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COLORADO SUPREME COURT 2 E. 14th Ave. Denver, CO 80203 Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #96 ("Requirements for Initiated Constitutional Amendment") **Petitioners:** Timothy Markham; Chris Forsyth, v. **Respondents:** Greg Brophy and Dan Gibbs **and** **Title Board:** Suzanne Staiert, Frederick Yarger, and Jason Galender	▲ **COURT USE ONLY** ▲
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TITLE BOARD'S 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:

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

It contains _3,307________ 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.

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Suzanne Staiert, Frederick Yarger, and Jason Galender, as members of the Ballot Title Setting Board ("Title Board"), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

1) Whether the Title Board had jurisdiction to set the Title. (Forsyth Petition)

2) Whether the title is incomplete, misleading, and/or contains an impermissible catch phrase. (Forsyth and Markham Petitions)

3) Whether the measure violates the single subject requirement. (Forsyth Petition)

STATEMENT OF THE CASE AND FACTS

This brief addresses the propriety of ballot titles set by the Title Board pursuant to § 1-40-107(2), C.R.S. (2015).

On February 19, 2016, proponents Greg Brophy and Dan Gibbs filed Proposed Initiative 2015-2016 #96 ("#96") with the Colorado Secretary of State. Proponents are also the designated representatives for #96. *See* § 1-40-104, C.R.S. (2015). The proposed initiative creates a

distribution requirement for ballot initiative qualification (*i.e.* each petition must be signed by a least two percent of registered electors in each state senate district), and increases the number of votes needed to pass a proposed constitutional amendment from a simple majority to at least fifty-five percent of the votes cast, unless the proposed amendment only repeals, in whole or in part, any provision of the constitution.

The Title Board set a title at a hearing held on March 2, 2016. Proponents' counsel stated at that hearing that #96's single subject was to make it more difficult to amend the Colorado Constitution. Petitioners Markham and Forsyth filed motions for rehearing. The Title Board considered the motions on March 16, 2016, granted them in part and set the titles. Petitioners Forsyth and Markham filed the above-captioned appeals shortly thereafter.

SUMMARY OF THE ARGUMENT

The Title Board's decision should be affirmed. Because the proponents of #96 appeared before the General Assembly as required, the Title Board had jurisdiction to set title. As set by the Title Board,

the title for #96 accurately summarizes the substance of the initiative, and does not contain an impermissible catch phrase. Finally, #96 does not violate the single subject rule merely because it would alter two components of the process for citizen-initiative constitutional amendments.

ARGUMENT

I. The Board correctly exercised jurisdiction to set title for #96.

Petitioner Forsyth contends the Board lacked jurisdiction to set title because the "actual proponent[s]" of the measure did not meet with the legislative research and drafting offices of the General Assembly. *Forsyth Amended Motion for Rehearing* at 1. While Forsyth admits that asserts that Dan Gibbs and Greg Brophy are listed as the measure's proponents, and that both Gibbs and Brophy attended the required meetings at the General Assembly, Forsyth nonetheless maintains that "Brophy is being paid to perform his work" and, as a consequence, is an merely an agent of the proponent rather than "the actual proponent." *Id.* This Court should reject Forsyth's argument.

A. Standard of review and preservation.

Whether the Board possessed jurisdiction to act is a matter of statutory interpretation that this Court reviews de novo. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103*, 328 P.3d 127, 129 (Colo. 2014). Forsyth raised this issue in his petition for rehearing.

B. Forsyth's complaint regarding improper proponent compensation lacks legal support.

In his motion for rehearing, Forsyth contends that article V, § 1(5) of the Colorado Constitution requires the initiative's proponents to meet with the General Assembly's legislative research and drafting offices.[1] He acknowledges in his motion that Brophy met with these offices, but he nonetheless argues that Brophy's purported receipt of compensation renders him ineligible to serve as one of #96's proponents, thus depriving the Board of jurisdiction to set title. *See Amended Motion for*

[1] In pertinent part, this provision states: "No later than two weeks after submission of the original draft, unless withdrawn by the proponents, the legislative research and drafting offices of the general assembly shall render their comments to the proponents of the proposed measure at a meeting open to the public…." Colo. Const. art. V, § 1(5).

