SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: June 2, 2016 4:26 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 ▲
Attorney for Petitioner Donna R. Johnson: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2016SA153**
PETITIONER'S ANSWER 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).

Choose one:

X It contains 2,910 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

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

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

SUMMARY

Proponents state, "the single subject of Initiative #132 is redistricting in Colorado." Resp. Op. Br. at 3. This statement vastly oversimplifies the measure, as #132 is not just about redistricting. It is about restructuring – a restructuring of sensitive government functions and elemental constitutional protections.

Specifically, Initiative #132:

- reconfigures the existing Reapportionment Commission in its role as to state senate and house district setting by changing appointment authorities, partisan composition, majority decision making, and various procedures as to the hearing and map-drawing processes;
- reassigns the responsibility for congressional district boundary setting by eliminating the General Assembly's constitutional role in this regard and giving it over to the new joint commission, subject to a different set of districting criteria and appeals process than applies to legislative district setting;
- revamps the Supreme Court Nominating Commission so it would no longer be an entity that is solely focused on appointments in the judicial branch but would also make appointments that are entirely legislative in function and political in effect; and

- restricts the rights of those who petition government, whether as a matter of personal advocacy or as a paid lobbyist, to participate as decision makers in any redistricting process, even if they do not lobby officials at that level of government.

In short, Initiative #132 provides voters with a smorgasbord of policy changes, but, unlike a cafeteria, does not permit them to say "yes" to some of those changes and "no" to others. Do voters wish to alter the current system for legislative reapportionment but continue the current system of congressional redistricting? Do they prefer to limit the political involvement of lobbyists in these processes but allow the Supreme Court Nominating Commission to maintain its role of screening judicial candidates without the political diversion of deciding a short list of possible redistricting commission members? Or do they support some other permutation of these options? This measure allows for only an all-or-nothing choice that violates the single subject requirement.

LEGAL ARGUMENT

I. Reallocating the power to set Congressional districts and refining the procedure for legislative district setting are not the same subject.

Proponents dismiss the notion that withdrawing a federally assigned responsibility from the General Assembly and reallocating it to a newly designed commission is a grave constitutional change. "Put simply, it replaces the old

process of redistricting political districts in Colorado with a new process." Resp. Op. Br. at 4. It certainly sounds simple. But to be accurate, it replaces the old process***es*** of redistricting political districts with ***two*** new process***es***.

Proponents rely on *In re Title, Ballot Title and Submission Clause of 2013-2014 #76*, 333 P.3d 76 (Colo. 2014) ("*#76*") to suggest that the single subject requirement is violated only when a new process is introduced into the Constitution. They are wrong that redistricting, at whatever level, is the same however it applies.

For instance, the congressional districting process under Initiative #132 and under current law uses one set of criteria while the legislative process uses a different set of criteria. Proposed Art. V, §§ 46(1); 47. #132's congressional criteria are expressly not prioritized, whereas the legislative criteria are set forth in a strict order that limits what and how the commission can consider the evidence before it. *Id.* The congressional criteria include considerations that are wholly vacant from the legislative criteria. For one, the commission is empowered to consider the minimization of disruption of district lines when it sets those lines for seats in Congress. The commission may not do so when it considers the district lines for seats in the state senate and house. Thus, two processes were structured to have a common touchpoint or two (the commission appointment and the 2/3

decision making thresholds, for example, would be new as to both), but they would operate in dramatically different ways for different purposes with different ends.

