

Philip Hayes, Objector

vs.

Mike Spaulding and David Ottke, Proponents.

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### MOTION FOR REHEARING ON INITIATIVE 2015-2016 #73

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Philip Hayes, through his legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2015-2016 #73 ("Public Accountability of Officials").

On January 20, 2016, the Board set the following ballot title and submission clause:

Shall there be an amendment to the Colorado constitution concerning recall of elective officials, and, in connection therewith, specifying recall and successor election procedures for state and local elective officials; defining future eligibility for elective office for recalled officials and for recall of officials who have already defeated a recall effort; requiring opposition donations and spending to be public records; and prohibiting identification, reporting, or limiting of donations to recall campaigns and payments to recall petition circulators?

### ADVISORY GROUNDS FOR RECONSIDERATION

#### **I. #73 comprises multiple subjects in violation of the Colorado Constitution.**

The Colorado Supreme Court did not resolve all single subject issues in connection with the measure proposed as Initiative 2013-2014 #76. In fact, it expressly left such matters open for future consideration by this Board. *See In re Titles for Initiative 2013-2014 #76*, 333 P.3d 76, 84 n.2 (Colo. 2014) (Court "need not and do[es] not" decide single subject issues other than recall of non-elected officers, including alleged separate subjects of "elimination of the single subject requirement of recall petitions, and allowance of five different types of officials to be recalled by the same petition"). Thus, the question of whether this initiative comprises a single subject is far from being a settled matter.

The Court held that the collective subject of several listed procedural elements of Initiative #76, *id.* at 81-82, reflected the subject of "the manner in which recall elections are triggered and conducted" which, standing alone, "constitute[s] a single subject." *Id.* at 83. The

Board lacks jurisdiction to set a title for #36 under Colo. Const., art. V, sec. 1(5.5), given the following additional subjects.

- A. The measure allows for recall of multiple (up to four) officials on the same recall petition, thus eliminating the “single subject” element of existing recall petitions – that is, the recall of a single, named elected official. Colo. Const., art. XXI, sec. 1 (“procedure hereunder to recall an elective public officer...”; “a successor of the incumbent sought to be recalled”; “the officer named in said petition”; “the person sought to be recalled”; “a successor to the incumbent”).
- B. The measure allows for recall of multiple (up to four) officials on the same recall petition within the same recall area and thus allows for the simultaneous recall of officials holding different and entirely unrelated offices. *Id.*
- C. The measure changes qualifications for all state and county officials, no matter what the office (“Recalled officials and those who resign during a recall process shall not be *any* official for six years”). This prohibition applies to every elective office in the state, from governor to those judges who are elected and not just retained. *See, e.g.*, Englewood Charter, art. IX, part II, § 68 (authorizing election of city municipal judge for a term of four years). As such, it amends numerous provisions of existing law in a way that would not be readily apparent to voters. *See, e.g.*, Colo. Const., art. IV, §§ 1(2), 4 (qualifications of executive branch officers at the state level); art. V, § 4 (qualifications of state legislators); art. XIV, § 8 (qualifications of county officers). It also applies to officials who, after a successful recall election, are elected or appointed to fill a vacancy, even if to an office that is wholly unrelated to the one in which the recall election occurred and at a different level of government. Changes to the prerequisites to run in all such regularly held elections are unrelated to the “recall elections” that are conducted, and thus included within, the single subject identified by the Supreme Court. #76, *supra*, 333 P.3d at 83. The qualifications of a governmental official to hold office is its own subject. *In re Title for 1999-2000 #104*, 987 P.2d 249, 257 (Colo. 1999).
- D. In combination with the specific office qualifications that have been changed as set forth above, the measure also eliminates the ability of home rule cities generally and the city and county of Denver and the city and country of Broomfield specifically to be the sole arbiters of officials’ qualifications through their charters and ordinances. Colo. Const, art. XX, § 2 (qualifications of officers of city and county of Denver); art. XX, § 6 (qualifications of home rule officers); art. XX, § 11 (qualifications of officers of city and country of Broomfield). These changes violated the single subject requirement. *See In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 263-64 (Colo. 1999) (indirect repeal of Denver’s “independent control over the selection” of judges was a separate subject). These changes to this constitutional authority for home rule cities also fall outside of the subject of “recall elections.”