Rehearing, p. 1. This jurisdictional argument should be rejected for three reasons.

First, nothing in Colorado law prohibits an initiative's proponent or his designated representative from receiving compensation. The term "proponent" is undefined—either in the state constitution or in article 40 of Title 1, and it does not appear that this Court has ever interpreted the term. Likewise, the phrase "designated representative," while defined, does not impose a ban on compensation. § 1-40-102(3.7) , C.R.S. (2015). Nothing in Article V or the corresponding statutes suggests that the named proponents must volunteer their time and efforts. To hold otherwise would be at odds with the justifications for requiring proponents to identify themselves in the first place: (1) the informational interests of potential petition signers and voters; (2) ensuring that "only initiatives with at least a modicum of local support are presented to the voters;" and (3) deterrence of "misleading or spoiler initiatives." *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520, 538 (9th Cir. 2015). Requiring identification of the proponents satisfies each of these interests, irrespective of whether

the proponents are volunteers or are compensated for their time and efforts. Brophy is a Colorado citizen, and as a former state senator and Republican gubernatorial candidate, a well-known one at that. His identification as a proponent of the initiative both provides information to the electorate and makes it clear that #96 enjoys "at least a modicum of local support." *Id.* Accordingly, because there is neither any constitutional or statutory prohibition on receiving payment to appear as a proponent, nor any substantial policy reason for imposing such a requirement, Forsyth's jurisdictional argument should be rejected.

Second, to the extent Forsyth may argue that initiative proponents must be Colorado citizens, he candidly admitted at the rehearing that he was not challenging Brophy's Colorado citizenship. *See Rehearing Before Title Board on Proposed Initiative 2015-2016 #93,*[2] *Part IV* (Mar. 16, 2016), *available at* (last visited Apr. 4, 2016). Rather,

[2] Rehearings on initiative Nos. 93-97, which have the same proponents and cover similar topics, were held on the same day. The objections and discussion for #93 were incorporated into the Title Board's ruling on #96.

Forsyth acknowledged that Brophy has served as a Colorado state legislator. *See id.*

Third, even if Colorado law did forbid proponents from receiving compensation, the Board is not statutorily authorized to adjudicate the type of claim brought by Forsyth. The Board's statutory authority is limited to setting a "proper fair title for each proposed law or constitutional amendment," § 1-40-106(1), C.R.S., and applying the constitutional single-subject requirement. *See* § 1-40-106.5(3), C.R.S. It may not make findings of fact regarding compensation that Brophy may or may not have received. Recognizing the Board's narrow role, this Court has repeatedly cautioned that its scope of review is limited to ensuring that the title, ballot title and 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. *Matter of Title, Ballot Title for 1997-1998 #105*, 961 P.2d 1092, 1096-97 (Colo. 1998); *In re Proposed Initiative on Sch. Pilot Program*, 874 P.2d 1066, 1070 (Colo. 1994). Forsyth's argument asks this Court, and the Board, to exceed that limited role.

This Court should therefore reject Forsyth's jurisdictional argument and affirm the Board's decision to set the title for #96.

II. The Board's title for #96 is fair, clear, accurate, and complete.

Both Forsyth and Markham assert #96 contains an impermissible political catch phrase. Markham independently asserts that #96 is misleading because it "fails to describe that signature requirements per senate district will vary, even within the same election cycle, depending on the date the petition form has been approved for circulation." Forsyth maintains #96 is misleading because it does not reflect the "intent, effect, or complexity of the initiative." Petitioners' arguments should be rejected.

A. Standard of review and preservation.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title

properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water,* 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d at 648.

