SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 19, 2016 4:11 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #132 ("Colorado Redistricting Commission") **Petitioner: Donna R. Johnson** **v.** **Respondents: Kathleen Curry and Frank McNulty** **and** **Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER**	▲ COURT USE ONLY ▲
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PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2015-2016 #132 ("COLORADO REDISTRICTING COMMISSION")

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).

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X It contains 5,803 words.

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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.

☐For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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
Mark G. Grueskin
Attorney for Petitioner

TABLE OF CONTENTS

ISSUE PRESENTED 1

STATEMENT OF THE CASE 1

A. Statement of Facts. 1

B. Nature of the Case, Course of Proceedings, and Disposition Below 2

SUMMARY 4

LEGAL ARGUMENT 6

A. The Title Board lacked jurisdiction to set a ballot title because Initiative #132 violates the single subject requirement. 6

1. Standard of review; preservation of issue below. 6

2. #132 inappropriately combines congressional redistricting with state legislative reapportionment. 7

a. Requiring voters to accept modifications to the existing legislative reapportionment commission as well as a major reconfiguration to the manner of congressional redistricting 7

b. Distinct underlying legal authority for reapportionment and redistricting 12

c. Creating new standards and expanding commission jurisdiction 16

3. #132's second subject: limits on political involvement of "lobbyists" 19

4. #132 also fundamentally changes the role and mission of the Supreme Court Nominating Commission. 21

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Arizona State Legislative v. Arizona Independent Redistricting Commission, 135 S.Ct. 2652, 2671 (U.S. 2015) 9
Armstrong v. Mitten, 37 P.2d 757, 759-60 (Colo. 1934) 23
Beauprez v. Avalos, 42 P.3d 642, 647 (Colo. 2002) 10
Evans v. Romer, 854 P.2d 1270 (Colo.1993), *cert. denied*, 510 U.S. 959, 114 S.Ct. 419, 127 L.Ed.2d 365 (1993) 20
Hall v. Moreno, 270 P.3d 961, 964 (Colo. 2012) 9, 11, 14, 17
In re Colorado General Assembly, 332 P.3d 108, 113 (Colo. 2011) 8, 17
In re Interrogatories Propounded by the Senate Concerning House Bill 1078, 536 P.2d 308 (Colo. 1975) 15
In re Proposed Initiative on "Public Rights in Water II", 898 P.2d 1076, 1078-79 (Colo. 1995) 16
In re Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33, 76 P.3d 460, 462 (Colo. 2003) 19, 20
In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997–1998 #64, 960 P.2d 1192, 1199–1200 (Colo.1998) 24
In re Title, Ballot Title, and Submission Clause and Summary for Proposed Initiative for 1997–1998 # 64, 960 P.2d 1192, 1200 (Colo. 1998) 25
In re Title, Ballot Title, and Submission Clause and Summary with Regard to Section 2 to Article VII ("Petition Procedures"), 900 P.2d 104, 109 (Colo. 1995) 15
In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 No. 43, 46 P.3d 438, 442-443 (Colo. 2002) 25
In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2009-2010 # 24, 218 P.3d 350, 353 (Colo. 2009) 12
In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2009-2010 No. 24, 218 P.3d 350, 353 (Colo. 2009) 25
In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #76, 333 P.3d 76, 79 (Colo. 2014) 12

In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2001-2002 #43, 46 P.3d 438, 447 (Colo. 2002)..11
In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2007-2008 #27, 172 P.3d 871 (Colo. 2007).. 18, 19
In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17), 920 .2d 798, 802 (Colo. 1996).......................7
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175, 987 P.2d 243, 245 (Colo. 1999) 6
Lucas v. Forty-Fourth General Assembly of State of Colo., 377 U.S. 713, 723 (1964)...13
People ex rel. Salazar v. Davidson, 79 P.3d 1221, 1232 (Colo. 2003)..............9, 10

Statutes

C.R.S. § 1–40–106.5(1)(e)(II)...25
C.R.S. § 24-6-301(3.5)(a)(I), (II.5), (IV)..20
C.R.S. § 24-6-301(3.7)...19

Other Authorities

Formal Op. Att'y. Gen. No. 04-03 (April 12, 2004) 22
Legislative Council of the Colo. Gen. Assembly, An Analysis of 1974 Ballot Proposals, Research Pub. No. 206 (1974) 8

Constitutional Provisions

Colo. Const., Art. V, § 1(1)...23
Colo. Const., Art. V, § 1(5.5).. passim
Colo. Const., Art. V., § 44 14
Colo. Const., Art. V., §§ 45–48 .... 13, 14, 15
Colo. Const., Art. VI, § 20(1) 23
Colo. Const., Art. VI, § 24(4) 22, 23
U.S. Const., Art., 1, § 4..13
U.S. Const., Art., 1, § 4, cl. 1 8

ISSUE PRESENTED

Does Initiative 2015-2016 #132 violate Colo. Const., art. V, sec. 1(5.5), as it addresses the distinct subjects of modifications to the state legislative reapportionment, a major overhauling of the congressional redistricting process, a limitation on political involvement due to a person's activity in petitioning government, and significant changes to the purpose and duties of the Supreme Court Nominating Commission?

