that indicated by its plain language and the statements of the proponents' intent, in order to evaluation the

Title Board's handiwork. And the Board is not required to state all of an initiative's effects. Id. at 33.

Even so, the Court's review of a ballot title is not superficial. "Our duty is to ensure that the title, ballot title, submission clause, and summary 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." Id. at 33. Where the Board has not correctly and fairly expressed the true intent and meaning of the proposed, the title is returned to the Board to be corrected, based upon directions from this Court.

B. The title must communicate that currently sitting judges and the commencement dates of their terms are affected by this measure.

This initiative paints with a broad brush. It governs the tenure of all justices on the Supreme Court and judges on the Court of Appeals, whether they are sitting on those courts at the time of passage or whether they are appointed in the future. Voters should know that existing terms are shortened by this measure, an aspect of the measure that the title fails to accurately communicate.

1. #75 limits the terms of sitting justices and appellate judges.

According to the proponents, this initiative was designed to affect currently serving members of the appellate bench. "[W]e intend this to operate on incumbents." Feb. 15 Tr. 31:6. Any judge or justice who has already served twelve

years would not be eligible for another term. Feb. 15 Tr. 31:13-14. And the remaining justices and appellate judges, who are now serving but who will not have served the maximum allowable twelve years, will be required to stand for retention at the next general election. Feb. 15 Tr. 31:7-10.

After this issue was addressed at the rehearing,[1] the Board became concerned enough about this facet of the initiative to change the title, but these revisions did not go far enough. One board member advocated amending the staff draft because most voters "would not instinctively or intuitively" apply the measure to the terms of currently sitting judges. Feb. 15 Tr. 29:17-25 (comments of Mr. Dunn). Another noted that #75's applicability to current terms is "a pretty dramatic result of the proposal that's not in our titles right now." Feb. 15 Tr. 30:8-9 (comments of Mr. Hobbs).

The Board's title, as revised, provides only that this measure "mak[es] any justice or judge who has served more than twelve years at one court level ineligible for another term at that level." It does not indicate, as the proponents did, that sitting judges who had served twelve years would have to vacate their offices after the following general election. This measure, in a surreptitious way, ushers a large part of the current appellate bench out of office. When existing members of a

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[1] This issue was raised before the Title Board. Motion for Rehearing, para. 6; Feb. 15 Tr. 11:5-7.

governmental body are to be affected by a seemingly procedural change such as this one, the nature of the system overhaul must be clear in the title. For instance, this Court has required that a ballot title reflect the change in the composition of the state senate and state house of representatives resulting from a reformatting of legislative districts. It was "a matter of significance to all concerned with the issue dealt with in the proposed amendment" that some legislators would be turned out of office if an initiative passed. Election Reform Amendment, 852 P.2d, at 36. It is not enough that the Board alludes to "any justice or judge" with the hope that voters will infer that terms of currently sitting members of the appellate bench are shortened and capped because of this measure.

2. *#75 shortens terms that are currently being served.*

Perhaps the most surreptitious aspect of the measure is that it shortens the terms of all currently sitting justices and appellate judges to four years. This feature was raised as part of the discussion of #75's retroactive applicability.[2]

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[2] This issue was raised before the Title Board. Motion for Rehearing, para. 6. The proponents exhaustively addressed the shortening of current terms as part of the measure's applicability to sitting judges and justices. "No. 6 [from the Motion for Rehearing] on retroactivity, Mr. Dunn and I did have some colloquy last time. I don't disagree with Mr. Grueskin's interpretation of the way **our amendment** is written that – that it **would upon adoption immediately begin to operate on everyone currently sitting on the court of appeals and supreme court.** I don't consider that retroactive. I – **I consider that to operate about when is the next**