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91,* 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Forsyth and Markham preserved the arguments asserted here by raising them in their petitions for rehearing.

B. Standards governing titles set by the Board.

Section 1-40-106(3)(b), C.R.S. establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62,* 184 P.3d 52, 58 (Colo. 2008). The statute provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed … within two weeks after the first meeting of the title board. … Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

To avoid misleading the electorate, a title must not contain a political catch phrase. A catch phrase consists of "words that work to a proposal's favor without contributing to voter understanding. 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. 2000). The Board's "task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal." *Id.*

Catch phrases "form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment" that may create prejudice for or against the proposal. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 6-7 (Colo. 2000) (internal quotations omitted). This Court determines whether a catch phrase exists "in the context of contemporary political debate." *Id.* at 7. The party asserting the

existence of a catch phrase must offer "convincing evidence" of its existence beyond the "'bare assertion that political disagreement currently exists over' the challenged phrase." *Id.* (quoting *In re Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995)).

C. The title set by the Board does not contain a prejudicial catch phrase and is not misleading.

Petitioners cannot satisfy their burden of showing by convincing evidence that "making it more difficult to amend the Colorado constitution" is either a political catch phrase or misleading, for four reasons.

First, the phrase "making it more difficult to amend the Colorado constitution" is a highly accurate description of what the proposed initiative accomplishes. By implementing a signature distribution requirement for ballot qualification, and by increasing the percentage of votes needed to pass a proposed constitutional amendment from a majority to fifty-five percent of the votes cast, the measure makes it more difficult to successfully enact a proposed constitutional amendment via the initiative or referendum process. The Title Board's

governing statute requires the titles to "be brief." § 1-40-106(3)(b). As a consequence, this Court has never required the title to reflect every minute detail of the initiative itself. *Sch. Pilot Program*, 874 P.2d at 1069 (holding that "the Board need not describe every feature of a proposed measure"). Adding the discussion that Markham and Forsyth contend should have been included would lengthen the title substantially, bogging it down with details that would not enhance the electorate's understanding of its intent.

Second, the language "mak[ing] it more difficult to amend [the Colorado] constitution" was drawn directly from the text of the proposed initiative. *See Attachments to Petitions for Review*. By quoting the text of the proposed initiative, the Board set a title that is simultaneously clear, accurate, and free of emotion-evoking language. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #85*, 328 P.3d at 146; *see also* In re Title, Ballot Title and Submission Clause for 2013-2014 #85, 328 P.3d 136, 146 (Colo. 2014) ("Phrases that merely describe the proposed initiative are not impermissible catch phrases.").

Third, although Markham's counsel at rehearing argued that an advocacy group allegedly used similar language in its marketing materials, that purported fact does not automatically convert the language into an impermissible catch phrase. "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). The Petitioners here submitted no other evidence to meet their burden of showing prejudice or voter confusion.

Fourth, the phrase "making it more difficult to amend the Colorado constitution" is hardly the sort of emotion-provoking language that this Court has found rises to the level of an impermissible catch phrase. *See Matter of the Title, Ballot Title v. Chavez*, 4 P.3d 1094 (Colo. 2000) (concluding "as rapidly and effectively as possible," used in initiative requiring children be taught in English, was improper catch phrase); *Say v. Baker*, 137 Colo. 155, 160, 322 P.2d 317, 320 (1958)

(holding "Freedom to Work" was properly excluded from title as a catch phrase). Rather, #96's title as set by the Board constitutes a fair, clear, accurate, and complete description of what the proposed initiative seeks to accomplish.

III. #96 does not contain multiple subjects.

A. Standard of review and preservation.

"In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions." The Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). Forsyth raised this issue in his petition for rehearing.

B. The Title Board correctly determined that "making it more difficult to amend the Colorado Constitution" is a single subject.

