

ORIGINAL

CERTIFICATION OF WORD COUNT: 1891

SUPREME COURT, STATE OF COLORADO

Court Address:

2 East 14th Avenue

Denver, Colorado 80203

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

Attorneys for Petitioners:

Mark G. Grueskin, #14621

Daniel C. Stiles, #35695

Isaacson Rosenbaum P.C.

633 17th Street, Suite 2200

Denver, Colorado 80202

Phone Number: 303-292-5656

Fax Number: 303-292-3152

E-mail: mgrueskin@ir-law.com; dstiles@ir-
law.com

FILED IN THE
SUPREME COURT

APR 14 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No.: 06 SA 63

PETITIONERS' REPLY BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

LEGAL ARGUMENT..... 1

A. The titles must state that the terms of sitting judges are limited by this measure 1

B. The Board failed to make voters aware that partial terms count as full terms under this measure2

C. The Board should not perpetuate a perception that this measure institutes a durational limit on judicial service3

D. Notwithstanding its other uses, the ballot titles’ inclusion of “term limits” was intended to be, and will be, a catchphrase5

CONCLUSION7

TABLE OF AUTHORITIES

Cases

<u>In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund, 913 P.2d 533 (Colo. 1996)</u>	1
<u>In re Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29, 972 P.2d 257 (Colo. 1999)</u>	2
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104, 987 P.2d 249 (Colo. 1999)</u>	4
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 ##245(b), 245(c), 245(d), and 245(e), 1 P.3d 720 (Colo. 2000)</u>	4, 5
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 ##245(f) and 245(g), 1 P.3d 739 (Colo. 2000)</u>	5
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215, 3 P.3d 11 (Colo. 2000)</u>	6
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #219, 999 P.2d 819 (Colo. 2000)</u>	5
<u>In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(a), 4 P.3d 1094 (Colo. 2000)</u>	5, 6
<u>People v. Elliott, 186 Colo. 65 (Colo. 1974)</u>	1

Statutes

Colorado Revised Statutes Section 1-40-106(3)(b).....	2
---	---

The Petitioners, through their counsel, hereby submit this Reply Brief on the question of the Title Board's compliance with the requirements for a clear, accurate, and fair ballot title on Initiative 2005-2006 #75.

LEGAL ARGUMENT

A. The titles must state that the terms of sitting judges are limited by this measure.

The Board maintains that there was no need to state in the titles that sitting judges are affected by this initiative or that the terms of sitting judges are shortened. Answer Brief at 4-6.

The proponents intended, and their language provides, that this measure apply retrospectively. Yet, the presumption given to every constitutional amendment is that such amendment will operate prospectively. In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund, 913 P.2d 533, 539 (Colo. 1996); People v. Elliott, 186 Colo. 65, 68 (Colo. 1974). The voters have a right to employ this presumption and to be notified where it is not operative. It most certainly is not operative here, but the Board failed to inform voters of this important fact.

There is no debate about this measure's retrospective applicability, both as to current judicial personnel and as to their terms. The proponents acknowledged

it before the Board. Feb. 15 Tr. 25:23-26:1, 47:25-48:1. The Board does not dispute in its Answer Brief that the measure was written in precisely this way. The Board's job is to "correctly and fairly express the true intent and meaning" of an initiative. § 1-40-106(3)(b), C.R.S. Much as it did when it failed to clearly state that another judicial term limits measure applied to incumbent judges, In re Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29, 972 P.2d 257, 267 (Colo. 1999), the Board failed to make this significant aspect of #75 apparent to voters. And as such, it erred.

B. The Board failed to make voters aware that partial terms count as full terms under this measure.

The Board maintains that it was not required to disclose that, under #75, a provisional term is the functional equivalent of a complete term. Answer Brief at 6-8.

Interestingly, the Board's position on this question has not been static. Regarding a subsequent iteration of this measure, heard by the Board at the Title Board meeting on April 5, 2006, the Board-set title included a reference to provisional terms. Initiative 2005-06 #90¹ provides, just as #75 does, that "A provisional term of office shall be a term of office." In contrast to the title set for

¹ Attachment A, p. 2.

#75, the title fixed for #90 at least gives voters an indication that this issue is included in the proposed amendment:

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, requiring appellate judges serving as of January 1, 2007, to stand for retention at the next general election, prohibiting an appellate judge from serving more than three terms, **specifying that a provisional term constitutes a full term**, and making any appellate judge who has served ten or more years at one court level ineligible for another term at that level.²

The Board included this highlighted phrase at its own initiative. And while it did not elaborate on what a provisional term is, the Board at least provided an inkling that there is a further, significant limit beyond the stated three-term maximum. As such, the Board took a step in the right direction of informing the voters about this issue. It should do the same in connection with #75, which contains precisely the same limitation on judicial service.

