

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 3, 2016 7:17 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107 Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 # 107 (“Colorado Redistricting Commission”)</p> <p><b>Petitioners:</b> Luis A. Corchado and Jason Legg, and Donna R. Johnson</p> <p>v.</p> <p><b>Respondents:</b> Kathleen Curry and Frank McNulty</p> <p>and</p> <p><b>Title Board:</b> Suzanne Staiert, Sharon Eubank, and Frederick R. Yarger.</p>	<p><b>▲ COURT USE ONLY ▲</b></p> <p>Case No. 2016 SA 125</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 these rules. Specifically, the undersigned certifies that:

1. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 2,420 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and C.A.R. 28(b) because, for the party raising the issue, the brief 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, and C.A.R. 32.

s/ W. Eric Kuhn

Attorney for the Title Board

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

### **STATEMENT OF THE ISSUES**

1. Whether Proposed Initiative #107 violates the single subject requirement. (Johnson Petition and Corchado/Legg Petition).
2. Whether the title for Proposed Initiative #107 is misleading. (Corchado/Legg Petition).

### **STATEMENT OF THE CASE**

Kathleen Curry and Frank McNulty (the “Proponents”) seek to circulate Proposed Initiative #107 to obtain the signatures needed to place a measure on the ballot to amend the Colorado Constitution. Initiative #107 seeks to use the renamed Colorado Redistricting Commission to draw boundaries for both judicial and congressional districts. Proponents amended the original draft of #107 after a review and comment period before the Office of Legislative Council and Legislative Legal Services, and submitted their final draft of #107 to the Board on March 4, 2016. *See Cert. Copies of Title Board Record 31.*

The Board conducted a hearing on March 16, 2016, at which it set title for #107. Petitioner Donna R. Johnson filed a motion for rehearing on March 23, 2016. *See id.* at 47. Petitioners Luis A. Corchado and Jason Legg filed their own motion for rehearing on the same date. *See id.* at 51. The motions for rehearing argued that #107 contains multiple subjects and that certain of its provisions were misleading.

A rehearing was held on April 6, 2016. The Board granted the motion in part and amended the title of #107. Specifically, the Board changed the description of the board makeup from “requiring appointment of members with equal representation from each major political party and those not affiliated with any major party” to “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.” This change was made because the measure could permit arrangements that were not equally divided between the two major parties and unaffiliated voters.

The Board denied the remainder of the motions. On April 13, 2016 Donna Johnson filed a petition for review and Luis Corchado and Jason Legg filed a separate petition for review.

## **STATEMENT OF THE FACTS**

Currently, redistricting for congressional districts is performed by the General Assembly whenever Congress makes a new apportionment of representatives to the state. Colo. Const. art. V, § 44. The Colorado Reapportionment Commission has the task of establishing senatorial and representative districts for the General Assembly after each federal census. *Id.* § 48. Proposed Initiative #107 would give responsibility for redrawing the congressional districts to the commission, which would be renamed the Colorado Redistricting Commission. *See Attachments to Petition for Review.* Thus, if passed, #107 would give the renamed commission responsibility for drawing both congressional and legislative districts.

## **SUMMARY OF THE ARGUMENT**

The Board's decision should be affirmed. Proposed Initiative #107 does not violate the single subject rule simply because it affects multiple aspects of the redistricting process. The initiative solely concerns how districts in Colorado will be drawn if it is adopted. As set by the Board, the title accurately summarizes the substance of the initiative and is not misleading.



## ARGUMENT

### **I. Proposed Initiative #107 consists of only a single subject.**

#### **A. Standard of review and preservation.**

“In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). The Court “will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.* All of the Petitioners raised this issue in their respective motions for rehearing. *Legg/Corchado Mot. for Rehearing, Cert. Copies of Title Board Record 51*; *Johnson Mot. for Rehearing on Initiative 2015-2016 #107, Cert. Copies of Title Board Record 47*.

#### **B. The Board correctly determined that the initiative addresses the single subject of how redistricting will be handled in Colorado.**

The purpose of the single subject rule is to “prohibit the practice of putting together in one measure subjects having ‘no necessary or proper connection,’ for the purpose of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed*

*Initiative Amend TABOR 25*, 900 P.2d 121, 124–25 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I), C.R.S.) [hereinafter *Amend TABOR 25*]. In addition, the requirement seeks to prevent surreptitious measures, surprise and fraud upon the voters.” *Id.* (quoting § 1-40-106.5(1)(e)(II). “The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *Hayes*, 333 P.3d at 79. A “second subject with a distinct and separate purpose not dependent on or connected to the first subject” will not pass muster. *Id.* Accordingly, “umbrella proposals” that attempt to unite separate subjects under a single description are unconstitutional. *Id.* (holding that an initiative that would allow recall of both elected and non-elected governmental officers was two subjects), *see also Amend TABOR 25*, 900 P.2d at 125–26 (holding “revenue changes” was an umbrella proposal); *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995) (holding that initiative relating to “water” was an umbrella proposal).

In proceedings before the Board, the Petitioners argued that #107 contains multiple subjects. The Petitioners argue that the proposed initiative changes the way that the existing commission is constituted and gives that commission new redistricting duties.

In *Hayes*, this Court considered a comparable ballot initiative that was intended to alter and expand recall procedures for state officials.

*Hayes* ultimately found that the initiative had two subjects: (1) the alteration of the right to recall elected officials and (2) the creation of a new constitutional right to recall non-elected officials. 333 P.3d at 82. The Court’s analysis of the first of these topics is relevant here.