As to this point, the proponents were quite specific. Currently serving judges and justices hold office only until the next general election because their "ten-year term has been revised to four years." Feb. 15 Tr. 44:1-3. To clarify one Board member's questions about how incumbents were affected, the proponents set forth the following example. "[W]hen terms already end according to the constitution, and if Section 27 were added, then – then Judge Brown or Judge Smith, who thought they were on a term of eight years, ten years, have been now advised by the voters that all the longer we intended to keep you was – was four years after your last retention or until – until the next January after the next general election." Feb. 15 Tr. 46:16-24. Given this statement, the board chairman restated this facet of the initiative. If #75 passed, a "justice would continue to serve the remainder of what is now a four year term." Feb. 15 Tr. 47:22-23 (comments of Mr. Hobbs).

Nothing in the ballot title adopted by the Board reflects this retroactive change in the length of sitting jurists' terms. As a result, voters could not possibly know that #75 changes existing term lengths, including those of justices and appellate judges who were retained at previous elections and appellate judges who stand for retention in 2006. This ambiguity is a fatal one. The Court has

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time that someone's term would – would be considered to be up for review by the voter." Feb. 15 Tr. 25:20-26:4 (emphasis added).

invalidated another judicial term limits proposal because its title did not inform voters whether that measure affected the retention votes for judges also on the 2000 ballot. In re Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29, 972 P.2d 257, 267 (Colo. 1999). When voters consider #75, they will be voting on court of appeals retentions at the same November, 2006 election. Yet, they will not know whether their vote to retain those judges for eight years is trumped by their vote for four-year terms for all justices and appellate judges.

Therefore, this ballot title fails to communicate a key element of #75 – namely, that all existing judicial terms are retroactively treated as four-year terms. The measure is not, as voters would reasonably assume, prospective in nature. The Court found in #29 that the initiative at issue contained "either a material ambiguity or a concealed intent." Id. at 269. In either event, the title could not stand. This measure suffers from the same infirmity, and therefore, the ballot title set for #75 must be returned to the Board to be corrected.

C. The title must inform voters that a partial term will count toward the limit on service by appellate judges.

The measure provides that a provisional term counts as a full term, but this fact is not reflected in the titles.[3] Provisional terms are interim terms when a judge or justice is appointed to fill an unexpired term. They last for two years and then until the second Tuesday in January following a general election. Colo. Const., art. VI, sec. 20(1).

The title approved by the Board provides that justices and judges have "four-year terms of office," are prohibited "serving more than three terms," and can serve no more than "twelve years at one court level." In other words, the title appears to state a fairly straightforward mathematical equation: four years times three terms equals twelve years.

But as the proponents noted before the Board, the actual service permitted will be less than twelve years, given that appointments typically begin by service of a provisional term. "I don't envision a circumstance where they (judges and justices appointed after the effective date) would serve more than two plus four plus four years either." Feb. 15 Tr. 30:20-22. The proponents made virtually a verbatim statement to this same effect at the original title setting hearing. Feb. 1

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[3] This issue was raised before the Title Board. Motion for Rehearing, para. 2; Feb. 15 Tr. 9:2-23.

Tr. 17:22-25. There is a theoretical possibility that someone could serve almost twelve years, but it would be much more common that justices and appellate judges would "serve more than ten but less than 12 (years)." Feb. 15 Tr. 33:8.

But the proponents disagreed that the role of partial terms in calculating total service should even be mentioned in the title. "I don't think the ten-year concern belongs in the title. It is an incidental feature of the operation of the design here." Feb. 15 Tr. 31:18-21. They displayed a strong preference for portraying the measure as providing for twelve years of judicial service at any one level of the appellate courts. "[T]he 12 years that are stated in the proposal itself, the language of the constitutional amendment, I think that's the only number of years of which the voters need to be advised." Feb. 15 Tr. 30:25-31:1-4.

