

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Ave. Denver, Colorado 80203</p>	<p>DATE FILED: April 14, 2016 4:53 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board</p>	
<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><b>Petitioners:</b> TIMOTHY MARKHAM and CHRIS FORSYTH,</p> <p>v.</p> <p><b>Respondents:</b> GREG BROPHY and DAN GIBBS</p> <p>and</p> <p><b>Title Board:</b> SUZANNE STAIERT, FREDERICK YARGER, and JASON GELENDER.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p><b>THE TITLE BOARD’S OPENING 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 those rules.

Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g) because it contains 3,181 words.
  
2. The brief complies with C.A.R. 28(k) because, 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 (R.\_\_, p.\_\_), not to an entire document, where the issue was raised and ruled on.

I acknowledge that the 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/ LeeAnn Morrill  
Attorney for the Title Board

TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT OF ISSUES.....	2
STATEMENT OF THE CASE AND FACTS.....	2
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	5
I.    The Board had jurisdiction to set title for #97.....	5
A. Standard of review and preservation.....	6
B. Petitioner Forsyth’s contention that a proponent may not be compensated lacks legal support.....	6
II.   Petitioner Forsyth waived any claim that #97 violates the single subject rule.....	10
A. Preservation.....	10
III.  The Board’s title for #97 is fair, clear, accurate, and complete.....	11
A. Standard of review and preservation.....	12
B. Standards governing titles set by the Board.....	13
C. The title set by the Board does not contain a misleading political catchphrase.....	15
D. The title set by the Board is not incomplete.....	17
CONCLUSION.....	19

## TABLE OF AUTHORITIES

	PAGE
<b>CASES</b>	
<i>Chula Vista Citizens for Jobs and Fair Competition v. Norris</i> , 782 F.3d 520 (9th Cir. 2015).....	8
<i>In re Ballot Title 1999-2000 #265</i> , 3 P.3d 1210 (Colo. 2000).....	11
<i>In re Proposed Ballot Initiative on Parental Rights</i> , 913 P.2d 1127 (Colo. 1996).....	11
<i>In re Proposed Initiative on Sch. Pilot Program</i> , 874 P.2d 1066 (Colo. 1994).....	10
<i>In re Proposed Initiative on Trespass-Streams with Flowing Water</i> , 910 P.2d 21 (Colo. 1996).....	12
<i>In re Tabor No. 32</i> , 908 P.2d 125 (Colo. 1995).....	15
<i>In re Title, Ballot Title, and Submission Clause for 1999-2000 #227 and #228</i> , 3 P.3d 1 (Colo. 2000).....	14-15
<i>In re Title, Ballot Title, and Submission Clause for 1999-2000 #258(A)</i> , 4 P.3d 1094 (Colo. 2000).....	14
<i>In re Title, Ballot Title, and Submission Clause for 2001-02 #21 and #22</i> , 44 P.3d 213 (Colo. 2002).....	18
<i>In re Title, Ballot Title, and Submission Clause for 2007-08 #62</i> , 184 P.3d 52 (Colo. 2008).....	13
<i>In re Title, Ballot Title, and Submission Clause for 2009-10 #24</i> , 218 P.3d 350 (Colo. 2009).....	19
<i>In re Title, Ballot Title, and Submission Clause for 2009-10 #45</i> , 234 P.3d 642 (Colo. 2010).....	12, 16, 18-19

	<b>PAGE</b>
<i>In re Title, Ballot Title, and Submission Clause for 2009-10 #91, 235 P.3d 1071 (Colo. 2010)</i> .....	12
<i>In re Title, Ballot Title, and Submission Clause for 2013-14 #85, 328 P.3d 136 (Colo. 2014)</i> .....	16
<i>In re Title, Ballot Title, and Submission Clause for 2013-14 #103, 328 P.3d 127 (Colo. 2014)</i> .....	6
<i>In re Title, Ballot Title, and Submission Clause Pertaining to Casino Gambling Initiative, 649 P.2d 303 (Colo. 1982)</i> .....	12
<i>Matter of Title, Ballot Title for 1997-98 #105, 961 P.2d 1092 (Colo. 1998)</i> .....	10
<i>Matter of the Title, Ballot Title v. Chavez, 4 P.3d 1094 (Colo. 2000)</i> .....	17
<i>Outcelt v. Schuck, 961 P.2d 1077 (Colo. 1998)</i> .....	4
<i>Say v. Baker, 322 P.2d 317 (1958)</i> .....	17

**STATUTES**

§ 1-40-102(3.7), C.R.S.....	6
§ 1-40-104, C.R.S.....	2
§ 1-40-106(1), C.R.S.....	9
§ 1-40-106(3)(b), C.R.S.....	14
§ 1-40-106.5(3), C.R.S.....	9
§ 1-40-107(2), C.R.S.....	4

**PAGE**

**OTHER AUTHORITIES**

COLO. CONST., art. V, § 1(5).....6, 7

Title Board members Suzanne Staiert, Frederick Yarger, and Jason Gelender (hereinafter “the Board”), by and through undersigned counsel, hereby submit the following Opening Brief.