C. The Board should not perpetuate a perception that this measure institutes a durational limit on judicial service.

The Board argues that its only obligation in setting titles is to describe the new limits, rather than state that the old limits are being repealed. Answer Brief at 8.

² See Attachment B, p. 1 (emphasis added).

Actually, the Board's duty is to accurately state all of the major features of the initiative. Where a repeal of an existing provision is contained in the measure, that repeal must be correctly related to voters. See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 ##245(b), 245(c), 245(d), and 245(e), 1 P.3d 720, 723 (Colo. 2000) (Board's title concerning judicial branch reform was invalid, given the imprecise statement in the titles about the measure's repeal of the constitutional requirement that Supreme Court justices be licensed to practice law for at least five years). The mere recitation of certain provisions in the measure is not sufficient to ensure a fair and accurate ballot title. A title is invalid if it gives voters an unclear or incorrect impression about the magnitude of the change implemented by a proposed initiative. See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 104, 987 P.2d 249, 259 (Colo. 1999) (title that communicated that a certain limit on signatures required for a recall petition must also explain that the extent of this change, or voters would have been confused about the reach of the amendment). Because the title set here does not indicate that the initiative repeals the existing limit on judicial service by Supreme Court justices, it fails to clearly set forth a key provision contained in this measure.

Accordingly, the ballot title set for #75 should be corrected by the Board.

D. Notwithstanding its other uses, the ballot titles' inclusion of "term limits" was intended to be, and will be, a catchphrase.

The Board recounts the use of "term limits" in other ballot titles, Blue Book descriptions, and court decisions as evidence that its use here is not problematic.

Answer Brief at 9-11.

However, it is the **contemporary** political debate that determines whether a phrase is likely to be part of a political slogan that is used by the proponents. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(a), 4 P.3d 1094, 1100 (Colo. 2000). Whereas a particular phrase may have been relatively innocuous in other political climates, the question for the Court is whether the phrase at issue is a hot button today. The Board received evidence, establishing that "term limits" was included as a phrase that triggers voter passions. It is not nearly as balanced as the phrase this Court has otherwise approved for comparable ballot titles: "limiting future terms of office for state court judges." ##245(b), 245(c), 245(d), and 245(e), supra at 724; In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 ##245(f) and 245(g), 1 P.3d 739, 745 (Colo. 2000); In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #219, 999 P.2d 819, 822 (Colo. 2000).

The Board suggests that there is no proof voters would be influenced by "term limits" in the ballot title. Answer Brief at 11. Of its own accord, though, the

Court is able to discern whether a phrase is one that would inflame voter passions. While objectors to a ballot title may not merely assert that a given phrase has political connotations, the Court has not mandated that evidence of the voters' mindset be presented before the Board either. *See #258(a)*, supra, 4 P.3d at 1100 (Court found that "as rapidly and effectively as possible" was a catchphrase that would likely be used in the substantive debate over the measure in a way that would favor proponents.) And when evidence such as a public opinion poll has been presented to the Board, this Court utilized its own judgment to determine whether a ballot title was fair and accurate. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215, 3 P.3d 11, 15-16 (Colo. 2000).


Even at this point in the electoral process, the proponents have spoken loudly and clearly about the evils associated with the current system of judicial nomination and retention and the alleged curative effects of "term limits." The proponents specifically requested that the Title Board replace neutral language in the ballot title with "term limits." As such, the Court has more than adequate evidence to find that, in this context at this time, this phrase is prejudicial and should not have been included in the titles.

CONCLUSION

The ballot title set for #75 does not completely or accurately reflect the major provisions contained in this initiative. It should be returned to the Board for correction.

Respectfully submitted this 14th day of April, 2006.

ISAACSON ROSENBAUM P.C.