The proponents in that case sought to repeal in its entirety article XXI of the Colorado Constitution and to “substitute substantial changes to the manner in which state and local recall elections are triggered under current constitutional and statutory law.” *Id.* at 81. The changes that the proponents would have made to the recall process included:

- Creating a new signature threshold requirement for the number of valid petition signatures needed to subject an officer to a recall election; *Id.* at 82.
- Eliminating the opportunity for an elected official to submit a statement of justification for his or her time in office; *Id.*
- Changing the way in which vacancies caused by recall elections are filled; *Id.*
- Eliminating the application of existing campaign finance laws to recall petitions and elections; *Id.* at 83.
- Changing the requirements applicable to petition circulation. *Id.* at 82–83.

The Court found that “[c]ollectively, these changes to the manner in which recall elections are triggered and conducted constitute a single subject.” *Id.* While the proposed initiative in *Hayes* was ultimately found to have multiple subjects, it was because an entirely new constitutional right to recall non-elected officials was introduced along with all of the changes described above. *Id.* at 85.

Proposed Initiative #107 does not have such a broad scope. The initiative is concerned with one task: how districts are drawn in Colorado. There are necessarily a number of details involved in how to draw districts, but there are no new rights involved in #107. Nor are there multiple subjects in the initiative.

Rather, #107 sets forth the process by which legislative and congressional districts will be drawn in Colorado. It specifies that the commission that currently draws congressional districts will now also draw legislative districts. It provides for the makeup of the commission and requirements for the commission members. It requires the commission to work in open meetings and provides for nonpartisan staff to submit plans to the commission. It also renames the commission to accurately reflect its function—as the Colorado Redistricting Commission.

In *Hayes* the proponents sought to entirely repeal the way in which election recalls were conducted and impose an entirely new framework with numerous changes. 399 P.3d at 81. As the Court found there, all of those changes constituted a single subject because they all related to the way in which recall elections were triggered and conducted. *Id.* at 83.

Here, the changes in the proposed initiative all relate to the manner in which districts will be drawn in Colorado if it is adopted. There is a change to the way that the districts will be drawn, but all of the changes relate to that one objective. Moreover, there are no new rights and no changes that are unrelated to drawing districts. This Court should thus affirm the Board's conclusion that #107 contains only a single subject.

## **II. The title is fair, clear, and accurate, and complete.**

### **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*, 234 P.3d 642, 648 (Colo. 2010) [hereinafter *In re #45*]. 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) [hereinafter *In re Trespass-Streams*]. 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). The Court will “liberally construe the single-subject requirement to ‘avoid unduly restricting the initiative process.’” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #129*, 333 P.3d 101, 104 (Colo. 2014) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009)).

Only Petitioners Legg and Corchado raise this issue in their petition. They preserved the arguments by raising the same in their motion for rehearing. *See Legg/Corchado Motion for Rehearing, Cert. Copies of Title Board Record 57.*

**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, & 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.

An initiative title must “consist of a brief statement accurately reflecting the central features of a proposed measure. *In re Trespass-*

*Streams*, 910 P.2d at 24. Accordingly, the title board should “set fair, clear, and accurate titles that do not mislead the voters through a material omission or representation.” *In re Title, Ballot Title, and Submission Clause for 2013-14 #89*, 328 P.3d 172, 178 (Colo. 2014) (quoting *In re Title, Ballot Title, and Submission Clause for 1999-2000 No. 256*, 12 P.3d 246, 256 (Colo. 2000)). An initiative is not required to contain every detail of a proposition and should not speculate as to the effects of enacting the initiative. *Id.*

**C. The title set by the Board is fair, clear, accurate, and complete.**

The Board set a title for #107 is a brief statement accurately reflecting the central features of the measure. It reflects that the Colorado Reapportionment Commission will be renamed as the Colorado Redistricting Commission, that the commission will redistrict both congressional and legislative districts, the requirements for the makeup and appointment of the commission members, and that only the nonpartisan staff may submit plans to the commission.

Petitioners Legg and Corchado assert that the purpose of the initiative is misleading because it will have the effect of “eliminating the Court’s appointment role, diluting the direct access that unaffiliated



voters have to the appointment process, concentrating all the appointment power in the hands of the two major parties, creating the potential for a deadlock, and essentially returning the entire redistricting process to the partisan politics that existed before the successful 1974 constitutional amendment.” *Corchado/Legg Pet. for Review* 4.

These arguments do not address whether the title fairly, clearly, accurately, and completely reflects the central features of the measure. Rather, they are policy arguments against implementing the measure. These arguments should be rejected for two reasons. First, because the board is not required to lay out every detail of a 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 assess 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 briefly and plainly expresses the measure’s core purpose: namely making the newly renamed Colorado

Redistricting Commission responsible for legislative and congressional redistricting and describing key characteristics of that commission. The items Petitioners Legg and Corchado wish to include do not address how the title reflects the initiative, but are rather details, possible future effects, or policy arguments about the initiative.

### CONCLUSION

For the above-stated reasons, the Court should affirm the Board's actions in setting the title for Proposed Initiative #107.

Respectfully submitted this 3rd day of May, 2016.

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## CERTIFICATE OF SERVICE

This is to certify that on May 3, 2016, I electronically filed a true and correct copy of The Title Board's Opening Brief with the Clerk of the Court via ICCES and served a true and correct copy of the same on the following via ICCES in the manner specified:

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