### **STATEMENT OF THE ISSUES**

- 1) Whether the Board had jurisdiction to set the title for #97. (Forsyth Petition).
- 2) Whether the measure violates the single subject requirement. (Forsyth Petition).
- 3) Whether the title is incomplete, misleading, and/or contains an impermissible catch phrase. (Forsyth and Markham Petitions).

### **STATEMENT OF THE CASE AND FACTS**

Greg Brophy and Dan Gibbs (collectively, “Proponents”) seek to circulate Proposed Initiative 2015-2016 #97 (“#97”) to obtain the requisite number of signatures to place a measure on the ballot to amend Section 1 of Article V of the Colorado Constitution. Proponents are also the designated representatives for #97. *See* § 1-40-104, C.R.S. The proposed initiative makes it more difficult to amend the Colorado Constitution by requiring that any petition for a citizen-initiated

constitutional amendment must be signed at least two percent of the registered electors who reside in each state senate district.

The Board conducted an initial public hearing to address #97 on March 2, 2016. *See Attachments to Petitions for Review*. At the hearing, Proponent's counsel stated that #97's single subject was to make it more difficult to amend the Colorado Constitution. The Board agreed with this contention and proceeded to set a title for #97. *March 2, 2016 Title Board Hearing on #97, Part I*, available at <http://tinyurl.com/zar5zye>, at ~52:20 mins. (last visited Apr. 13, 2016).

Petitioners/Objectors Timothy Markham ("Petitioner Markham") and Chris Forsyth ("Petitioner Forsyth") each filed a motion for rehearing on March 9, 2016. *See Attachments to Petitions for Review*.

On March 16, 2016, the Board conducted a rehearing. *March 16, 2016 Title Board Rehearing on #97, Part IV*, available at <http://tinyurl.com/zar5zye>, at ~01:16:20 mins. (last visited Apr. 13, 2016). The Board granted in part Petitioner Forsyth's motion for rehearing, agreeing that the words "for the amendment to be placed on



the ballot” should be added to #97’s title. The Board denied the motions for rehearing in all other respects.

The Board thus set the following title for #97: “An amendment to the Colorado constitution making it more difficult to amend the Colorado constitution by 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.” *See Attachments to Petitions for Review.*

Petitioner Markham filed a timely petition for review with this Court on March 23, 2016, challenging the Board’s title as containing an impermissible political catchphrase and as inaccurate, misleading, and confusing to voters. Petitioner Forsyth filed a petition for review with this Court on March 24, 2016, raising three arguments: lack of jurisdiction by the Board, violation of the single subject requirement, and inclusion of a misleading political catch phrase.<sup>1</sup>

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<sup>1</sup> Although Petitioner Forsyth filed his petition one day after the seven-day deadline for seeking this Court’s review expired, *see* § 1-40-107(2), C.R.S.; *Outcalt v. Schuck*, 961 P.2d 1077, 1080-81 (Colo. 1998), the

## SUMMARY OF THE ARGUMENT

The Board's actions in setting title for #97 should be affirmed.

The Proponents met with the General Assembly's legislative research and drafting offices as required, thus giving the Board jurisdiction to set title. The allegation by Petitioner Forsyth that one of the individual Proponents received compensation in exchange for advancing #97 does not impact that individual's ability to serve as a Proponent. Further, Petitioner Forsyth waived any argument based on the single subject rule by failing to raise it before the Board. Finally, the Board's title for #97 accurately summarizes the substance of the initiative and does not contain an impermissible catch phrase.

## ARGUMENT

### **I. The Board had jurisdiction to set title for #97.**

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.

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Clerk's office has advised the undersigned that all filings due on March 23, 2016 are being treated as timely-filed if received on March 24, 2016, due to the winter storm that affected Denver on March 23, 2016.

*Forsyth Amended Motion for Rehearing*, p. 1. While Forsyth admits that Dan Gibbs and Greg Brophy are listed as the measure’s proponents, and that both attended the required meetings at the General Assembly, Forsyth nonetheless maintains that “Brophy is getting paid for his work” and, as a consequence, is an merely an agent of the proponent rather than “the actual proponent.” *Id.* This Court should reject Petitioner 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 2013-14 #103*, 328 P.3d 127, 129 (Colo. 2014). Petitioner Forsyth preserved this issue by raising it in his amended motion for rehearing. *Forsyth Amended Motion for Rehearing*, pp. 1-2.

**B. Petitioner Forsyth’s contention that a proponent may not be compensated lacks legal support.**

In his motion for rehearing, Petitioner Forsyth contends that Article V, Section 1(5) of the Colorado Constitution requires the

initiative’s proponents to meet with the General Assembly’s legislative research and drafting offices.<sup>2</sup> 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 #97’s proponents, depriving the Board of jurisdiction to set title. *See Amended Motion for 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. Nothing in Article V or the corresponding statutes suggests that the named proponents must volunteer their time and efforts.

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<sup>2</sup> 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).

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 #97 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, Petitioner Forsyth’s jurisdictional argument should be rejected.