Proponents are wrong that #132 is not *#76* redux. They seek to distinguish that case, insisting that "the redistricting of congressional districts is not a new process but rather has long-been addressed under the redistricting provisions of the Colorado Constitution." Resp. Op. Br. at 10. But Initiative #76 also sought to justify its multi-pronged approach with an asserted common thread: the accountability of public officials. 333 P.3d at 86 ("This article intends to increase public accountability of public servants"). Under the law leading up to Initiative #76, the law provided one process for ensuring the accountability of elected officials (the right of recall) and another process for ensuring the accountability of appointed officials (the responsiveness that appointing authorities are legally allowed to demand of their appointees). *Id*. at 84 ("The Colorado Constitution provides for the election of certain members of the executive branch,… and these elected officers are also statutorily authorized to appoint officers who are accountable to them"). This Court's ruling in *#76* cannot be evaded by pointing to pre-existing (albeit entirely distinct) "procedures."

In a fundamental way, this case is *#76*. The real flaw in Initiative #76 was that it "combine[d] proposals to **expand the types of officers**" who were subject to a governmental process (there, recall) "with proposals to change the process" that

would affect the now-expanded group of public officers subject to that process. 333 P.3d at 85 (emphasis added). #132 also seeks to "expand the types of officers" who are subject to a redistricting commission – namely, members of Congress as well as state senators and representatives. #132 also changes key elements of the existing commission in its appointment, hearing, and decision making that are unrelated to this expansion of officers subject to it.

Proponents treat the current redistricting provisions of the Constitution as one conglomerated plan to redistrict the state. Therefore, to them, changing any part of one is really changing a part of the whole. But as discussed at length in the Petitioner's Opening Brief, the congressional and state legislative redistricting provisions have never been treated this way by voters. Pet. Op. Br. at 12-14. Changes to each of the two processes has been considered independently of the other and for different reasons. The voters have tweaked the congressional redistricting process but have massively overhauled the legislative district setting structure, timeline, and standards. As a response to the legislature's deadlock, they first set their own district lines by initiative, and then, when that did not work, the voters created the Reapportionment Commission.

Initiative #132 effectively repeals and reenacts the two distinct redistricting schemes. For twenty years, a repeal and reenactment of a multi-subject provision (or grouping of provisions) has been treated as a violation of the single subject

requirements. *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996). This Court called to mind that precept in coming to its decision in *#76*. 333 P.3d at 85, citing *In re Title for 1999-2000 #104*, 987 P.2d. 249, 254 (Colo. 2000). As the Court observed in *#104*, "a proposed initiative contains multiple subjects not only when it proposes new provisions constituting multiple subjects, but also when it proposes to **repeal** multiple subjects." (Emphasis in original.) The same is true here. Initiative #132 is a two-fold measure, revising one set of procedures and then also eliminating a grant of authority and reformulating a commission to fill that role. The pairing of procedural adjustments and a systemic overhaul is a violation of the single subject mandate.

II. Changing the Supreme Court Nominating Commission's constitutionally assigned task is another subject of Initiative #132.

Initiative #132 repurposes the Supreme Court Nominating Commission, converting it from a body that screens applicants for vacant appellate judgeships to one that must come up with the short list of the redistricting commission's balance of power – the four people who are not major political party members. This is a fundamental structural change in a commission that, to date, has only served the judicial branch.

The issue raised here is whether, consistent with the single subject requirement, a commission which has a limited role to operate within one branch

of government can be coopted by initiative proponents to perform a very different role (sorting through potential political appointees vs. screening judicial applicants) for a different branch of government (legislature vs. judiciary) with an entirely different mission (political vs. apolitical).

Proponents argue that "by Ms. Johnson's logic, any time an initiative alters the nominating duties of the executive, legislative, or judicial branches, such alteration would involve a single subject violation unless addressed by its own ballot initiative." Resp. Op. Br. at 11. This overly broad statement is incorrect. The issue here is the restructuring of a voter-approved commission. Initiative #132 proposes an incongruous add-on to an existing agency of government: the injection of an inherently political mission when the Nominating Commission was deliberately crafted as an entity divorced from politics.