In #29, the Court noted that the measure then before it counted a partial term as a full term. Judges and justices were limited to three four-year terms, and any judge retained by less than sixty percent of the voters could only serve a one-year term until the next annual election. This one-year of service was counted as a full term. 972 P.2d at 268. The title's silence on this aspect of the initiative was a factor in the Court's conclusion that, in describing a measure that limited judicial terms, "the Title Board reinforces voter confusion about the effect of a 'yes' or 'no' vote." Id. The purposeful crafting of a measure that obfuscates this element of an

initiative is an "abuse of the voters' right to be presented with straightforward distinct proposals." Id.

Similarly, voters should not frame their support for or opposition to #75 on the basis of a hypothetical twelve-year tenure at any one court level, particularly when the Board stated that the measure "really is a ten-year limitation." Feb. 15 Tr. 29:18-19 (comments of Mr. Dunn). Voters should know that where a judge or justice resigns, his or her successor will serve a partial term that counts as a full term under the measure. Whether this is a political plus or minus is unknown, but it is important. In the legislative context, this very issue was fiercely litigated in the last several weeks (see Exhibit 7 submitted to the Board) and was also widely reported in the media. Because the partial term issue was controversial in the legislative context and would likely generate similar interest around #75, it should be related to voters in the ballot title.[4]

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[4] Before the Board, this case was discussed. The Board was thus aware that the ballot title for the initiative that imposed limits on legislative and executive terms was silent regarding the impact of partial terms on the total duration a person could hold state office. Feb. 15 Tr. 9:2-23; *see* Exhibit 7.

D. The title must indicate that the measure repeals constitutional and statutory terms for Supreme Court justices and Court of Appeals judges.

This measure expressly repeals the ten-year terms provided by the Constitution for Supreme Court justices in Article VI, section 7 of the Constitution. *See* section 2 of #75. It also supersedes the eight-year statutory terms for Court of Appeal judges. § 13-4-104, C.R.S. However, the title does not reflect these repeals.[5]

The title states that #75 has the outcome of "providing four-year terms of office for justices of the supreme court and judges of the court of appeals." This statement implies that the measure establishes, rather than changes, limitations on judicial terms. This phrase is politically powerful, but it is substantively inaccurate.

In #29, the initiative summary's reference to repeal of terms of office for Supreme Court justices was enough so that the combined product of the Title Board was not misleading to voters. 972 P.2d at 266, n.14. That summary expressly stated: "The measure would repeal conflicting provisions of the Colorado constitution including: The terms of office and qualifications for judges and justices...." Id. at 270. There is no comparable statement in the ballot title for

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[5] This issue was raised before the Title Board. Feb. 15 Tr. 12:1-10.

#75, and there is no summary to rescue this title. Voters will not know that they are repealing the existing limitations on the terms of sitting appellate judges and justices. They may vote for or against #75, thinking that in "providing" for limits on judicial service, they are filling a void when in fact none exists.

Accordingly, the title is misleading in this respect and should be returned to the Board for correction.

E. As used in proponents' political messaging, "term limits" is a catchphrase or slogan, and the Title Board's inclusion of that phrase at proponents' request was error.

The title is not supposed to be part of the political leveraging between proponents and opponents. But because the proponents sought to replace the language that has always been used to frame these measure – "limiting future terms of office" – and replace it with "term limits," the title is now part of the campaign dialogue about this measure.[6]

A phrase included in a ballot title that can influence voters regarding the measure violates the requirement that a title be neutral and fair. § 1-40-106(3)(a), C.R.S. Titles may not contain a catch phrase that unfairly prejudices the proposal in its favor. *See* In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # # 227 & 228, 3 P.3d 1, 3 (Colo. 2000). A "catch phrase" consists of

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[6] This issue was raised before the Title Board. Motion for Rehearing, para. 1; Feb. 15 Tr. 4:2-8:22.

"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." In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 # 105, 961 P.2d 1092, 1100 (Colo. 1998). "By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 258(a), 4 P.3d 1094, 1100 (Colo. 1998). The fact that the initiative text includes a particular phrase is not a good reason to include the language in the title. Id. But the mere allegation that a phrase constitutes a catch phrase is not sufficient; there must be evidence submitted that establishes this allegation. # # 227 and 228, 3 P.3d at 7.

