

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding Pursuant to §1-40-107(2),
C.R.S.

Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2015-
2016 #107

Petitioners: LUIS A. CORCHADO, JASON
LEGG, and DONNA R. JOHNSON,

v.

Respondents: KATHLEEN CURRY and FRANK
MCNULTY,

and

Title Board: SUZANNE STAIERT, SHARON
EUBANKS, and FREDERICK R. YARGER.

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Supreme Court Case No.:
2016SA125

RESPONDENTS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains **2,691** words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

By: /s/ Kelley B. Duke

Kelley B. Duke, #35168

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Respondents Kathleen Curry and Frank McNulty ("Proponents"), registered electors of the State of Colorado and the proponents of Initiative 2015-2016 #107 ("Initiative #107"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Opening Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #107.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in finding that Initiative #107 contains a single subject when Initiative #107 addresses redistricting in Colorado by renaming the current Colorado reapportionment commission as the Colorado redistricting commission and directs the redistricting commission to redistrict both state legislative and federal congressional districts pursuant to the procedures and criteria set forth therein?

2. Whether the Titles set by the Title Board for Initiative #107 are clearly misleading?

STATEMENT OF CASE

I. Nature of the Case and Proceedings before the Title Board.

This is an original proceeding pursuant to C.R.S. § 1-40-107(2) of the Title setting for Initiative #107. On February 19, 2016, Proponents submitted Initiative #107 to the Legislative Council and the Office of Legislative Legal Services for

review, comment, and public hearing. After revising it in response to comments received, Proponents filed Initiative #107 with the Secretary of State on March 4, 2016. The Title Board, on behalf of the Secretary of State, held a title hearing on March 16, 2016, finding that Initiative #107 contains a single subject and setting the Titles.

Petitioners Corchado and Legg filed a motion for rehearing on March 23, 2016. Petitioner Johnson (collectively with Corchado and Legg, "Petitioners") also filed a motion for rehearing that same day. In their respective motions, Petitioners contended that Initiative #107 contains more than one subject and that the Titles set by the Title Board were misleading. The rehearing was held on April 6, 2016, at which the Title Board denied Petitioners' motions as to single subject and granted, in part, their motions as to the clarity of the Titles, revising the Titles accordingly.

On April 13, 2016, Corchado and Legg petitioned this Court pursuant to C.R.S. § 1-40-107(2) for review of the single subject issue. They raised a second issue that may also address single subject but could also be viewed as addressing the clarity of the Titles. *See* Corchado and Legg Petition, § II.B. This Court issued its order setting the briefing schedule that same day. Subsequently, Johnson filed her Petition under the same case number as Corchado and Legg's appeal. Johnson,

however, is appealing only the single subject issue. Proponents address both Petitions herein.

II. Statement of Relevant Facts.

Initiative #107 amends the Colorado Constitution's existing provisions addressing redistricting in Colorado. *See* Colo. Const. art. V, §§ 44-48. Currently, the Colorado Constitution assigns redistricting tasks to the inaptly named Colorado reapportionment commission for state legislative districts and to the general assembly for federal congressional districts. Colo. Const. art. V, §§ 44, 48. As stated in proposed section 43.5, the purpose of Initiative #107 is to end the practice of political gerrymandering of state legislative and federal congressional districts. *See* R., pt. 1, p. 2.¹ Initiative #107 proposes to do so by renaming the Colorado reapportionment commission as the Colorado redistricting commission and directing it to redistrict both legislative and congressional districts using nonpartisan staff members to draw maps according to the procedures and criteria set forth therein. *See* R., pt. 1, pp. 2-16, §§ 44, 47, 47.5, 48. Initiative #107 also sets forth the number and eligibility of commissioners; how they are appointed;

¹ Citations to the Title Board Record are to the two-part, certified copy of the Title Board Record submitted by Johnson with her Petition. Because the Title Board Record is not paginated, page number references are to the electronic page number.

and subjects the redistricting commission to open meeting laws. *See R.*, pt. 1, pp. 4-16, § 48(1), (2).

The Title, as amended at rehearing, states as follows:

An amendment to the Colorado constitution concerning redistricting in Colorado, and, in connection therewith, renaming the Colorado reapportionment commission as the Colorado redistricting commission; directing that the commission redistrict congressional districts as well as legislative districts; requiring appointment of 12 members with no more than four members from the same political party and at least four members not affiliated with any major party; prohibiting commission members from being lobbyists or incumbent members or candidates for either the state legislature or congress; 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.

See R., pt. 2, p. 26.

SUMMARY OF ARGUMENT

As reflected in its Titles, the single subject of Initiative #107 is redistricting in Colorado. Initiative #107 addresses this subject by renaming the Colorado reapportionment commission as the Colorado redistricting commission and setting forth its authority and criteria for redistricting congressional and legislative districts. Redistricting in Colorado is not an overly broad or overreaching

category, and all of the subsections of Initiative #107 are logically connected to its single subject. Consequently, Colorado voters will not be surprised by any of the provisions of Initiative #107. In fact, because Initiative #107 contemplates redistricting by a single commission, it would be illogical and confusing to parse out its subsections into two separate initiatives. Moreover, Petitioners' concerns about the merits of Initiative #107 are irrelevant to the single subject inquiry.

