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Colorado Supreme Court 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board	**▲COURT USE ONLY▲**
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") **Petitioners**: Timothy Markham and Chris Forsyth; v. **Respondents**: Greg Brophy and Dan Gibbs; and **Title Board**: Suzanne Staiert, Frederick Yarger and Jason Gelender.	Supreme Court Case No.: 2016SA103
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RESPONDENTS' 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:

This brief complies with C.A.R. 28(g).

☒ It contains 1,980 words.

This brief complies with C.A.R. 28(a)(7)(A).

☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☒ 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/ Dee P. Wisor
Dee P. Wisor

s/ Martina Hinojosa
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BUTLER SNOW LLP
Attorneys for Respondents
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Respondents Greg Brophy and Dan Gibbs (the "Proponents"), by and through their undersigned counsel, hereby submit their Answer Brief:

SUMMARY OF THE ARGUMENT

The Title Board has considerable discretion in setting the title, the ballot title and the submission clause for an initiative. *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90),* 328 P.3d 155, 158 (Colo. 2014). The Court should reverse the Title Board's decision only if the title is insufficient, unfair or misleading. *See id.* at 159.

Petitioner Chris Forsyth ("Forsyth") and Petitioner Timothy Markham ("Markham" and together with Forsyth, the "Petitioners") have failed to provide any evidence that the title for Proposed Ballot Initiative #93 (the "Initiative") contains a catch phrase. Furthermore, Forsyth has failed to cite any constitutional or statutory provisions that would bar the Proponents from receiving payment for their services as proponents or as designated representatives of the Initiative.

For these reasons, the Court should uphold the decision of the Title Board.

ARGUMENT

I. The Title Expresses the True Intent and Meaning of the Initiative.

A. The Title Does Not Contain a Catch Phrase.

Title and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *See* R. Respondents' Opening Brief, p. 12 (citing *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 648 (Colo. 2010)); *see also Garcia v. Chavez*, 4 P.3d 1094 (Colo. 2000) (the Court's task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of a proposal). The phrase "making it more difficult to amend the constitution" provides an overview of the intent and meaning of the Initiative, and further ensures that a voter unfamiliar with the Initiative would be able to determine what the Initiative will accomplish simply by reading the title. Because the phrase assists voter understanding of the Initiative, the Court should uphold the decision of the Title Board.

Petitioners argue that "making it more difficult to amend the constitution" constitutes a catch phrase. *See* R. Markham's Opening Brief, p. 5; Forsyth's Opening Brief, p. 11. Markham contends that "making it more difficult to amend

the constitution" is a catch phrase because the Proponents conducted polling on the Initiative and suggested language for the title to the Title Board. *See* R. Markham's Opening Brief, p. 6, 8; *see also* R. Markham's Opening Brief, Transcript of Hearing on Initiative #93, p. 6, lines 6-21. These arguments are irrelevant to the Court's limited review of the title and the Initiative. The Court need only examine the wording of the title and the Initiative to determine whether they comport with the clear title doctrine's prohibition on catch phrases. *See, e.g.*, *Cordero*, 328 P.3d at 159. Markham's arguments pertaining to the Title Board proceedings are well beyond the scope of the Court's review of the wording of the title and the Initiative. Accordingly, Markham's arguments are insufficient to support a finding that a catch phrase exists.

Markham also seems to suggest that the Proponents proposed the phrase "making it more difficult to amend the constitution," because it will tip the vote in favor of the Initiative. *See* R. Markham's Opening Brief, p. 6. However, as the Title Board commented, "[making it] more difficult to amend [the constitution] . . . explains the purpose of the Initiative." *See* R. Markham's Opening Brief, Transcript of Hearing on Initiative #93, p. 10, lines 17-25. The phrase helps to make the title "simpler [and] more user-friendly." *See* R. Markham's Opening Brief, Transcript of Hearing on Initiative #93, p. 6, line 13. Furthermore, the Title

Board noted that some voters may view "making it more difficult to amend the constitution" in a positive light while others may view it negatively. *See* R. Markham's Opening Brief, Transcript of Hearing on Initiative #93, p. 10, lines 22-25; *see also* R. Forsyth's Unopposed Motion to Supplement Record with Transcript, Transcript of Rehearing on Initiatives Nos. 93, 94, 95, 96 and 97, p. 26, lines 10-15 ("I think there are many people who will believe that making it more difficult is a bad thing. And so I don't think it suggests an answer or suggests how you should vote on it . . ."). Because there is no evidence that the phrase tips the substantive debate in favor of the Proponents of the Initiative, the Court should uphold the Title Board's actions.

Markham further argues that the phrase "making it more difficult to amend the constitution" should be removed because the title adequately explains the purpose of the Initiative without the phrase. *See* R. Markham's Opening Brief, p. 7. Again, this argument exceeds the scope of the Court's limited review of the Title Board's actions. So long as the Title Board's language is "neither misleading nor unfairly reflects the intent of the initiative, [the Court] will not meddle with the language chosen by the [Title] Board." *See In The Matter of the Title, Ballot Title and Submission Clause, and Summary Pertaining to the Proposed Initiative Designated "Governmental Business,"* 875 P.2d 871, 875 (Colo. 1994). The Title

Board "need not set the 'best possible' title; rather, the title must fairly reflect the proposed initiative such that voters 'will not be misled into support for or against a proposition by reason of the words employed by the Title Board.'" *Kemper v. Hamilton*, 274 P.3d 576, 582 (Colo. 2012). Because the title is clear and fairly reflects the intent of the Initiative, the Court should uphold the title as set by the Title Board.