- E. The measure restricts and displaces the time honored power, set out in Colo. Const., art. XX, sec. 6, of home rule municipalities to control all election matters. *See Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 95*, 960 P.2d 1204, 1208-09 (Colo. 1998). For instance, the City and County of Denver provides for run-off elections for recall elections whereas #73 expressly authorizes run-off elections where recall of a city official is at issue. Compare D.R.M.C., § 15-11(d)(2) with #73, proposed art. XXI, § 2(9). In the same fashion, Denver provides for reimbursement to public officials subject to recall to repay legal costs incurred whereas #73 prohibits any government funds given or any repayment of costs in connection with a recall. Compare D.R.M.C., § 15-75 with #73, proposed art. XXI, § 2(9). Also, Denver requires all committees to report contributions and expenditures, D.R.M.C., § 15-35, whereas #73 insulates pro-recall committees from all disclosure requirements. Proposed art. XXI, § 2(9). The displacement of home rule power as to election authority is a second subject.

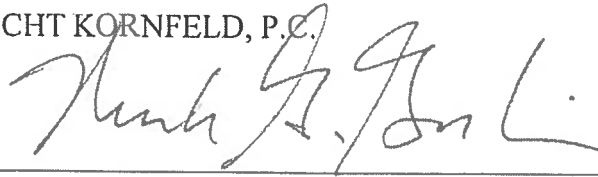
**II. Even if the Board had jurisdiction to set a title for #73, the title it set was misleading, confusing, and inaccurate.**

- A. The title fails to state that no local recall laws of any sort may be adopted.
- B. The title fails to state that no “[a]dded recall requirements” of any sort may be adopted, whether by statute, ordinance, regulation, or policy.
- C. The title fails to state the measure significantly changes the formula for establishing the required number of signatures for a sufficient recall petition, both in terms of the percentage of electors required to sign a recall petition and the fact that a petition can support recall of four (4) officials, meaning that each official would only have to be the cause for 25% of signers to affix their names to a petition.
- D. The title fails to state the measure significantly changes the formula for establishing the required number of signatures for a sufficient candidate petition.
- E. The title fails to state that as many as four elective officials within the “same recall area” can be recalled by means of one petition.
- F. The title fails to state the measure sets (and lengthens) the period allowed to gather sufficient signatures for a recall petition.
- G. The title fails to state the measure expands the current time periods for elected officers to be immune from recall (four years) or that successors to offices because of recall cannot be recalled for two years.
- H. The title fails to state the measure restricts the ability of election officials to ensure the legality of petition signatures and circulator actions.

- I. The title fails to state that an election official may only strike a signer's completed entry by disproving its validity in court and by clear and convincing evidence.
- J. The title fails to specify the changes made to qualifications of all elected officials (for four years, they cannot have been recalled from that elected office or resigned from office during the recall process).
- K. The title is confusing and inaccurate in stating that #73 "defin[es] future eligibility for elective office... for recall of officials who have already defeated a recall effort." The measure does not address the eligibility of officials who are not recalled by voters for any other office.
- L. The title states what is already in existing campaign finance law, namely that opponents' "donations and spending" must "be public records." That #73 mimics existing law is not a change to current law and thus cannot be a central feature of the measure to be reflected in the title.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of January, 2016.

RECHT KORNFELD, P.C.



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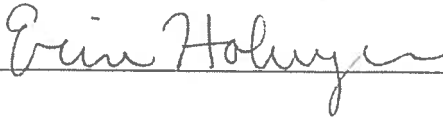
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**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate cop of the **MOTION FOR REHEARING ON INITIATIVE 2015-2016 #73** was sent this day, January 27, 2016, via first class U.S. mail, postage pre-paid to the proponents at:

Mike Spalding  
18 Buckhorn Drive  
Littleton, CO 80127

David Ottke  
3308 S. Hannibal Street  
Aurora, CO 80013

  
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