STATEMENT OF THE CASE

A. Statement of Facts.

Initiative #132 is one of several redistricting concepts that have been proposed by these designated representatives this election cycle. Initiative #55 was proposed and withdrawn, and Initiatives #107, #128, #132, and #133 received titles which were appealed to this Court. Proponents then withdrew Initiatives #107 and #128. This measure vastly changes the procedures and substantive rights relating to the decennial reapportionment of the State for purposes of drawing districting lines for 35 state senate districts and 65 state house of representative districts as well as removing from the General Assembly the right to redistrict the state for Colorado's seats in the U.S. House of Representatives.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

Kathleen Curry and Frank McNulty (hereafter "Proponents") proposed Initiative 2015-2016 #132 ("#132"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member. Initiative #132 proposes to:

- group congressional redistricting and the setting of legislative district lines to the same commission;
- transfer the authority to set congressional districts from the General Assembly to an independent commission;
- constitutionalize and add to the criteria to be considered in setting congressional district boundaries;
- revamp and add to the existing criteria for setting the boundaries of state legislative districts;
- change the process for arriving at and appealing state legislative districting decisions;
- impose limits on who may serve on the commission, excluding any person who is a registered lobbyist, among others; and

- assign a new and unrelated task to the Supreme Court Nominating Commission, giving it authority to determine finalists for positions as commissioners to fill one-third of the commission

Like its companion proposals, Initiative #132 authorizes majority and minority legislative leaders to each appoint two members of the commission. In addition, the state's highest ranking elected officials of the two largest political parties would each appoint two more members (for a total of four) and could do so only from a list of ten (10) voters, produced by the Supreme Court Nominating Commission. Prior to the making of appointments, the Nominating Commission would determine which applicants from across the state meet the political party affiliation requirements for these four positions (members of minor parties or unaffiliated with any political party) and then evaluate those voters on any other factors it deems appropriate to winnow the group to the only ten people who maybe be considered for these commission appointments.

A Title Board hearing was held on April 20, 2016 to establish the Proposed Initiative's single subject and set a title. On April 27, 2016, Petitioner filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title. The rehearing was held on April 28, 2016, at which time the Title Board denied the Motion for Rehearing. The Board set the following title:

Shall there be an amendment to the Colorado constitution concerning redistricting in Colorado, and, in connection therewith, replacing the Colorado reapportionment commission with a Colorado redistricting commission; directing that the commission redistrict congressional districts and state legislative districts; requiring the appointment of 12 commissioners, of whom at least 4 must be either a member of a minor political party or unaffiliated with any political party; prohibiting commissioners from being lobbyists or members of or candidates for either Congress or the state legislature; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; adopting existing criteria for congressional districts and adding competitiveness to the criteria for state legislative and congressional districts; requiring that only the nonpartisan staff of the commission may submit plans to the commission; and requiring that the commission's work be done in public meetings?

SUMMARY

The Proponents violated the single subject requirement in drafting their initiative. The Title Board embraced that error by setting a ballot title.

Initiative #132 contains at least four subjects: (1) transferring from the General Assembly the power to set congressional districts to the revamped commission, applying new standards and procedures to this redistricting process; (2) changing the existing Reapportionment Commission process for setting state legislative districts; (3) curtailing certain political involvement of all volunteer lobbyists, as well as all professional lobbyists, by prohibiting them from serving on the commission; and (4) changing the basic mission and apolitical role of the Supreme Court Nominating Commission to add the role of determining the finalists for the four swing votes on the Reapportionment Commission.

Pairing process changes to the legislative reapportionment with a major structural shift in responsibility for congressional redistricting (from the General Assembly and the courts to the combined redistricting commission), puts voters in the position of having to vote in favor of both competing policy priorities or vote to support neither. Voters may endorse adjusting the current independent Reapportionment Commission process but disagree that the commission is appropriate, well-structured, or even needed for congressional redistricting. Given that the Proponents have created a false premise – that both processes produce gerrymandered districts – only the Proponents benefit from packaging these two proposals into an all-or-nothing "yes" or "no" vote. That packaging is exactly what the single subject requirement was enacted to avoid.

This Court previously has held that limiting an entire profession's political involvement, as part of a measure that changes election-related procedures, is a second subject. The prohibition on lobbyists serving on a redistricting commission is no different than the prohibition on lawyers serving on the Title Board; both are a second subject that deprives the Board of jurisdiction to set a title.

The Court also previously held that fundamentally changing a commission that is, by its nature, unrelated to the subject of an initiative comprises a second subject. Reapportionment is a legislative function; judicial nominations are a judicial function. The Nominating Commission was adopted in order to make the

process apolitical; the setting of federal and state political districts is not. Voters must choose whether to support significant changes to the reapportionment commission process or a transformation in the Nominating Commission, a divergence that goes to the heart of the evils the single subject requirement was intended to prevent: voters being surprised by an element of a measure or being forced to choose among competing provisions, both of which they would not ordinarily favor.

Thus, the Board erred, and this initiative should be returned to Proponents.

LEGAL ARGUMENT

A. The Title Board lacked jurisdiction to set a ballot title because Initiative #132 violates the single subject requirement.