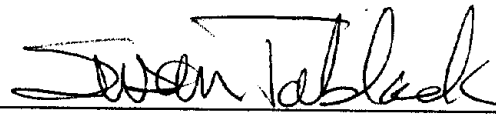
By: 
Mark G. Grueskin, #14621
Daniel C. Stiles, #35695

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

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

Kathleen A. LeCrone 4371 S. Fundy Street Centennial, Colorado 80015	John K. Andrews, Jr. 7156 S. Verbena Way Centennial, Colorado 80112
Maurice G. Knaizer, Esq. Deputy Attorney General Colorado Department of Law 1525 Sherman Street, 5th Floor Denver, Colorado 80203	



STATE OF COLORADO
Department of State
1700 Broadway
Suite 270
Denver, CO 80290



Ginette Dennis
Secretary of State

J. Wayne Munster
Acting Director, Elections Division

March 9, 2006

NOTICE OF MEETING

You are hereby notified that the Secretary of State,
Attorney General, and the Director of the Office of Legislative
Legal Services will meet for a hearing
for a proposed initiative concerning
2005 - 2006 #90*

Wednesday, April 5, 2006 at 1:30 p.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

GINETTE DENNIS
Secretary of State

AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT WWW.SOS.STATE.CO.US AND CLICK ON THE "INFORMATION CENTER".

ATTACHMENT A

* Unofficially captioned "Term Limits on Court of Appeals and Supreme Court Judges" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Main Number
TDD
Fax

(303) 894-2200
(303) 869-4867
(303) 860-2861

Web Site
E-mail - Elections

www.sos.state.co.us
sos.elections@sos.state.co.us

Final #90

PROPOSED CONSTITUTIONAL AMENDMENT FOR 2006 BALLOT
INITIATIVE NO. 90

PROPONENTS

John K. Andrews, Jr.
7156 S. Verbena Way
Centennial CO 80112
720 489 7700
andrewsjk@aol.com
Registered voter, Arapahoe County

RECEIVED

MAR 09 2006

ELECTIONS/LICENSING
SECRETARY OF STATE

C. G.
1:24 P.M.
via email
JWM

Kathleen A. LeCrone
4371 S. Fundy St.
Centennial CO 80015
Registered voter, Arapahoe County

FINAL REVISION PER LEGISLATIVE STAFF REVIEW 3/9/06

Be it Enacted by the People of the State of Colorado:

Section 1. Article VI of the constitution of the state of Colorado is amended by the addition of a new section to read:

(continued)

Initiative No. 90
Continued, Page 2

Section 27. Terms of office and term limits. EFFECTIVE JANUARY 1, 2007, TERMS OF OFFICE FOR APPEALS COURT JUDGES AND SUPREME COURT JUSTICES SHALL BE FOUR YEARS. INCUMBENTS AS OF THAT DATE SHALL STAND FOR RETENTION AT THE NEXT GENERAL ELECTION, IF ELIGIBLE FOR ANOTHER TERM AT THAT LEVEL. AT EACH APPELLATE COURT LEVEL, NO ONE SHALL SERVE MORE THAN THREE TERMS OF OFFICE. A PROVISIONAL TERM SHALL BE A TERM OF OFFICE. ANYONE WHO HAS SERVED TEN YEARS OR MORE AT ONE APPELLATE COURT LEVEL SHALL BE NOT ELIGIBLE FOR ANOTHER TERM AT THAT LEVEL.

Section 2. Repeal. Section 7 of Article VI of the constitution of the state of Colorado is repealed as follows:

Section 7. Term of office. ~~The full term of office of justices of the Supreme Court shall be ten years.~~

Ballot Title Setting Board

Proposed Initiative 2005-2006 #90¹


The title as designated and fixed by the Board is as follows:

1 An amendment to the Colorado constitution concerning term limits for appellate
2 court judges, and, in connection therewith, providing four-year terms of office for justices
3 of the supreme court and judges of the court of appeals, requiring appellate judges serving
4 as of January 1, 2007, to stand for retention at the next general election, prohibiting an
5 appellate judge from serving more than three terms, specifying that a provisional term
6 constitutes a full term, and making any appellate judge who has served ten or more years at
7 one court level ineligible for another term at that level.

The ballot title and submission clause as designated and fixed by the Board is as follows:

8 Shall there be an amendment to the Colorado constitution concerning term limits for
9 appellate court judges, and, in connection therewith, providing four-year terms of office for
10 justices of the supreme court and judges of the court of appeals, requiring appellate judges
11 serving as of January 1, 2007, to stand for retention at the next general election, prohibiting
12 an appellate judge from serving more than three terms, specifying that a provisional term
13 constitutes a full term, and making any appellate judge who has served ten or more years at
14 one court level ineligible for another term at that level?

¹ Unofficially captioned "Term Limits on Court of Appeals and Supreme Court Judges" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.