Markham attempts to establish a parallel between the phrase "making it more difficult to amend the constitution" and the phrase at issue in initiative #258(A) in *Garcia*, "as rapidly and effectively as possible." *See* R. Markham's Opening Brief, p. 7. Markham claims that the initiative #258(A) proponents "built into their ballot measure language to address the speed and thoroughness with which their policy goal would be met." There is nothing in *Garcia* to support Markham's interpretation of the intent of the initiative #258(A) proponents' phrasing. The Court's decision in *Garcia* turned not on the initiative #258(A) proponents' reason for including the contested phrase in their initiative, but rather on the long-standing proposition that the determination of the existence of a catch phrase must be viewed in the context of contemporary political debate. *See e.g., Garcia*, 134 P.3d at 1100. As Markham states, the way in which contemporary

political debate is evaluated has not been precisely defined by the Court. See R. Markham's Opening Brief, p. 4.

What can be determined from a review of the Court's catch phrase jurisprudence is that the Court rarely finds the existence of a catch phrase. *See* R. Respondents' Opening Brief, pp. 13-14 (citing the following cases in which the Court held that catch phrases did not exist: *Kemper v. Leahy*, 328 P.3d 172, 180 (Colo. 2014); *Earnest*, 234 P.3d at 642; *In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008); *Blake v. King*, 185 P.3d 142, 147 (Colo. 2008); *In re Ballot Title & Submission Clause & Summary for 2005-2006 #75*, 138 P.3d 267, 269-70 (Colo. 2006); *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #227 & #228*, 3 P.3d 1, 7 (Colo. 2000); *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #256*, 12 P.3d 246, 257 (Colo. 2000); *In re Title, Ballot Title & Submission Clause & Summary for 1997-1998 #105*, 961 P.2d 1092, 1100 (Colo. 1998); *Contra* the following cases in which the Court held that a catchphrase existed: *In re Title, Ballot Title & Submission Clause, and Summary Pertaining to the Proposed Initiative Designated "Governmental Business,"* 875 P.2d at 875; *Garcia*, 134 P.3d at 1100. Furthermore, the initiative titles in which the Court has found the existence of a catch phrase have been limited to measures involving "arguably

inflammatory" or insufficient, unfair, or misleading phrases. *See In re Proposed Initiative on Parental Notifications of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) (title failed to explain to voters that the initiative would change the legal definition of personhood); *Garcia*, 134 P.3d at 1100 (the phrase "as rapidly and effectively as possible" tipped the substantive debate to be submitted to the electorate). Unlike the phrases at issue in those cases, the phrase "making it more difficult to amend the constitution" will assist, and not limit, voter understanding of the Initiative. "Making it more difficult to amend the constitution" is neither inflammatory nor insufficient to explain the Initiative. It is not prejudicial against opponents of the Initiative, nor is it misleading to voters. Accordingly, the Court should uphold the decision of the Title Board.

II. The Title Board Did Not Err in Setting a Title for the Initiative.

Forsyth argues that the Title Board should not have set a title for the Initiative because Brophy is being paid for his services and because the Title Board failed to fulfill an "implicit function to prevent fraud." *See* R. Forsyth's Opening Brief, p. 6. Neither of these arguments have merit.

There is no legal authority that prohibits a proponent or a designated representative from receiving payment for their services. Neither the word "proponent" nor "designated representative" is defined in the constitution or in the

initiative and referendum statutes, nor are there any express requirements for, or limitations on, who may serve as a proponent or as a designated representative. *See, e.g.,* COLO.REV.STAT. §§ 1-40-102 and -106. In fact, at the Title Board rehearing, Forsyth was unable to cite a case, statute, or constitutional provision that stands for the proposition that receipt of payment makes someone ineligible to serve as a proponent of an initiative. *See* R. Forsyth's Unopposed Motion to Supplement Record with Transcript, Transcript of Rehearing on Initiative Nos. 93, 94, 95, 96 and 97, p. 7, lines 18-25 and p. 8 lines 1-3. Accordingly, there is no support for Forsyth's position that Brophy is legally unqualified to be a proponent or a designated representative solely because he is being compensated for his services.

Nevertheless, Forsyth attempts to draw support for his position by citing Article II, Section 2 of the Colorado constitution, which provides that the people have the right to govern themselves, and Article V, Section 1 of the Colorado constitution, which preserves the right of initiative to the people. *See* R. Forsyth's Opening Brief, p. 7. Neither of these constitutional provisions prohibit a designated representative from receiving payment for his or her services. *See* COLO. CONST. Article II, Section 2; COLO. CONST. Article V, Section 1. Forsyth also cites *McClellan v. Myer*, 900 P.2d 24, 34 (Colo. 1995), wherein the Court

upheld the Secretary of State's decision to reject fraudulently obtained signatures on an initiative petition, and C.R.S. §§ 1-13-720 and -721, which bar voters from receiving money or other benefits in exchange for their vote or refusal to vote. *See* R. Forsyth's Opening Brief, p. 4. Again, neither of these propositions bar initiative proponents or designated representatives from receiving payment for their services. Forsyth is asking the Court to establish entirely new precedent that has no support in the initiative and referendum statutes or in the Colorado constitution. Such a request far exceeds the Court's limited review of Title Board actions. *See, e.g., Sarchet v. Hobbs*, 3 P.3d 1, 5 (Colo. 2000) (the Court's role in reviewing titles and summaries set by the Title Board is narrow); R. Respondents' Opening Brief, p. 6 (citing *Cordero*, 328 P.3d at 158). Therefore, the Court should uphold the Title Board's decision.

CONCLUSION

For the reasons stated herein, the Proponents respectfully request that the Court uphold the title, ballot title and submission clause for Initiative #93.

Respectfully submitted this 4th day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2016, I filed a true and correct copy of the foregoing RESPONDENTS' ANSWER BRIEF using the ICCES electronic filing system and served electronic copies to the following:

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