1. Standard of review; preservation of issue below.

The Colorado Constitution requires that any initiative must comprise a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board's analysis and this Court's review is a limited one, addressing the meaning of an initiative to identify its subject or subjects. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172*, *No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). To find that a measure addresses only one subject, the Court must determine that an

initiative's topics are "necessarily and properly" related to the general single subject assigned to the measure by the Title Board, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 .2d 798, 802 (Colo. 1996).

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See* Donna R. Johnson's Motion for Rehearing on Initiative 2015-2016 #133 at 1-7 (¶¶B.1, 2, 3, and 4).

2. #132 inappropriately combines congressional redistricting with state legislative reapportionment.

There are multiple indicia of multiple subjects, stemming from the combination of legislative reapportionment and congressional redistricting.

a. Requiring voters to accept modifications to the existing legislative reapportionment commission as well as a major reconfiguration to the manner of congressional redistricting

This measure requires voters to choose whether the dual aspects of Initiative #132 – revamping the current commission process dealing with state legislative reapportionment and also eliminating the current legislative/judicial process dealing with congressional redistricting – are both objectives they support. While it is certainly conceivable that a voter would favor retention of the Reapportionment Commission under its existing format but also favor a new

commission for congressional redistricting, this section will consider his or her counterpart: the voter who: (1) is open to Proponents' changes to the legislative reapportionment; but (2) values the existing congressional district line-drawing debate through the General Assembly, and if it fails, the judicial fact-finding and application of law to evaluate competing maps.

Voters adopted the constitutional amendment that created the Reapportionment Commission to create a politically fair process for drawing state legislative district maps. "By its nature, reapportionment is an inherently political endeavor. The purpose of the reapportionment process, as approved in 1974, is to promote political fairness and to reduce the gerrymandering of legislative districts." *In re Colorado General Assembly*, 332 P.3d 108, 113 (Colo. 2011) (Bender, J. dissenting) (citing Legislative Council of the Colo. Gen. Assembly, An Analysis of 1974 Ballot Proposals, Research Pub. No. 206 (1974) at 29–30). There are voters who believe that the process for configuring legislative districts has not worked as well as it could and who would favor some change to the state legislative reapportionment system.

But there are also voters – the Objector included – who find that the political tension in considering congressional districts to be the best approach to be undertaken "by the legislature." U.S. Const., Art., 1, § 4, cl. 1 ("The times, places and manner of holding elections for senators and representatives shall be

prescribed in each state, by the legislature thereof"); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1232 (Colo. 2003). In Colorado, the congressional redistricting power, as exercised by the "General Assembly," has "encompasse[d] the entire legislative process, as well as voter initiatives and redistricting by court order." *Id.* at 1236.[1] This process has not resulted in gerrymandering, a point that requires no judicial speculation but instead is based on this Court's clear precedent.

In 2011, this Court noted that the General Assembly had been unable to agree upon a congressional redistricting plan. *Hall v. Moreno*, 270 P.3d 961, 964 (Colo. 2012). Thereafter, the district court capably filled that role.

> The (trial) court demonstrated a conscious effort to be as inclusive as possible. Prior to the trial, the court permitted any party who so desired to intervene in the case and also permitted any party to file an amicus brief. During the trial, the court permitted all proposed testimony and the vast majority of objections were overruled. Virtually no exhibits were excluded. In addition, the court permitted the parties to submit final revised maps after closing arguments, as well as amended proposed findings of fact based on other parties' final submitted maps.

Id. at 965. The lower court considered all proposed maps using a "flexible and open approach" that "was admirable," deciding on a map that "reasonably balances the many non-constitutional factors that a court can consider." *Id.* at 966, 974.

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[1] In other states, the legislative power has included the use of an independent redistricting commission. *Davidson, supra*, 79 P.3d at 1232; *see Arizona State Legislative v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652, 2671 (U.S. 2015) ("the Elections Clause permits the people of Arizona to provide for redistricting by independent commission").

This fairness in redistricting was no anomaly. In 2001, after the legislature also fell short of consensus on a congressional district map, the district court employed an approach that was devoid of partisan pressure.

> We determine that the process utilized by the district court in adopting a redistricting plan was **thorough, inclusive, and non-partisan**. The district court engaged in an even-handed approach to the complex and detailed process of congressional redistricting. It encouraged all parties and intervenors to submit proposed plans in order for it to adopt a plan that would reflect, as much as possible, the input of the general assembly and the governor, while satisfying the relevant constitutional and non-constitutional criteria.

Beauprez v. Avalos, 42 P.3d 642, 647 (Colo. 2002) (emphasis added). It resulted in thoroughly justified district line-drawing. "The district court was careful to explain its reasoning regarding the non-constitutional factors for each of the seven districts in the plan it adopted." *Id.* And as this Court subsequently found in considering the first election held after the *Avalos* decision, "The plan did indeed end up being non-partisan." *Davidson, supra*, 79 P.3d at 1227.

In Initiative #132, the Proponents create a false premise to mask the dual subjects of legislative reapportionment and congressional redistricting.

> The people of the state of Colorado find and declare that fair representation requires that the practice of **political gerrymandering, whereby congressional**, and senatorial and representative **districts** of the general assembly **are purposefully drawn to favor one political party or incumbent politician over another or to accomplish political goals, must end**.

