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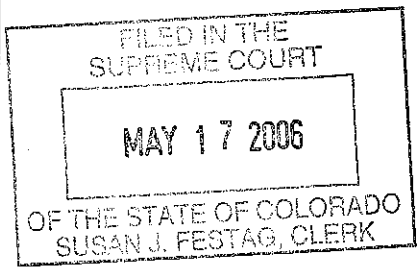
SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203	
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2005) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #90 **Petitioners**: BENNETT 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** ▲
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	Case No.: 06 SA 131
PETITIONERS' OPENING BRIEF	

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STATEMENT OF ISSUES PRESENTED

Whether "term limits" is a prohibited catch phrase, given the way it is used in contemporary political debate by the initiative proponents in a wide variety of political messages.

Whether the title is misleading by referring to a phrase encumbered with legal jargon – "provisional term" – that voters will not understand.

STATEMENT OF THE FACTS

John K. Andrews, Jr. and Kathleen A. LeCrone ("proponents") are the two registered electors who have proposed Initiative 2005-06 #90 ("#90") which limits the terms of service for justices on the Colorado Supreme Court and judges on the Court of Appeals. This measure is a variation on a previously submitted measure, Initiative 2005-06 #75 ("#75") and creates a new section 27 to Article XI of the Colorado Constitution that provides:

> Effective January 1, 2007, terms of office for Court of Appeals 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 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."

Initiative #90 responds to several concerns addressed in the title challenges regarding #75 before the Title Board and the Court, including: (1) clarification that only appellate judges are affected by this measure; (2) express provision that currently sitting judges must stand for retention; and (3) change of a person's eligibility for an additional judicial term based on his or her previous judicial service of ten years (#90) as opposed to twelve years (#75).

The title set by the Title Board for #90 reads as follows:

> An amendment to the Colorado constitution concerning term limits for appellate court judges, and, in connection therewith, reducing the terms of office for justices of the supreme court and judges of the court of appeals to four years, requiring appellate judges serving as of January 1, 2007, to stand for retention at the next general election, if eligible for another term, 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 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 April 5, 2006 and set a title for this measure. On April 12, 2006, Bennett S. Aisenberg and Federico C. Alvarez submitted a Motion for Rehearing, which was heard at the Board's April 19 meeting. The Board

granted in part and denied in part the Motion for Rehearing. A timely appeal of that decision was filed with the Court, pursuant to § 1-40-107(2), C.R.S.

SUMMARY OF ARGUMENT

The title set by the Board is deficient in two respects. First, the proponents persuaded the Board to use "term limits" in the ballot title for #75, notwithstanding the fact that this phrase has never been used in a ballot title on this topic and is one that the proponents currently use to gain political leverage. The Board did not correct this error when it set the title for #90.

Second, the title includes the phrase "provisional term" as the equivalent of a full term. However, without thumbing through the Colorado Constitution to uncover the relevant definition, voters will not know what this phrase means. The Board did not include this phrase in the title it set for #75 and, in fact, argued that it would be misleading to do so. Having reversed course without providing any clarifying language to assist voters in understanding this further limitation on judicial service, the Board erred.

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

ARGUMENT

A. The standard for review of Title Board decisions is limited.

A measure's ballot title need not address every detail of an initiative. It must, however, be:

- fair, § 1-40-106(1), C.R.S.;
- not misleading, § 1-40-106(2), C.R.S.;
- stated so that the meaning of a "yes" or "no" vote is apparent to voters, *id.*;
- set forth so that it clearly expresses the true intent and meaning of an initiative, *id.*;
- brief, *id.*;
- not in conflict with any other title set by the board, *id.*; and
- unambiguous in stating the principle of the provision sought to be added, amended, or repealed. *Id.*

Ballot titles that fail to meet these standards must be returned to and corrected by the Board. § 1-40-107(2), C.R.S.

The Court has often noted that it is not its job to set a perfect title. But it is its responsibility to ensure that voters are not misled or confused about what a ballot measure proposes to achieve after reading the measure's title on a petition or

a ballot. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment*, 852 P.2d 28, 33 (Colo. 1993). And in this regard, the Court is inclined to defer to the Board's decision unless there are concerns that voter understanding of a proposed measure is threatened by the language in the title. *Id.* at 32.

B. "Term limits" is a prohibited catch phrase.

The question of whether "term limits" constitutes a political slogan was briefed thoroughly in the matter now pending before this Court in *In the Matter of the Title and Ballot Title and Submission Clause for Initiative 2005-06 #75*, Case No. 06 SA 63. The Petitioners adopt by reference each of the concerns voiced there and the reasoning and case law cited in support thereof.

