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COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #96 ("Requirements for Initiated Constitutional Amendments") PETITIONERS: Timothy Markham; Chris Forsyth, v. RESPONDENTS: Greg Brophy and Dan Gibbs, and TITLE BOARD: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER.	▲ **COURT USE ONLY** ▲
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TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,290 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

> Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ *Matthew D. Grove*

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Title Board members Suzanne Staiert, Frederick Yarger, and Jason Gelender (hereinafter "the Board"), by and through undersigned counsel, hereby submit the following Answer Brief.

STATEMENT OF THE ISSUE

This Answer Brief addresses only the following issues raised by Markham:

1) Whether the title contains an impermissible catch phrase.

2) Whether the title incorrectly "omits any reference to the fact that the signature requirement will vary, even within the same election cycle."

The Board rests on its Opening Brief for all other issues.

SUMMARY OF THE ARGUMENT

The Board's title for #96 should be affirmed. The title does not contain an impermissible political catch phrase. The challenged phrase, "making it more difficult to amend the Colorado constitution," does not appeal to emotion but rather is merely descriptive of the measure. Further, none of the evidence proffered by Markham suggests that the

challenged phrase will be used as a slogan in political advertising. Last, Markham's characterization of the challenged phrase as "unnecessary" does not convert it into an impermissible catch phrase.

The title also strikes an appropriate balance between length, clarity and detail. Although Markham argues that the Title Board should have informed voters that "the required number of signatures will float, depending on the registered voter base at the time the petition has been validated," the title's reference to a percentage of the electorate, rather than a fixed number, does just that. And in any event, titles need not include minutiae, particularly when it will not enhance the electorate's understanding of the measure's intent.

ARGUMENT

I. The title for #96 does not contain an impermissible catch phrase.

A. Standard of Review and Preservation.

The applicable standard of review is stated in the Board's Opening Brief at pages 10 and 11. The Board agrees Markham preserved this issue for review. R. Tr. (Mar. 16, 2016), p. 18, l.23 – p. 20, l.21.

B. Markham's analogy to political catch phrases fails; the challenged phrase is descriptive only.

Markham argues that #96's title contains an impermissible catch phrase because it uses the language "making it more difficult to amend the Colorado constitution." In addition to the arguments raised in the Board's Opening Brief, this Court should reject this argument for three additional reasons.

First, Markham's reliance on *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094 (Colo. 2000) is misplaced. There, the Court made clear that catch phrases are "brief striking phrases for use in advertising or promotion" that "appeal to emotion" rather than "contributing to voter understanding." *Id.* at 1100. They do not, however, include terms that "are merely descriptive of the proposal." *Id.* Here, the phrase "making it more difficult to amend the Colorado constitution" is merely descriptive of the measure. Unlike the phrase "requiring all children . . . to be taught English as rapidly and effectively as possible," which appeals to

the emotions of persons involved the political debate over immigration, the challenged phrase here elicits no such emotion. *Id.*

Second, no evidence exists that the phrase "making it more difficult to amend the Colorado constitution" will be used in advertising or promotion activities. While Markham's exhibits A and B—documents from Building a Better Colorado—contain generalized conclusions that large segments of the electorate desire to make it more difficult to amend the state constitution, nowhere do these documents suggest that the challenge phrase will be used as a slogan in political advertising.[1] Markham therefore failed to satisfy his burden of presenting "convincing evidence" of an impermissible catch phrase. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000).

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[1] Even if it was used in advertising, that fact would not require reversal. "The purpose of the catch-phrase prohibition is to prevent prejudice and voter confusion, not to forbid the use of language that proponents of the initiative might also use in their campaigns." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45,* 234 P.3d 642, 650 (Colo. 2010) (internal citations omitted).

Third, Markham argues that the challenged phrase is "an unnecessary addition to the title" that may be stricken. Markham Op. Br., p. 7. But this Court has never held that "unnecessary" language is tantamount to a political catch phrase, nor has it demanded that the Board omit all language that some objectors deem unnecessary. To the contrary, this Court has repeatedly stated that it "gives great deference" to the Board's drafting authority, and does not demand that the Board set "the best possible title." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) (citing *In re Title, Ballot Title, & Submission Clause for 2007-2008 # 62,* 184 P.3d 52, 58 (Colo.2008)).

In this case, the Board properly exercised its drafting authority. Using the phrase "making it more difficult to amend the Colorado constitution" will contribute to voter understanding and assist the electorate in deciding whether to support the measure. Most voters, uneducated in the intricacies of the initiative and referendum process, will be able to quickly grasp from #96's title that the measure will render it harder to amend the state constitution. Omitting the

challenged phrase, by contrast, will weaken voter understanding. *See In re Title, Ballot Title and Submission Clause for 1999-2000 #25*, 974 P.2d 458, 469 (Colo. 1999) (stating that the connection between the title and measure should "be within the comprehension of voters of average intelligence.").

II. The title adequately describes the contents of the initiative.

Markham argues that the title was inaccurate because it did not mention that "the required number of signatures in any senate district will float, depending on the registered voter base at the time the petition form has been validated by the Secretary of State." Markham Op. Br., p. 7. This omission, Markham contends, was "material and significant" and thus rendered the title misleading. *Id.*

At the outset, the title for #96 arguably *does* inform signers that the number of signers is not fixed over the course of an entire election cycle. The title states that the amendment would "requir[e] that any petition for a citizen-initiated constitutional amendment be signed by at least two percent of the registered electors who reside in each state

senate district…." This language does not suggest that the two percent figure is based on a calculation performed at any particular point in time—the last census, for example, or the last general election. A better reading of the language would take into account the title's use of the present tense, and conclude that the "two percent of the registered electors who reside in each state senate district" would be calculated at the time of circulation.

And even if the title does not inform signers that the required number of signatures will "float," any omission of such information was not material and significant. "The Board need not and often cannot describe every feature of a proposed initiative in a title or ballot title and submission clause and simultaneously heed the mandate that such documents be concise." *In re Proposed Initiative on Sch. Pilot Program*, 874 P.2d 1066, 1071 (Colo. 1994). What Markham seeks is "an item-by-item paraphrase," a level of detail that this Court has held is not required in the title setting process. *Outcelt v. Schuck*, 961 P.2d 1077, 1083 (Colo. 1998). So long as the title describes "the central features of the initiative for the voters"—as this one does by explaining that a

signature distribution requirement will be implemented for ballot initiatives—it will pass muster.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for #96.

Respectfully submitted this 4th day of May, 2016.

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s/ Matthew D. Grove

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via ICCES and/or via U.S. first class mail at Denver, Colorado this _4th__ day of May, 2016 addressed as follows:

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