

<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 #97 (“Petition Signature Requirements for Initiated Constitutional Amendments”)</p> <p>Petitioner: Timothy Markham v. Respondents: Greg Brophy and Dan Gibbs</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER</p>	<p style="text-align: right; color: blue;">DATE FILED: May 4, 2016 4:37 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">PETITIONER’S ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #97</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.

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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.

Respondent and Title Board dispute that the phrase, “making it more difficult to amend the Colorado constitution,” obscures #97’s legal change. The Board’s task is to describe the measure’s change in law, not characterize what effect it might have. This initiative requires petition organizers to change how they collect valid signatures (2% of registered voters in each state senate district).

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 Markham’s Opening Brief, functionally analogous to “as rapidly and effectively as possible.” *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, appearing 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 2% signature requirement – occurs because voters are first presented with the qualitative “make it more difficult to amend” language. Answering “yes” to whether a voter wants to “make it more difficult to amend the Colorado constitution” will frame and potentially color one’s view about the actual change – spreading petition circulation efforts throughout the state into all state senate districts.

Fourth, this phrase is a distraction from the measure’s merits. The facts that it precedes the description of the actual legal change concerning signature

collection in each senate district and that the title would be fully informative for voters if the “make it more difficult” language been omitted, establishes this distraction element. There is simply no need to inject “making it more difficult to amend the Colorado constitution by” into the main statement about the measure, as the title would have read: “Shall there be an amendment to the Colorado constitution... requiring 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 for the amendment to be placed on the ballot ?”

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 aid 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, given that the phrase in question satisfies this test.

II. This title inaccurately states the measure will make it more difficult to amend the Colorado constitution by requiring statewide signature gathering.

The Proponents insist that the geographic dispersion of signatures will make amending the constitution more difficult.

There was no showing before the Title Board that signatures have been centralized around specific population centers in recent initiative petition efforts. In fact, this measure opens the door for recruitment of more circulators, regardless of where they live or where they are willing to circulate petitions. Increasing that pool of circulators facilitates the right of initiative rather than restricting it. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 194-95 (1999).

This Court has approved of steps to broaden means of petition circulation as facilitating the exercise of that right. For example, the Court approved of initiative petition forms that were printed in a newspaper advertisement, so any person reading the paper could remove a petition, circulate it, and return it to petition proponents for filing with the Secretary of State. *Billings v. Buchanan*, 555 P.2d 176, 178 (Colo. 1976).

Not surprisingly, technology now makes the device used in *Billings* seem quaint. Today, proponents place their petition forms on the internet so circulators in any part of the state may print, circulate, and return them. One current petition

effort has placed their forms on line with instructions regarding the circulation process: <http://www.judicialintegrity.org/petitions.html> (last viewed May 3, 2016).

It is no wonder that the sponsors of this initiative found that the geographic dispersion requirement had never had the effect of making it more difficult to qualify an initiative for the ballot. *See* Opening Brief of Timothy Markham at 12 (sponsors’ statement that geographic dispersion “[d]oesn’t impact which measures end up on the ballot, based on other states’ experiences”).

Therefore, the Title Board erred in setting the title using the “making it more difficult” language to evaluate the requirement that petition signatures come from each state senate district.

CONCLUSION

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

Respectfully submitted this 4th day of May, 2016.

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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 #97** was sent this day, May 4, 2016, via ICCES to:

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