

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Ave. Denver, Colorado 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the 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>PETITIONERS: Timothy Markham and Chris Forsyth,</p> <p>v.</p> <p>RESPONDENTS: Greg Brophy and Dan Gibbs,  and</p> <p>TITLE BOARD: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER.</p>	
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<p><b>THE TITLE BOARD’S ANSWER BRIEF</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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 838 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/ Grant T. Sullivan*

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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 issue raised by Petitioner Markham:

- 1) Whether the title contains an impermissible catch phrase.

The Board rests on its Opening Brief for all other issues raised by the petitioners.

### **SUMMARY OF THE ARGUMENT**

The Board’s title for #93 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 Petitioner Markham suggests that the challenged phrase will be used as a slogan in political advertising. Last, Petitioner Markham’s characterization of the

challenged phrase as “unnecessary” does not convert it into an impermissible catch phrase.

## **ARGUMENT**

### **I. The title for #93 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 Petitioner Markham preserved this issue for review. R. Tr. (Mar. 16, 2016), p. 18, l.23 – p. 20, l.21.

#### **B. Petitioner Markham’s analogy to political catch phrases fails; the challenged phrase is descriptive only.**

Petitioner Markham argues that #93’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**, Petitioner 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 Petitioner 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.<sup>1</sup> As such, Petitioner Markham 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).

**Third**, Petitioner 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

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<sup>1</sup> 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).



(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 #93’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.”).

## CONCLUSION

For the above-stated reasons, the Court should affirm the Board’s actions in setting the title for #93.

Respectfully submitted this 4th day of May, 2016.

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*s/ Grant T. Sullivan*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE 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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