In sum, "term limits" is a catchphrase in light of contemporary political context, given the Proponents' use of it as an antidote to "black robed dictators" and controversial judicial decisions. The Proponents requested that the Title Board use it to replace a more neutral phrase, "limiting terms for appellate judges." And the Proponents, in what may have been more of an inadvertent than an uninformed slip of the tongue, even stated to the Board that it was a catchphrase, as noted in

the transcripts cited in the briefing on #75. For the reasons set forth in those briefs, the Board erred by including this phrase.[1]

C. The failure to define "provisional term" in the title will leave voters wondering how judicial terms are limited by Initiative #90.

The titles state that the measure specifies "that a provisional term constitutes a full term." However, the titles do not state what a "provisional term" is and thus leave voters in the dark as to what this phrase actually means.[2]

Under existing law, where a justice or a judge is appointed to fill a vacancy in office, that person holds office for a provisional term. A "provisional term" is defined as "two years and then until the second Tuesday in January following the next general election." Colo. Const., art. VI, sec. 20(1). In other words, someone who is appointed to an unexpired term does not sit until his or her predecessor would have left office, filling the rest of the ten-year term for Supreme Court justices or eight-year term for Court of Appeals judges, as is typically the case for vacancy appointments. Generally, a successor occupies office for a period of time that, in combination with his or her predecessor's time in office, constitutes a full term. *See People ex rel. Lamm v. Banta*, 542 P.2d 377, 279 (Colo. 1975). Under the judicial appointment system though, a fractional term of office – a provisional

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1 This issue was raised before the Title Board. Motion for Rehearing, p. 1, ¶1.

2 This issue was raised before the Title Board. Motion for Rehearing, p. 1, ¶2.

term – comes into existence and is all the time a new appointee serves. A provisional term lasts for two years plus whatever additional period exists through the first general election occurring thereafter.

While both the initiative text and the ballot title refer to "provisional term," a typical voter – and frankly, most practicing lawyers – will have no idea what this two-word phrase means. And yet it is central to the impact of this measure, as it limits judicial service to something notably less than the twelve years (three four-year terms) that the measure otherwise holds out. The ballot title fails to inform voters that a provisional term is two years plus the time until the next general election. And since there will be no Blue Book until just prior to the election, many voters will unwittingly sign petitions, bearing only the non-descriptive ballot title and equally uninformative initiative text. In subsequent months, they will discover that the measure proposes to accomplish something at odds with what they understood it to do.

In its Answer Brief in Case No. 06 SA 63 on Initiative 2005-06 #75, the Board acknowledged that the use of the undefined phrase, "provisional term," in the title carries the risk of misleading voters.

> First, mentioning "provisional term" in the title may actually mislead the public. "Provisional term" is a term of art used in Colo. Const. art. VI, § 20 to describe the time between a judge's initial appointment and the judge's first retention election. The public may very well confuse

> this term with the more generally known partial terms. Colo. Const., art. IV, § 1; art. V, § 3(2); art. VIII, § 11.

Answer Brief of the Title Board at 6-7. Thus, as the Board points out, voters will presume that the judicial appointment process parallels the one used for other offices, whereby a successor completes the original officeholder's term. The Board was correct that the question about the scope of a provisional term will likely lead to voter confusion, due to the undefined reference to "provisional term."

Additionally, the fact that the Board set a title for #75 without any mention of the legal effect of a provisional term and only loosely referred to that change in the title set for #90 should set off alarms. Was the Board correct the first time? Or is it correct now? Or did it err both times by failing to tell voters what the impact of this treatment would be? The Petitioners argued in #75 that the titles needed to clearly state how a provisional term limited the actual tenure of appellate judges. *See* Opening Brief in Case No. 06 SA 63 at 11-13. The Board disagreed, as set forth above. But the Board cannot possibly be correct as to #75 – that a reference to provisional terms standing alone would confuse voters – **and** as to #90 – that a reference to provisional terms without any further clarification aids the electorate's understanding. While the mention of provisional terms in the title set for #90 is undoubtedly an improvement over the silence regarding this issue as reflected in the title set for #75, it does not go far enough if the jargon used is

incomprehensible to voters. And as the Board pointed out in its brief on #75, this phrase not only will be lost on voters; it "may actually mislead" them.