*Second*, to the extent Petitioner Forsyth argues that initiative proponents must be Colorado citizens, he candidly admitted at the rehearing that he was not challenging Mr. Brophy's Colorado citizenship. *See March 16, 2016 Title Board Rehearing on #93, Part IV, available at <http://tinyurl.com/zar5zye>, at ~05:13 (last visited Apr. 14, 2016).*<sup>3</sup> Rather, Petitioner 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 Petitioner 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

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<sup>3</sup> Rehearings on Proposed Initiative Nos. 93-97, which have the same Proponents and concern similar topics, were held on the same day. The objections and discussion for #93 were incorporated into the Title Board's ruling on #97.

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 1997-98 #105*, 961 P.2d 1092, 1096-97 (Colo. 1998); *In re Proposed Initiative on Sch. Pilot Program*, 874 P.2d 1066, 1070 (Colo. 1994). Petitioner Forsyth’s argument asks this Court, and the Board, to exceed that limited role.

Accordingly, this Court should reject Petitioner Forsyth’s jurisdictional argument and affirm the Board’s exercise of jurisdiction.

## **II. Petitioner Forsyth waived any claim that #97 violates the single subject rule.**

Petitioner Forsyth’s petition for review lists the following as an advisory issue for review: whether “[t]he measure violates the single subject requirement of the Colorado Constitution by seeking to address separate subjects that are created by the measure.” *Forsyth Petition for Review*, p. 4.

### **A. Preservation.**

Petitioner Forsyth did not argue that #97 violates the single subject rule either in his motion for rehearing or at the rehearing before

the Board on March 16, 2016. *See Attachments to Petitions for Review; March 16, 2016 Title Board Rehearing on #97, Part IV, available at <http://tinyurl.com/zar5zye>, at ~01:16:20 mins. (last visited Apr. 13, 2016).* He is therefore prohibited from raising in this Court any single subject rule challenge to #97. *See In re Ballot Title 1999-2000 #265, 3 P.3d 1210, 1215-16 (Colo. 2000); In re Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1130 n.3 (Colo. 1996).*

**III. The Board's title for #97 is fair, clear, accurate, and complete.**

Both Petitioner Forsyth and Petitioner Markham assert #97 contains an impermissible political catch phrase. Petitioner Markham also asserts #97 is incomplete 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. Petitioner Forsyth also asserts #97 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 for 2009-10 #45* (“#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 #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 for 2009-10 #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 Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Petitioners preserved the arguments asserted here by raising them in their respective motions for rehearing. *See Forsyth Amended Motion for Rehearing*, p. 2; *Markham Motion for Rehearing*, pp. 1-2.

**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 for 2007-08 #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 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 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 misleading political catch phrase.**

Petitioners cannot satisfy their burden of showing by convincing evidence that “making it more difficult to amend the Colorado constitution” is a misleading political catch phrase 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 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 raises the threshold needed—making it more difficult—to successfully enact a proposed constitutional

amendment via the initiative or referendum process. “Phrases that merely describe the proposed initiative are not impermissible catch phrases.” *In re Title, Ballot Title, and Submission Clause for 2013-14 #85 (“#85”)*, 328 P.3d 136, 146 (Colo. 2014).

*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 hewing the title to the text of the proposed initiative, the Board set a title that is simultaneously clear and accurate, and free of emotion-evoking language. *See In re #85*, 328 P.3d at 146.

*Third*, although Petitioner Markham’s counsel argued at rehearing 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 #45*, 234 P.3d at 650 (internal citations

omitted). The Petitioners here submitted no other evidence to meet their burden of showing prejudice or voter confusion.

And *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*, 322 P.2d 317, 320 (1958) (holding “Freedom to Work” was properly excluded from title as a catch phrase). Rather, #97’s title as set by the Board constitutes a fair, clear, accurate, and complete description of what the proposed initiative seeks to accomplish.

**D. The title set by the Board is not incomplete.**

Both Petitioners claim that the title for #97 is not fair and accurate because it is incomplete. Petitioner Markham specifically contends that the title 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. And Petitioner Forsyth specifically contends that the title fails to reveal that the measure allows one senate district to prevent an initiative from being placed on the ballot by refusing to sign the petition, and that the measure's requirement that two percent of the registered electors who reside in each senate district must sign the petition is in addition to the current requirement for signatures equaling five percent of the votes cast for the office of Secretary of State in the last election.

These contentions should be rejected for two reasons. *First*, because the Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for 2001-02 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002). And *second*, because in setting titles, the Board may not ascertain the measure's efficacy, construction, or future application. *In re #45*, 234 P.3d at 645. Rather, title-setting is about distilling the proposed initiative down to a "reasonably ascertainable expression of the initiative's purpose." *Id.*, at

648, citing *In re Title, Ballot Title, and Submission Clause for 2009-10 #24*, 218 P.3d 350, 356 (Colo. 2009).

In this case, the Board's title plainly and briefly expresses the measure's core purpose—namely, making it more difficult to place a measure on the ballot to amend the Colorado Constitution by requiring at least two percent of the registered electors who reside in each state senate district to sign the petition in support of same.

### CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for #97.

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 foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel via overnight delivery or electronically via ICCES this 14th day of April, 2016 addressed as follows:

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