Proposed Article V, § 43.5 (emphasis added). But how can gerrymandering be possible under a congressional district map "that will maximize 'fair and effective representation for all citizens,'" one that is "supported by the record, which was compiled through a thorough, open, and fair process"? *Hall, supra*, 270 P.3d at 982.

This is not an argument about the merits of the measure. It is, however, an acknowledgement that Proponents seek to gain approval of a change to congressional redistricting by calling past results of that process something they were not. If the 2011 congressional district map was a product of gerrymandering, this Court would not have approved the district court's consideration of "competitiveness as an important factor in providing for the election of accountable and responsive representatives" or held it to be "consistent with the ultimate goal of maximizing fair and effective representation." *Id*. at 973.

Initiative #132 holds out a carrot to voters who have an issue with one process – reapportionment or redistricting – but not the other. A surreptitious measure is one that seeks "to secure the support of various factions which may have different or even conflicting interests." *In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2001-2002 #43*, 46 P.3d 438, 447 (Colo. 2002). Measures such as this one violate the single subject requirement precisely because their multiple objectives have the effect of "pushing voters into an all-or-

nothing decision." *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2009-2010 # 24*, 218 P.3d 350, 353 (Colo. 2009). It is this voting conundrum that the single subject requirement was intended to protect against.

Single subject concerns have been triggered where an existing election-related process is revised in its current application and then also extended to apply where it did not apply before. This Court so held in connection with changes to the recall election process. "In the case before us, some voters might favor altering the requirements or procedures for recalling elected officers but not favor establishing a new constitutional right to recall non-elected officers, or vice-versa." *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). Here, a commission that now sets district lines for state legislative seats would continue to do so, albeit under a changed regime, and its authority would be extended to set the lines of congressional districts for the first time in Colorado's history.

Because voters should not be forced into a "yes" vote because they approve of one discrete change but oppose another, #132 violates the single subject mandate.

b. Distinct underlying legal authority for reapportionment and redistricting

The sources of authority for drawing legislative districts and congressional districts are entirely unrelated. The basis for congressional redistricting is found in

the United States Constitution where responsibility for regulating elections is assigned to each state. U.S. Const., Art., 1, § 4. Congressional redistricting is mentioned in the Colorado constitution in an amendment to Article V, § 44 of the Colorado Constitution. This amendment, adopted by voters at the 1974 general election to revise language that had been in the Colorado Constitution since 1877, only states that the General Assembly must set these district lines. No criteria are set; no appointed body is established; no month-by-month procedure is mandated.

In contrast, the provisions for legislative reapportionment spring solely from the Colorado Constitution, where the current Reapportionment Commission is authorized. *See* Colo. Const., Art. V, §§ 45-48. For much of Colorado's first century, legislative reapportionment was a sometimes occurrence, taking place in 1881, 1891, 1901, 1909, 1913, 1932, 1953, and 1962. *See Lucas v. Forty-Fourth General Assembly of State of Colo.,* 377 U.S. 713, 723 (1964). Later amendments to the reapportionment provisions in the Constitution were by voters who also proposed and approved of the Reapportionment Commission for the setting of state legislative districts at the 1974 general election. *See* Colo. Const., art. V, § 48.

The reapportionment provisions of the Constitution are replete with direction about the criteria to be considered and the process to be used. In contrast, the congressional redistricting provisions are vague in the extreme. Other than the fact that both use the word "districts," they have little or nothing to do with each other.

> In stark contrast to its elaborate provision for state senate and representative districts, *see* Colo. Const. art. V., §§ 46–48, the state constitution provides almost no guidance for or limitation on the general assembly's division of the state into congressional districts, *see* Colo. Const. art. V., § 44, other than requiring it do so.

Hall, supra, 270 P.3d at 982 (Coates, J., concurring).

Further, the intertwining of the reapportionment and redistricting processes was attempted in *Hall* but rejected because it was legally flawed. As to one of the intervenor maps, proposed by the Colorado Latino Forum and Colorado Hispanic Bar Association ("CLF/CHBA"), this Court observed:

> [T]he [district] court found the CLF/CHBA's "nesting" approach problematic. Under the nesting approach, the maps were drawn by combining five state senate districts developed by the 2011 Colorado Reapportionment Commission. The court rejected this approach because the **state reapportionment criteria and policies are different from the redistricting criteria** and because the Commission's map had not been approved by this court at the time that the CLF/CHBA maps were submitted.

Id. at 968 (emphasis added). And while the CLF/CHBA map was not at issue before this Court, the district court's conclusion is relevant here: the redistricting and reapportionment considerations are inconsistent enough with one another as to make aggregating the two processes a jumble of constitutional subjects and processes.

That these processes are addressed separately in the Constitution is an additional factor to be considered in this analysis. A proposal dealing with "varied procedural and substantive provisions" affecting citizen-initiated rights

(referendum, recall, and initiatives) was reviewed by the Supreme Court. The different sources of seemingly related rights was one concern to the Court in its holding that the proposed measure violated the single subject requirement. *In re Title, Ballot Title, and Submission Clause and Summary with Regard to Section 2 to Article VII ("Petition Procedures"),* 900 P.2d 104, 109 (Colo. 1995) ("Colorado Constitution treats these different citizen initiated measures in separate sections").