The Board and the Proponents will likely argue that it is not the Board's duty to relate existing law in the ballot title. And while the Court has noted that existing law need not be addressed in certain instances, only rarely has a reference to current law been such a pivotal provision. This seemingly technical change reduces the ability of sitting judges and justices to serve by up to 1/6 of the maximum tenure at an appellate level (2 years out of 12). In such a case, the Court has required increased clarity.

The Court considered just such a claim in *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 17, 1996*, 920 P.2d 798 (Colo. 1996). There, the Board reviewed a title set for an initiative that would have amended existing statutes concerning automobile emissions testing in six metro area counties. Because the title did not name the counties that were specified in then-existing law, the Court held that the Board erred by failing to make the limitations on the proposed change transparent to voters.

> The title set by the Board in this case becomes misleading because it does not notify voters that the **current** enhanced emissions program applies only to the City and County of Denver, Boulder County, Douglas County, Jefferson County, and parts of Adams and Arapahoe Counties. § 42-4-304(20)(c), 17 C.R.S. (1995 Supp.). Because the titles and summary do not contain any indication that the geographic

> area to be affected is quite limited, there is a significant risk that voters statewide will misperceive the scope of the proposed Initiative.
>
> The proponents argue that it would have been misleading for the Board to state that the **current** enhanced emissions program is limited to the six-county Denver metropolitan area because under certain prescribed conditions, parts of additional counties may be added to the enhanced emissions testing area on a case-by-case basis by order of the Commission. § 42-4-304(20(c)(III), 17 C.R.S. (1995 Supp.). The "current" enhanced emissions program, however, applies only in the six-county area. The fact that the geographic area affected may be changed in the future does not prevent the Board from setting an accurate title at the time the Board acts.

Id. at 803 (citations omitted) (emphasis added).

In a similar manner, Initiative #90 proposes to use existing law to define and restrict judicial tenure. By referring only to the oblique phrase, "provisional term," however, voters will be unable to discern just how this portion of the initiative limits such tenure. Setting forth the parameters of the meaning of "provisional term" would have precisely the same effect that setting forth the then-current list of counties in the emissions program would have had: it would delineate for voters the scope of the proposed initiative.

The fact that the title refers only to language that is used in the initiative text is no defense. The Proponents admitted before the Title Board that they amended the text to incorporate the constitutional definition of provisional term. Transcript from Title Board hearing held on February 15, 2006, concerning Initiative 2005-06

#75, at 35:18-36:1 ("[A]fter the legislative review and comment we did indeed change partial to read provisional precisely so that we would be tied into an understood verbatim term already in the constitution") (included as part of record submitted in Case No. 06 SA 63). Contrary to what the Proponents suggested, "provisional term" is far from an "understood" phrase as far as the vast majority of voters are concerned. Moreover, the title cannot use phrases that are so murky as to prevent voter understanding. "The pertinent question is whether the general understanding of the effect of a 'yes' or 'no' vote will be unclear from reading the title. There may be situations, therefore, where the title and submission clause likely would create public confusion or ambiguity about the effect of an Initiative even though they merely repeat the language contained in the Initiative itself." *In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850 (Colo. 1994) (citations omitted). Where a phrase is loaded with legal meaning which is not immediately apparent to voters, its inclusion in the title creates confusion and ambiguity and thus is unwarranted without some explanatory language. *In the Matter of the Title, Ballot Title, and Submission Clause for 1999-2000 #104*, 987 P.2d 249, 260 (Colo. 1999).

In the sphere of terms for justices and judges, the Court has previously noted that the period comprising a partial term must be part of the information the Board

gives to voters. In *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257 (Colo. 1999), the Court noted that the measure then before it, like #90, counted a partial term as a full term. Judges and justices were limited to three four-year terms, like #90, 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. *Id.* 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.* If it was incumbent on initiative proponents to be clear about what a partial term was and how it affected permissible period of tenure on the bench in #29, the same principle applies as to #90. Accordingly, the Board should be ordered to correct this defect in the title set on this measure.

CONCLUSION

The Board continued one error it made in setting a title on #75 by including the phrase, "term limits," which is a prejudicial political slogan. It has been used by Proponents even at this early stage in ways that make it clear that the phrase, "term limits" will be a political fulcrum used throughout this debate.

The Board also compounded an error it made in setting the title on #75 by referring to "provisional terms" without giving voters any hint about what a provisional term is. By employing a phrase that has no inherent meaning or relevance to voters, the Board ignored one of its primary responsibilities and set an unclear title.

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

Respectfully submitted this 17th day of May, 2006.

ISAACSON ROSENBAUM P.C.

By: _____

Mark G. Grueskin
Daniel C. Stiles

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served via hand delivery or overnight mail, to the following:

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