The Titles for Initiative #107 are fair, clear, and accurate. The Titles set forth the initiative's single subject purpose and then concisely addresses the central features of the initiative. Petitioners Corchado and Legg have argued for the addition of a laundry list of descriptions to the Titles, which would violate the requirement that initiative titles be brief. The additional descriptions Corchado and Legg propose are also not descriptions at all, but rather their biased assessment of the purported impacts of Initiative #107, if enacted.

ARGUMENT

I. The Initiative Contains a Single Subject.

A. Standard of Review.

In reviewing the Title Board's decision on single subject, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328

P.3d 172, 176 (Colo. 2014) ("*In re #89*") (quoting *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010)). Consequently, the Court "liberally construe[s] the single subject requirement and 'only overturn[s] the Title Board's finding that an initiative contains a single subject in a clear case.'" *Id.* (quoting *In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 565 (Colo. 2012); *In re Title, Ballot Title, Submission Clause, & Summary Adopted March 20, 1996, by the Title Bd. Pertaining to Proposed Initiative 1996-6*, 917 P.2d 1277, 1280 (Colo. 1996)).

In addition to this deferential standard, the Court's review of the Title Board's single subject decision is limited to the narrow inquiry of the "plain language of the initiative to determine whether it comports with the [single subject requirement]." *In re #89*, 328 P.3d at 176 (citing *In re 2011-2012 No. 3*, 274 P.3d at 565). The Court does not consider the initiative's merits and does not review its "efficacy, construction, or future application." *In re #89*, 328 P.3d at 176.

B. Initiative #107 Addresses the Single Subject of Redistricting in Colorado.

Pursuant to Article V, section 1(5.5) of the Colorado Constitution and C.R.S. § 1-40-106.5(1)(a), ballot initiatives must contain a single subject. A proposed initiative has a single subject "if the initiative tends to effect or to carry out one general object or purpose." *In re #89*, 328 P.3d at 177 (quoting *In re Title, Ballot*

Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II, 898 P.2d 1076, 1080 (Colo. 1995)). "An initiative meets this requirement as long as the subject matter of the initiative is necessarily or properly connected. Stated differently, so long as an initiative encompasses related matters it does not violate the single subject requirement." *Id.* (internal citations and quotations omitted) (emphasis in original); *see also In the Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 14 (re-stating single subject standard).

The purpose of the single subject requirement is twofold. First, it prevents the enactment of combined, unrelated measures that would fail on their individual merits. *In re #89*, 328 P.3d at 177. Second, it protects against voter surprise by the inadvertent passage of surreptitious provisions hidden within a complex initiative that has multiple, unconnected purposes. *Id.* at 177-78.

Here, as reflected in its Title, the single subject of Initiative #107 is redistricting in Colorado. Initiative #107 proposes to address redistricting with a single redistricting commission that will employ nearly identical criteria and nonpartisan staff to draw both legislative and congressional districts. Redistricting in Colorado is by no means an overly broad or overarching category, as evidenced by the fact that Initiative #107 proposes that all redistricting in Colorado be

managed by a single commission. While Petitioners have raised concerns as to the merits of utilizing a single commission to manage redistricting in Colorado, the merits of the initiative are for the Colorado voters to decide and are irrelevant to the single subject inquiry. *In re #89*, 328 P.3d at 176.

All of the provisions of Initiative #107 are properly connected to the single-subject of redistricting in Colorado. Proposed section 43.5 sets forth the purpose of the initiative, which is to end political gerrymandering in Colorado by appointing the independent redistricting commission to manage all redistricting tasks in Colorado. Proposed section 44 directs the redistricting commission to draw congressional districts. Proposed sections 47 and 47.5 set forth the criteria for redistricting state legislative and congressional districts.

Subsection (1) of proposed section 48 puts in place nonpartisan staff to create legislative and congressional redistricting plans. Subsection (1) further addresses the number of and eligibility requirements and appointment process for the commissioners. Subsection (2) of proposed section 48 establishes the nonpartisan nature and process by which staff draws and submits preliminary redistricting plans to the redistricting commission and subjects the commission and staff to various open meeting requirements. Subsection (3) of proposed Section 48 establishes the procedure by which the redistricting commission submits plans to

this Court for review and approval. While Proponents believe all of these provisions are necessary to accomplish Initiative #107's purpose, at a minimum, they "tend to effect[] or to carry out one general object or purpose," which is to end political gerrymandering in Colorado by appointing the independent redistricting commission to manage all redistricting tasks in Colorado. *In re #89*, 328 P.3d at 177.

Petitioner Johnson uses semantics in an effort to draw a distinction between reapportionment and redistricting. However, as the Title Board recognized at rehearing, the currently existing Colorado reapportionment commission is a misnomer because it is actually a redistricting body.² Reapportionment is the process by which congressional seats are divided among the states, while redistricting is the process of redrawing the boundaries of congressional and state legislative electoral districts to reflect decennial population changes.³ Consequently, Initiative #107 correctly renames the reapportionment commission as the redistricting commission because the commission will draw both congressional and legislative district lines.