In determining severability of state law, the Colorado Supreme Court agreed that legislative reapportionment in an initiative is its own subject. In *In re Interrogatories Propounded by the Senate Concerning House Bill 1078*, 536 P.2d 308 (Colo. 1975), the Court evaluated two initiatives dealing with changes to the process for setting legislative district boundaries.

> At the general election in Colorado, held on November 5, 1974, among other propositions on the ballot were No. 6 and No. 9, being proposed constitutional amendments relating to reapportionment. Amendment No. 6 was addressed to several other subjects, while Amendment No. 9 was solely concerned with reapportionment.

Id. at 311. As the Court observed, "We wish to make clear that Amendment No. 6 related to **many subjects other than Colo. Const., Art. V, §§ 46 and 48**. Each of the subjects appears to be severable." *Id*. at 319 (emphasis added). Thus, reapportionment was and is a unique subject.

As evidence that redistricting and reapportionment are separate subjects, these Proponents also submitted Initiatives 2015-2016 #128 and 133, which deal

with congressional redistricting and legislative reapportionment separately. Those measures contain distinct standards and commission authority to draw district lines. Necessarily, then, the subjects of resetting the process for drawing lines of legislative districts and the procedure for creating boundaries for congressional districts are "distinct and separate purposes which are not dependent upon or connected with each other." *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076, 1078-79 (Colo. 1995).

Thus, the two processes are unrelated in terms of their root legal authority and their legal history in Colorado. They cannot be part and parcel of the same subject under Article V, § 1(5.5).

c. Creating new standards and expanding commission jurisdiction

Initiative #132 changes both legislative reapportionment and congressional redistricting in significant ways. As to congressional redistricting, this proposal:

- transfers redistricting from the General Assembly to a commission, Proposed Art. V, § 44;
- requires the commission to use specific standards, many of which are now found in statute, to guide the courts' consideration of redistricting, Proposed Art. V, § 46(1)(a), (b);

- requires the consideration of additional standards, not found in statute, including maximizing competition[2] and precluding plans drawn to favor a political party, incumbent legislator, member of congress, or "other person," Proposed Art. V, §§ 44(1), 46(1)(c); and
- mandates that legislative staff draw a congressional redistricting map for the commission and submit such map to the Supreme Court if the staff cannot present a map to the commission, Proposed Art. V, §§ 48(2)(c)(II).

As to state legislative districting, this proposal:

- maintains the task of district line-drawing by the renamed reapportionment commission, Proposed Art. V, § 44(1);
- changes the criteria for drawing districts by adding standards, including maximizing competition[3] and precluding plans drawn to favor a political

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[2] Although competitive districts were endorsed in *Hall v. Moreno*, it was not a mandated standard under the statute concerning judicial consideration of congressional redistricting. Given that the statute is "open-ended," the district court found competitive districts made it more likely that a member of Congress would attend to a voter bloc's "needs and preferences," maximizing the potential for "fair and effective representation." 270 P.3d at 972-73. However, competition is not specified or required by current law.

[3] Currently, competitiveness is not explicitly part of legislative reapportionment. "Other nonconstitutional considerations, such as the competitiveness of a district, are not per se illegal or improper; however, such factors may be considered only after all constitutional criteria have been met." *In re Colorado General Assembly, supra*, 332 P.3d at 111.

party, incumbent legislator, member of congress, or "other person," Proposed Art. V, § 47;

- requires a 2/3 vote among commissioners to approve a reapportionment plan rather than a majority as in current law, Proposed Art. V, § 48(2)(c)(II);
- changes the appellate process where the commission agrees by super-majority to a map, Proposed Art. V, § 48(2)(b)(I);
- authorizes staff to draw maps to be submitted to the Supreme Court if staff cannot present a map to the commission, Proposed Article V, § 48 (2)(c)(II);
- requires the commission, where it cannot achieve a 2/3 consensus on its first, second, or third maps, to submit the second map to the Supreme Court for approval, Proposed Article V, § 48 (1)(b)(IV); and
- allows the reconfigured commission to establish rules so it may remove a commissioner for cause and mandates removal of any commissioner who has an ex parte contact. Proposed Art. V, §§ 44 (6)(b), (7)(e).

The creation of a new government agency and the creation of new legal standards (maximizing competition in drawing both legislative and congressional districts, for instance) is akin to this Court's holding in *In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2007-2008 #27*, 172 P.3d 871 (Colo. 2007). There, a public trust standard was created to be applied to water matters by the same proposed initiative that created a new environmental

department by reorganizing existing programs, boards, and commissions. *Id*. at 873. An initiative that changes a public entity's structure and standards, if "complex and subtly worded," will violate the single subject requirement where there is "the danger of voter surprise and fraud" because one such change may eclipse the other in terms of voter awareness. *Id.* at 875.

3. #132's second subject: limits on political involvement of "lobbyists"

Initiative #132 prohibits any person who is a "registered lobbyist" from serving on the Commission. This prohibition would apply to any person who is either a professional lobbyist or a volunteer lobbyist. *See* C.R.S. § 24-6-301(3.7) ("'Lobbyist' means either a professional or volunteer lobbyist.")