Here, the proponents ran "push polls" in late 2005 that framed high profile judicial decisions with the possible remedy of "term limits." (Exhibit 1 submitted at hearing, appended to Feb. 15 Tr.) These "polls" are intended persuade rather than just survey voters, and this goal is evident from the text of the push polls run in late 2005. *See* id. Information about these push polls was widely disseminated on the Internet. (Exhibit 2 submitted at hearing, appended to Feb. 15 Tr.) The proponents spoke openly of term limits as the antidote to "virtual life terms on the

bench." (Exhibit 3, page 4, submitted at hearing, appended to Feb. 15 Tr.) Term limits are also posed as **the** answer to certain judicial decisions which reflect ultra-hot buttons for the electorate: "Murderers let off on a technicality... Property rights trampled... School vouchers thrown out." Id. The tone of the campaign to come is clear: only the elixir of term limits can cure the ailing judicial system. How else will Coloradans be able to stem the tide of judges the proponents are already referring to as "'black-robed dictators?'" (Exhibit 4 submitted at hearing, appended to Feb. 15 Tr.)

Notably, the original staff draft of the ballot title did not include a reference to "term limits." Like ballot titles for previous initiatives proposing limits on judicial service, (*see* Exhibits 5 and 6 submitted at hearing), the staff draft referred to a "limitation on the terms of appellate court personnel." Feb. 1 Tr. 9:1-2. At the proponents' suggestion, though, this phrase was changed to "term limits for appellate court judges." And the proponents stated the reason they wanted this change: "Term limit is a catchphrase." Feb. 1 Tr. 10:20. They added that they thought it was "plain language" and "would be clearer to voters," Feb. 1 Tr. 10:21-11:1, and later said they had not meant that it was a catch phrase in the legal sense. Feb. 1 Tr. 14:8-20. But their political rhetoric was not before the Board at this

initial hearing, rhetoric that suggests "term limits" is not intended to be a neutral phrase.

In any event, a phrase need not be inherently loaded with political meaning in order to qualify as a catch phrase. A phrase that is seemingly neutral – like "as rapidly and effectively as possible" – can be a political slogan. #258(a), 4 P.3d at 1100. It all depends on the way in which the words are used, as it is the current political climate and "the context of contemporary political debate" that determines whether specific wording qualifies as a catch phrase. # # 227 and 228, 3 P.3d at 7. If the Court finds that a phrase "tips the substantive debate surrounding the issue to be submitted to the electorate," #258(a), 4 P.3d at 1100, the Board has not done its duty to provide a fair and impartial ballot title.

Given the blatantly political usage of this phrase by proponents in recent months and their clear request to include these words in the ballot title, "term limits" is not intended to be, and will not be, an inconsequential addition to this ballot title. The Board's decision in this regard should be reversed.

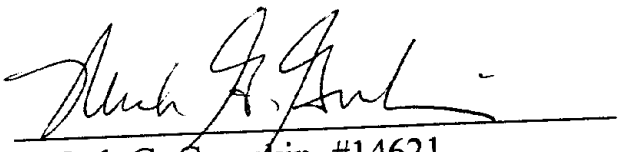
CONCLUSION

The ballot title fails to inform the voters of critical elements of the initiative: current justices and appellate judges are affected; existing judicial terms are shortened; provisional terms are counted toward the maximum period that can be

served in judicial office; limits already provided by law are repealed; and the measure uses a term that fits neatly into the political rhetoric used by proponents. The title can be salvaged, but this title should not be placed before the voters. Accordingly, it is respectfully requested that the Court return the ballot title to the Board for corrections.

Respectfully submitted this 14th day of March, 2006.

ISAACSON ROSENBAUM P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was either hand delivered or sent via overnight delivery to the following:

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