² See Audio Tr. of April 6 Rehearing, pt. 1, 18:55-19:32 (available at http://www.sos.state.co.us/pubs/info_center/audioArchives.html).

³ Redistricting in Colorado, <https://www.colorado.gov/pacific/cga-redistrict/redistrictingreapportionment>.

Additionally, Initiative #107 does not present either of the two policy dangers that the single subject requirement is designed to prevent. First, because all of its provisions are related to its single purpose of ending political gerrymandering in Colorado through the redistricting commission, the initiative will pass or fail on its own merits and does not present dangers of "log rolling." *In re #89*, 328 P.3d at 177, 179. Those voters who desire to have the redistricting commission manage both legislative and congressional redistricting tasks in Colorado will vote in favor of the initiative, while those who disapprove will have an opportunity to vote against it.

Second, voters will not be surprised by any of Initiative #107's provisions because they are all directly connected to its single purpose. As reflected in its Titles, Initiative #107 sets forth in plain terms the redistricting commission's responsibilities, how it will be constituted, and the criteria and processes for redistricting congressional and legislative districts. Contrary to Petitioners' contentions, simply because Initiative #107 alters existing redistricting procedures does not make its clearly stated provisions otherwise "surreptitious." Moreover, any argument that voters will be surprised by the purported negative policy ramifications of Initiative #107 is not persuasive because the Court does not

consider the initiative's merits and does not review its "efficacy, construction, or future application." *In re #89*, 328 P.3d at 176.

In sum, Initiative #107 contains a single subject.

II. The Titles for Initiative #107 Satisfy the Clarity Requirement.

A. Standard of Review.

As with the single subject issue, when reviewing the clarity and accuracy of an initiative's title setting, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re #89*, 328 P.3d at 176 (quoting *In re 2009-2010 No. 45*, 234 P.3d at 645). Therefore, the Court reverses Titles only "where the language is 'clearly misleading.'" *Id.* at 179 (quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 256 (Colo. 2000)). This inquiry also does not address the merits of the initiative or its "efficacy, construction, or future application." *In re #89*, 328 P.3d at 176 (quoting *In re 2009-2010 No. 45*, 234 P.3d at 645).

B. The Titles for Initiative #107 Are Fair, Clear, and Accurate.

Initiative titles must "consist of a brief statement accurately reflecting the central features of a proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water"*, 910 P.2d 21, 24 (Colo. 1996). Consequently, the Title Board should "set fair, clear and accurate titles that do not mislead the voters through a

material omission or representation." *In re #89*, 328 P.3d at 178 (quoting *In re 1999-2000 No. 256*, 12 P.3d at 256). However, initiative titles do not need to contain every detail of the proposal and should not speculate as to the effects of enacting the initiative. *Id.* at 179 (citing *In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 720-21 (Colo. 1994)).

Here, after amendment at rehearing, it appears that only Petitioners Corchado and Legg object to the language used in the Titles.⁴ The Court should reject their argument because the Titles for Initiative #107 are clear and will not mislead the voters. The Titles set forth the initiative's single subject purpose and then addresses the central features of the initiative, including, but not limited to, renaming the Colorado reapportionment commission as the Colorado redistricting commission; directing the commission to redistrict congressional districts as well as legislative districts; limiting the number of members from the major political parties and requiring a certain number of unaffiliated members; setting forth certain commission eligibility restrictions; adding competitiveness to the

⁴ Corchado and Legg's first issue at section II.A of the Petition clearly addresses the single subject issue. It is unclear whether their second issue at section II.B. of the Petition also addresses the single subject issue or the clarity of the Titles. Because Corchado and Legg objected below to the clarity of the Titles, Proponents address that issue herein.

redistricting criteria; requiring nonpartisan staff to submit redistricting plans to the commission; and requiring that the commission's work be done in public meetings.

Petitioners Corchado and Legg contend that Initiative #107 is misleading because it does not contain explanatory language that is consistent with their biased assessment of the purported effects of Initiative #107. *See* Corchado and Legg Petition, § II.B., p. 4. However, Petitioners' inaccurate characterization of the merits of Initiative #107 is irrelevant to this inquiry because titles should not speculate as to the effects of enacting the initiative. *In re #89*, 328 P.3d at 179; *see* Corchado and Legg Petition, § II.B., p. 4 (contending the Titles are misleading because they do not set forth Petitioners' view that Initiative #107 is purportedly "returning the entire redistricting process to the partisan politics that existed before the successful 1974 constitutional amendment"). In fact, it would have been error for the Title Board to speculate as to the initiative's effects, and therefore Petitioners' argument on this point is without merit.

In short, the Titles satisfy the clarity requirement and Petitioners Corchado and Legg's Petition should be denied on this point.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petitions and affirm the Title Board's setting of the Titles for Initiative #107.

Respectfully submitted this 3rd day of May, 2016.

IRELAND STAPLETON PRYOR & PASCOE, PC

s/ Kelley B. Duke

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**ATTORNEYS FOR
PROponents/RESPONDENTS**

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2016, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was duly filed with the Court and served via ICCES upon the following:

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