This single subject issue is controlled by a clear holding on another ballot initiative that sought to restrict political involvement based on a person's profession. In *In re Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 460, 462 (Colo. 2003), the Supreme Court considered an initiative that changed the process for initiative qualification and also prohibited the Attorney General and any other lawyer from participating in the ballot title setting process as "ballot title setters." The Court's holding is instructive.

> More generally and perhaps more importantly, however, the provision also limits the substantive rights of all attorneys. By foreclosing any possibility that an attorney could serve on the title board, **these initiatives restrict the political rights of all attorneys.** Under our prior decisions, **this exclusion from the political process is a substantive matter, not a procedural change** to the petitions

> process. *See Evans v. Romer*, 854 P.2d 1270 (Colo.1993), *cert. denied*, 510 U.S. 959, 114 S.Ct. 419, 127 L.Ed.2d 365 (1993)….
>
> In the case at hand, the four initiatives propose that a specifically identifiable group, lawyers, be excluded from the ballot title board. Although this provision is much more limited than the exclusion in *Evans v. Romer*, **it does affect the substantive rights of attorneys to participate in the political process**. It has no necessary or proper connection to the purpose of the proposed measures, i.e., to liberalize the procedure for initiative and referendum petitions…. Because **these proposed measures would affect existing substantive rights in addition to the primary subject concerning the procedural mechanisms** of the initiative and referendum process, # 21 and # 22 do not comply with the single subject requirement.

#32 and #33, supra, 76 P.3d at 462-63 (emphasis added).

In the same way, Initiative #132 prohibits any person who lobbies, either as a professional or as a volunteer, from serving on the Commission. This is true even though a person may lobby at one level (federal vs. state) but not the other. It is also true that it is simply the fact of political participation that can disqualify one as a possible commissioner. Thus, a person who lobbies for the League of Women Voters,[4] for instance, on issues such as openness in government or fairness of elections is prohibited, from also participating as a commissioner who helps draw the lines of legislative and congressional districts. *See* C.R.S. § 24-6-301(3.5)(a)(I), (II.5), (IV) ("lobbying" means communicating directly or soliciting others to communicate with a covered official on a wide variety of matters,

[4] *See* Exhibit A, attached hereto (list of volunteer lobbyists for current legislative session).

including any legislation, report, fiscal impact statement, or agency rule or standard).

This additional subject – the exclusion of a "specifically identifiable group" from participation in the political process – violates Article V, § 1(5.5).

4. #132 also fundamentally changes the role and mission of the Supreme Court Nominating Commission.

One mandate of this initiative is to impose upon the Supreme Court Nominating Commission, for the first time, the requirements that it: "establish and announce a process for appointment" of the four redistricting commission members who must be either unaffiliated with any major political party or members of a minor political party; solicit, receive, and review applications for these redistricting commission positions; and "forward a list of 10 recommended applicants to the eight members of the (redistricting) commission." Proposed Article V, § 44(8)(a)(III).

As such, the Supreme Court Nominating Commission is given the task of choosing among applicant names to provide the decisive four votes on the redistricting commission. Given the Proponents' ominous warning about gerrymandering in the redistricting process, *see* Section 1, the Proponents certainly cannot deny that this redistricting task will be politically charged. And to the extent that the Supreme Court Nominating Commission would provide the list of

nominees to be the political balance of power on the redistricting commission, its members will have a uniquely political role to perform and can be chosen to serve with that goal in mind.

This conversion of a non-political commission, which is now charged solely with winnowing names to fill vacancies on the Colorado Court of Appeals and the Colorado Supreme Court, is a major change in mission. Not only does the Supreme Court Nominating Commission have no expertise regarding redistricting or persons suited to undertake that task, voters approved it to completely divorce political influence from the process of determining the membership of the judiciary. The 1966 voter-adopted constitutional amendment reflected "the intent of Colorado's voters to maintain an independent judiciary by **insulating the judicial nominating process from politics**." Formal Op. Att'y. Gen. No. 04-03 (April 12, 2004) (emphasis added).

An example of how the non-political Supreme Court Nominating Commission can easily become a partisan effort can be seen in reviewing the list of current members' terms. Non-attorney Nominating Commission members are appointed by the governor, and all of them, except for one, will turn over prior to the 2021 redistricting.[5] *See* Colo. Const., art. VI, § 24(4). If the Proponents are correct about the infusion of political interests by persons engaged in redistricting,

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[5] *See* Exhibit B, attached hereto (current roster and terms of Supreme Court Nominating Commission).

then the same people who are narrowing a statewide list of redistricting commission applicants will also be nominating appellate justices, even though their primary focus is supposed to be on "insulating the judicial nominating process from politics."

The current merit selection process for judges and justices utilizes the Supreme Court Nominating Commission to identify two or three nominees to fill a vacant position on the Supreme Court or an intermediate appellate court. The governor appoints from this list, and if he or she fails to do so within fifteen days of receiving the list, the chief justice makes the appointment. Colo. Const., art. VI, sec. 20(1).

State legislative redistricting, placed in Article V of the Constitution dealing with the "Legislative Department," is a legislative task. Using an initiative to divest the General Assembly of this authority is still a legislative act, as the voters are exercising that portion of their "reserved" legislative authority that they have decided not to cede to the legislature itself. Colo. Const., art. V, § 1(1); *Armstrong v. Mitten*, 37 P.2d 757, 759-60 (Colo. 1934).