Colorado Secretary of State
ELECTIONS CENTER

[Elections Center](#) | [Business Center](#) | [Information Center](#) | [Leaching Center](#) | [Secretary of State Home](#)

Welcome Guest

english (united states)

- Elections Home
- Campaign Finance
- Candidate Information
- GoVoteColorado.com
- Help America Vote Act (HAVA)
- Initiative Information
- Lobbyists
- Voting Systems
- Contact Elections Division
- Election Resources

- 2005-2006 Final Results**
- [Proposed Initiative 2005-2006 #1](#)
- [Proposed Initiative 2005-2006 #3](#)
- [Proposed Initiative 2005-2006 #4](#)
- [Proposed Initiative 2005-2006 #5](#)
- [Proposed Initiative 2005-2006 #8](#)
- [Proposed Initiative 2005-2006 #10](#)
- [Proposed Initiative 2005-2006 #11](#)
- [Proposed Initiative 2005-2006 #12](#)
- [Proposed Initiative 2005-2006 #13](#)
- [Proposed Initiative 2005-2006 #14](#)
- [Proposed Initiative 2005-2006 #15](#)
- [Proposed Initiative 2005-2006 #16](#)
- [Proposed Initiative 2005-2006 #17](#)
- [Proposed Initiative 2005-2006 #18](#)
- [Proposed Initiative 2005-2006 #19](#)
- [Proposed Initiative 2005-2006 #20](#)
- [Proposed Initiative 2005-2006 #21](#)
- [Proposed Initiative 2005-2006 #22](#)
- [Proposed Initiative 2005-2006 #23](#)
- [Proposed Initiative 2005-2006 #24](#)
- [Proposed Initiative 2005-2006 #25](#)
- [Proposed Initiative 2005-2006 #26](#)
- [Proposed Initiative 2005-2006 #27](#)
- [Proposed Initiative 2005-2006 #28](#)

Proposed Initiative 2005-2006 #90

[Return to Initiatives homepage](#)

The title as designated and fixed by the Board is 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, requiring appellate judges serving as of January 1, 2007, to stand for retention at the next general election, prohibiting an appellate judge from serving more than three terms, specifying that a provisional term constitutes a full term, and making any appellate judge who has served ten or more years at one court level ineligible for another term at that level.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be 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, requiring appellate judges serving as of January 1, 2007, to stand for retention at the next general election, prohibiting an appellate judge from serving more than three terms, specifying that a provisional term constitutes a full term, and making any appellate judge who has served ten or more years at one court level ineligible for another term at that level?

*Hearing April 5, 2006:
Single subject approved; staff draft adopted; titles set.
Hearing adjourned 1:52 p.m.*

- Proposed Initiative 2005-2006 #29
- Proposed Initiative 2005-2006 #30
- Proposed Initiative 2005-2006 #33
- Proposed Initiative 2005-2006 #35
- Proposed Initiative 2005-2006 #36
- Proposed Initiative 2005-2006 #39
- Proposed Initiative 2005-2006 #45
- Proposed Initiative 2005-2006 #46
- Proposed Initiative 2005-2006 #50
- Proposed Initiative 2005-2006 #51
- Proposed Initiative 2005-2006 #52
- Proposed Initiative 2005-2006 #55
- Proposed Initiative 2005-2006 #58
- Proposed Initiative 2005-2006 #62
- Proposed Initiative 2005-2006 #64
- Proposed Initiative 2005-2006 #65
- Proposed Initiative 2005-2006 #66
- Proposed Initiative 2005-2006 #70
- Proposed Initiative 2005-2006 #71
- Proposed Initiative 2005-2006 #72
- Proposed Initiative 2005-2006 #73
- Proposed Initiative 2005-2006 #74
- Proposed Initiative 2005-2006 #75
- Proposed Initiative 2005-2006 #76
- Proposed Initiative 2005-2006 #76(a)
- Proposed Initiative 2005-2006 #80
- Proposed Initiative 2005-2006 #83
- Proposed Initiative 2005-2006 #84
- Proposed Initiative 2005-2006 #86
- Proposed Initiative 2005-2006 #87
- Proposed Initiative 2005-2006 #88
- Proposed Initiative 2005-2006 #90
- Proposed Initiative 2005-2006 #93

*Unofficially captioned "Term Limits on Court of Appeals and Supreme Court Judges" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Prior Years Final Results

[2003-2004 Final Results](#)

Elections center: 303.894.2200 • Elections fax: 303.869.4861 • email: sos.elections@sos.state.co.us

Colorado Department of State - Secretary of State | April 14, 2006 | [Search](#) | [Accessibility](#) | [Contact us](#) | [Colorado Department of State](#) | [Terms](#) | [Privacy](#) |

[Login](#)