The purpose of the single subject rule is to "prohibit the practice of putting together in one measure subjects having 'no necessary or proper connection,' for the purposes of garnering support for measures from parties who might otherwise stand in opposition." *In re Proposed*

Initiative Amend TABOR 25, 900 P.2d 121, 125 (Colo. 1995), quoting § 1-40-106.5(1)(e)(I). "In addition, the requirement seeks to prevent surreptitious measures, surprise and fraud upon the voters." *Id.,* quoting § 1-40-106.5(1)(e)(II). "The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *Hayes*¸ 333 P.3d at 79. A "second subject with a separate purpose not dependent on or connected to the first subject" will not pass muster." *Id.* Accordingly, "umbrella proposals" that attempt to unite separate subjects under a single description are unconstitutional. *Id.* (holding that initiative that would allow recall of both elected and non-elected governmental officers was two subjects)*, see also TABOR 25*, 900 P.2d at 125-26 (holding "revenue changes" was an umbrella proposal); *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995) (holding that initiative relating to "water" was an umbrella proposal).

In Title Board proceedings, Forsyth argued that #96 violates the single subject rule by bundling a supermajority requirement for ballot initiative elections with a distribution requirement for ballot initiative qualification. In *Hayes*, this Court considered a comparable ballot

initiative that was intended to alter and expand recall procedures for state officials. *Hayes* ultimately found that the initiative had two subjects: (1) the alteration of the right to recall elected officers; and (2) the creation of a new constitutional right to recall non-elected officers. The Court's analysis of the first of these subjects, however, bears directly on the analysis here.

The ballot initiative in *Hayes* proposed "a number of significant changes" to article XXI of the Colorado Constitution. 333 P.3d at 82. Those discussed in the Court's opinion included:

- Changing the threshold requirement for the number of valid signatures required to subject an officer to a recall election. *Id*. at 82.
- Eliminating of the existing requirement allowing the incumbent to provide a statement "justif[ying] … his course in office." *Id.*
- Altering the manner of filling vacancies caused by recall elections by permitting some elective offices to remain vacant until the next election. *Id.*

- Exempting recall petitions and elections from existing campaign finance laws. *Id.* at 83.
- Preempting "the existing name disclosure requirement for paid recall petition circulators" by prohibiting a "law, rule, or court" from requiring paid circulators to be named. *Id.*

The measure was ultimately held to violate the single subject rule, but it was not invalidated based on the extensive changes to Article XXI discussed above. Rather, this Court's conclusion hinged on the fact that in addition to the changes above, the measure added even more— an entirely new and distinct constitutional right to recall *non*-elected officers. As for the extensive amendments to both the signature-gathering and election process for recalls that the *Hayes* initiative would have imposed, this Court held that "changes to the manner in which recall elections are triggered and collected constitute a single subject." *Id.* at 83.

#96 is far more modest than the first component of the initiative in *Hayes*. It is true that by including both a distribution requirement for ballot qualification with a supermajority requirement for those

initiatives that qualify, #96 combines changes to both pre-election and post-election procedures into a single initiative. But *Hayes* confirms that a proposed initiative does not have multiple subjects merely because it has an effect on multiple stages of the election process. Precisely like #96, the first component of the initiative in *Hayes* altered both the procedure for collecting signatures in order to appear on the ballot as well as the manner in which the election would be decided once the recall proposal had qualified. In fact, *Hayes* piled on even more by preempting campaign finance requirements and dictating the language that would appear on the recall ballot itself. The changes that #96 would impose are not nearly as extensive, and they both directly impact the ability of the People of the State of Colorado to change the Colorado Constitution via the ballot initiative process. This Court should thus affirm the Title Board's conclusion that #96 contains only a single subject.

Respectfully submitted this 14th day of April, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **TITLE BOARD'S OPENING BRIEF** upon all parties herein electronically via ICCES or overnight delivery, at Denver, Colorado, this 14th day of April, 2016 addressed as follows:

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