However, the Supreme Court Nominating Commission is not part of the legislative branch. None of its members are legislatively appointed. *See* Colo. Const., art. VI, § 24(4) ("Members of each judicial nominating commission selected by reason of their being citizens admitted to practice law in the courts of

this state shall be appointed by majority action of the governor, the attorney general and the chief justice. All other members shall be appointed by the governor.") Moreover, the Commission does not exercise legislative powers or perform a legislative function.

Voter-proposed initiatives contain separate subjects if they: (1) alter the powers of a commission that has a particularized mission; and (2) revamp a key function of an unrelated branch of government. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997–1998 #64*, 960 P.2d 1192, 1199–1200 (Colo.1998). This proposed initiative both changes the focus of the Supreme Court Nominating Commission (from non-political to political and from appellate judges to legislative district boundaries) and revises the redistricting function of the legislative branch.

Additionally, this measure requires voters to accept a fundamental policy trade-off – between further de-politicizing of the body charged with legislative redistricting and re-politicizing of the body charged with appellate judicial selection. This is precisely the type of initiative that Colo. Const., art. V, § 1(5.5) was intended to prevent. "[T]he single subject requirement protects against proponents that might seek to secure an initiative's passage by joining together unrelated or even **conflicting purposes and pushing voters into an all-or-**

nothing decision." *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2009-2010 No. 24*, 218 P.3d 350, 353 (Colo. 2009) (emphasis added).

This measure is a virtual poster-child for the concerns that led to enactment of the single subject requirement. First, the use of a generalized descriptor for the measure's subject does not meet the constitutional standard for a "single subject." *In re Title, Ballot Title, and Submission Clause and Summary for Proposed Initiative for 1997–1998 # 64*, 960 P.2d 1192, 1200 (Colo. 1998) ("If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated."). "State legislative redistricting" does not encompass "changes to the objective of an independent judicial nominating commission."

Second, the single subject requirement was designed to avoid voter surprise resulting from the inadvertent passage of a surreptitious provision, concealed within an omnibus initiative. *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 442-443 (Colo. 2002); C.R.S. § 1–40–106.5(1)(e)(II). Given the drastic overhaul of the redistricting process sought by this measure, it is unlikely that voters discern this initiative's actual reach to a fundamentally unrelated commission.

Therefore, the measure contains multiple subjects and deprives, solely by the decision of the Proponents, this Board of jurisdiction to set a ballot title.

CONCLUSION

Petitioner respectfully requests that, after consideration of the parties' briefs, this Court determine that the Proposed Initiative violates the single subject requirement and thus the Title Board lacked jurisdiction to set such title for the Proposed Initiative, rendering the ballot title void.

Respectfully submitted this 19th day of May, 2016.

/s Mark Grueskin
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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2015-2016 #132 ("COLORADO REDISTRICTING COMMISSION")** was sent this day, May 19, 2016, via ICCES to counsel for the Title Board and the Proponents:

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Grant Sullivan
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Kelley B. Duke
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/s Erin Holweger

Registered Volunteer Lobbyists - 2016

Previous A | C | D | E | F | G | H | J | L | M | N | O | P | R | S | W | Y | Next

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Clinton, Carisa **CCDC**	(O) 1121 W. Prospect Rd. Ft. Collins 80526	(O) 970.204.(
Cloven, Matthew **ARC of Larimer County**	(O) 1121 W. Prospect #140 Fort Collins CO 80526	(O) 970-204-
DeBey, Kenneth **Colorado Alliance for Retired Americans**	(H) 10650 West 87th Place Lakewood, CO 80215	(H) 303=233-
Diana, Milne **Colorado Cross-Disability Coalition**	(O) 855 Broadway Denver, CO 80203	(O) 303-839-
Edmiston, Robert E **Colorado Citiens for Scund in Medicare**	(O) 721 S Maiposa Way Denver, CO 80223	(H) 303.935.(
Fahrenbruch, Karin **CCDC**	(H) 1303 N. Wilson #102 Loveland CO 80537	(O) 970-221-
Fahrenbruch, Melody L **CO Cross Diabilitty Coalition**	(H) 735 14th Street #106 Loveland CO 80537	(H) 970-581-

Exhibit A

Registered Volunteer Lobbyists - 2016

Name / Organization	Address	Phone
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Grattet, Jean **League of Women Voters**	(O) 1410 Grant Street B204 Denver, CO 80203	(O) 303-863-
Hanilton, Richard G **Action for Public Trust** **The South Park Coalition** **Citizens Progressive Alliance**	(O) 531 Front St Fairplay, CO 80440	(O) 720.483.:
Hart, Linda K **Colorado Federation of Dog Clubs, Inc**	(O) PO Box 265 Littleton, CO 80160	(O) 303.842.:
Haven, Robert D **Colorado Cross Disability Coalition**	(O) 655 Broadway #775 Denver, CO 80203	(O) 303-839- (H) 303-564-
Hillery, Jeannette **League of Women vters**	(O) 1410 Grant Street B 204 Denver, CO 80203	(O) 303-863- (H) 303-494-
Hillery, Jeannette **League of Women Voters**	(O) 1410 Grant St Denver, CO 80203	(O) 303.494.:
Huber, Blake **Approval Voting USA**	(O) 7094 S. Costilla Way Littleton,CO 80120 (H) 655 S. Clinton 655 S. Clinton St. #3B Denver, CO 80247	(H) 720.254.:
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Hutter, Ron K **Self** **ARC of Aurora**	(O) 935 S Joilet St Aurora, CO 80012	(O) 303.364.:

Registered Volunteer Lobbyists - 2016

Name / Organization	Address	Phone
Hutter, Ron K **Self** **ARC of Aurora**	(O) 935 S Joilet St Aurora, CO 80012	(O) 303.364.:
Hutter JR., Ron **CCDC**		
Jones Glischiwsky, Gregoy D **ERROR** **Incorrect data type for operator or @Function** **Text expected** **AARP**	(O) 5160 S Pitkin St Centennial CO 80237	(O) 303.331.·
Levine, Jonna C **7859 W. 38th Ave**	(O) 7859 W. 38th Ave. Wheatridge, CO 80033	
Levutt, Burchan L **Self**	(O) 2668 West Colfax Ave Denver, CO 80219	(O) 720-628-
McVaney, James M **Industrial Hemp in Colorado LLC**	(O) PO Box	
Medbery, Angela **Colorado Pesticide Network**	(O) 2205 Meade St Denver, CO 80211	(O) 303.433.:
Merrill, Forrest Nicole R **Colorado Cross Disabiltiy Coalition**	(H) 6150 W. 13th Ave Lakewood, CO 80214	(O) 720.231.:
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Nofles, Jean **Legislative Advocate - AARP**	(O) 303 17th ST denver, CO 80203	

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Norris, Olympia **Posterity Productions, LLC**	(O) 2200 Market Street Denver CO 80205	(H) 310-254-
Officer, Derek R **Social Justice and Environmental Issues**	(O) PO Box 876 Denver CO 80201	(O) 303-915-
Pace, Carol **League of Women Voters----------AARP**	(O) 1410 Grant Street B204 Denver, CO 80203	(O) 303-863-
Robertson, Aaron **The Patriot League**	(O) PO Box 1435 Eastlake, CO 80614	(O) 303.876.((H) 719.495.!
Rosa, Linda A **Providing infromation on pbstroca; cpmsumer advocacy**	(H) 711 W 9th St. Loveland, CO 80537	(O) 970.667.:
Rosser, Edwin "Mike" M **ERROR** **Incorrect data type for operator or @Function** **Text expected** **AARP** **Colorado Mortgage Lenders Associaiton**	(O) 12478 E Ameherst Cirlce bldg A, Suite 80222 Auora, CO 80014	(O) 303.887.8
San Miguel, Sophia C	(H) 5520 Federal Blvd. #52 Denver 80221	(H) 720-907.!
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Welch, Maureen P **self**	(H) 4896 South Clarkson St. Cherry Hills Village, CO 80113	(H) 720.436.4

Registered Volunteer Lobbyists - 2016

Name / Organization	Address	Phone
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Whinery, Barbara **League of Women Voters**	(H) 235 North 39th Place Gree;ey, CO 80634	(H) 970-353-
Williams, Shannon M **CCDC**	(H) 6093 S. Beeler Greenwood Village 80111	
Wren, Randy M		
Wright, Hal V **Coloradans for Alternatives to the Death Penalty**	(H) 7311 South Marion St Centennial, CO 80122	(H) 303-795
Yott, Paul L **CCDC, Veterans Military Affairs**	(H) 1203 E 108th Ave Northglenn 80233	(H) 303.254.

Supreme Court Nominating Commission Members

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Attorney Members

- Kathleen Lord (D) 1st Congressional District — 01/01/14 to 12/31/19
- Shannon Stevenson (U) 2nd Congressional District — 01/01/15 to 12/31/20
- Kim Childs (U) 3rd Congressional District — 08/14/12 to 12/31/17
- Scott C. Johnson (U) 4th Congressional District — 04/13/12 to 12/31/17
- Eric Von Levern Hall (R) 5th Congressional District — 01/01/12 to 12/31/17
- Michael Burg (D) 6th Congressional District — 01/01/14 to 12/31/19
- Charles Tingle (R) 7th Congressional District — 09/08/11 to 12/31/16

Non Attorney Members

- Mosiah Montoya (D) 1st Congressional District — 08/12/14 to 12/31/19
- Ann Hendrickson (R) 2nd Congressional District — 04/06/12 to 12/31/17
- Robert Scott (R) 3rd Congressional District — 01/31/14 to 12/31/19
- Tracee Marie Bentley (R) 4th Congressional District — 03/16/15 to 12/31/20
- Jay Patel (R) 5th Congressional District — 01/01/16 to 12/31/21
- Jim Carpenter (D) 6th Congressional District — 01/01/14 to 12/31/19
- Olivia Mendoza (D) 7th Congressional District — 04/06/12 to 12/31/17
- Connie McArthur (D) At Large — 01/01/14 to 12/31/19

As of: 03-16-15

Exhibit B