

<p>SUPREME COURT OF COLORADO  2 East 14th Ave.  Denver, CO 80203</p> <hr/> <p>Original Proceeding  Pursuant to Colo. Rev. Stat. § 1-40-107(2)  Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and  Submission Clause for Proposed Initiative  2015-2016 #93 (“Threshold for Voter  Approval of Initiated Constitutional  Amendments”)</p> <p><b>Petitioner: Timothy Markham</b>  <b>v.</b>  <b>Respondents: Greg Brophy and Dan  Gibbs</b></p> <p><b>and</b></p> <p><b>Title Board: SUZANNE STAIERT;  FREDERICK YARGER; and JASON  GELENDER</b></p>	<p style="text-align: right;">DATE FILED: May 4, 2016 4:27 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;"><b>PETITIONER’S ANSWER BRIEF ON PROPOSED INITIATIVE  2015-2016 #93</b></p>	

**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 C.A.R. 28(g).

Choose one:

It contains \_\_\_\_\_ words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

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

*s/ Mark G. Grueskin* \_\_\_\_\_  
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## LEGAL ARGUMENT

### **I. This title contains a political catch phrase, consistent with the Court’s four-part test for misleading slogans in a ballot title.**

The question in this matter is whether “making it more difficult to amend the Colorado constitution” is a phrase that obscures this initiative’s legal change. The task of the Board is to describe for voters what the measure is, rather than characterize what the measure might do. In relevant part, this initiative changes the electoral system to mandate that a constitutional amendment receive 55% of the vote rather than 50.1%.

#### *A. The four-part test*

While it has not precisely identified it as such in the past, this Court has employed a straightforward, four-part test for a prohibited slogan or catch phrase in a ballot title. “Slogans are brief, striking phrases designed for use in advertising or promotion that encourage prejudice in favor of the proposal, impermissibly distracting voters from the merits of the proposal.” *In the Matter of Title, Ballot Title, & Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 649 (Colo. 2010). The elements of a slogan/catch phrase break down as follows:

1. A brief, striking phrase;
2. Designed for use in advertising or promotion;
3. That will encourage prejudice in favor of the proposal;

4. In a way that will distract voters from the measure's merits.

*B. This phrase meets the elements of the Court's test.*

This phrase satisfies all four of these criteria. First, "making it more difficult to amend the Colorado constitution" is brief and, as noted in the Petitioner's Opening Brief, has the same impact as the phrase used in *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (2000). It is qualitative language, designed to predict to voters that a desired event is more likely to occur due to the passage of an initiative. It makes a specific impression and is intended to do so.

Second, the phrase is designed for political use. That it has been rigorously and continuously tested by the sponsors' polling and focus groups, not to mention surveys of public opinion leaders over a period of years, is evidence of that fact.

Third, this phrase "will encourage prejudice in favor of the proposal." Here, the prejudging of the true substance of the measure – the 55% requirement – occurs because voters are first presented with the qualitative "make it more difficult to amend the constitution" language. Answering "yes" to whether a voter wants to "make it more difficult to amend the Colorado constitution" would frame and potentially color one's view about the actual change – from a majority of "yes" votes required to change the constitution to a super-majority of 55%.

Fourth, this phrase is a distraction from the measure’s merits. The fact that it precedes the description of the actual legal change to 55% and that the title would be fully informative for voters, had the “make it more difficult” language been omitted, establishes this distraction element. There is simply no substantive need to inject “making it more difficult to amend the Colorado constitution by” into the title’s main statement about the measure: “Shall there be an amendment to the Colorado constitution... increasing the percentage of votes needed to pass a proposed constitutional amendment from a majority to at least fifty-five percent of the votes cast.”

Therefore, the Board erred in including this wording at the request of the Proponents.

*C. The advantage of using the Court’s four-part test*

This four-part test is preferable to notions that defy definition, such as appealing to emotions of the electorate or the context of current political debate. These “eye of the beholder” standards provide little direction for initiative proponents or the Board. As a result, the Title Board employs a subjective standard when assessing a potential catch phrase in the title. The Court would well-serve all future participants in the process by announcing its embrace of the four-part test in this matter and requiring the Board to strike this language from this ballot title.

## CONCLUSION

Because the Title Board erred, the title should be returned to it for correction.

Respectfully submitted this 4th day of May, 2016.

*/s/ Mark Grueskin*

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**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #93** was sent this day, May 4, 2016, via ICCES to:

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