Proponents also argue that this concern is just an argument about the merits of the measure. Pet. Op. Br. at 6-7. That a single subject flaw is also a reason to vote against the measure does not detract from the fact that the Proponents' single subject violation is problematic in its own right. Virtually every second subject in every measure found by this Court to violate Colo. Const., art. V, sec. 1(5.5) presented reasons to vote for – and against – that measure. But that fact does not rob this Court of its ability to conduct its authorized single subject analysis. One of the evils the single subject requirement was designed to avert is the injection of

a side-debate on an initiative, providing voters with a side-reason to cast their ballots without regard to the other subjects in the initiative. Thus, Proponents' argument only fortifies the conclusion that this is a multiple subject initiative.

In truth, the Proponents' Opening Brief highlights why this measure violates the single subject requirement. A "central purpose" to "depoliticize redistricting" is a vague notion, not a subject, for an initiative. Resp. Op. Br. at 11. Overarching, umbrella concepts do not meet the constitutional tests for a single subject. *In re "Public Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995) (holding that water conservation district elections and "public trust" doctrine could not be grouped under the common characteristic of "water"). And this is precisely why, despite Proponents' argument to the contrary, the decision in *In re Title for 1997-1998 #64*, 960 P.2d 1192, 1200 (Colo. 1998) is apropos here. Simply sharing a common word – "judicial" in *#64* and "redistricting" here – is not enough and is certainly not a "subject." If the "entire judicial branch" is too broad a subject, *id.* at 1200, then the same must be true for "redistricting." The fact that a vague theme like "redistricting" could be applied in even a broader fashion (to city council or county commissioner districts, for example) does not affect the fact that it must, under the Constitution, be narrower to qualify as a single subject.

It is, of course, no answer that the Nominating Commission would make appointments in the place of the Chief Justice. The Nominating Commission

members are chosen either unilaterally by, or with the active involvement of, partisan actors (the governor, the attorney general, and staff that answers to legislative leadership). The chief justice pays homage or owes political debts to none of these actors and is sworn and ethically obligated to conduct that role without regard to their parochial or partisan interests. It was for this reason that the voters added to the chief justice's appointment responsibilities these appointments to the Reapportionment Commission.

In any event, what was possible in 1974 when the Reapportionment Commission was authorized by voters is not necessarily possible after 1994 when the single subject requirement was enacted. If the voters in 1974 violated a then-nonexistent single subject requirement, the amendment of that same measure cannot be accomplished through a multiple-topic measure such as Initiative #132. About this, the Court has been crystal clear for two decades. *1996-4*, *supra*, 916 P.2d at 533. Therefore, there is no refuge for Proponents in the notion that this multiple subject amendment is just an overhaul of a previous multiple subject amendment.

Proponents overlook one essential point about the change in the Nominating Commission. Currently, its members are chosen for one reason: their ability to assess candidates for appellate judgeships. Whether based on their training, professions, education, or life background, the lawyers and non-lawyers who are

appointed to this commission are chosen to seek out the very most qualified candidates for the Supreme Court and the Court of Appeals. They are not, and should not be, chosen to be political arbiters. Under the current system, they do not look for political balance or redistricting software acumen or consider political negotiating skills. Initiative #132 will change all that, producing a redirected Nominating Commission with a very different mission and motivation for membership. And it is that fundamental change that reflects this measure's second subject.

Voters will vote on this package with no notice about this redirection of the Nominating Commission, as the ballot title set by the Board makes no reference at all to the Nominating Commission's changed role. Thus, #132 presents the perfect single subject storm wherein a second subject is hidden in terms of prominence and also concealed from voters by means of the ballot title framed by the Board, which provided no signals in the title that this change could be at issue. The Board's decision thus warrants reversal.

III. Restricting political rights of volunteer lobbyists and others is yet another subject of Initiative #132.

Proponents justify their lobbyist ban this way: "prohibiting lobbyists who are directly involved in influencing the political process is properly connected to

Initiative #132's central purpose" of "depoliticiz[ing] redistricting through a new redistricting process." Resp. Op. Br. at 13.

First, inasmuch as one need only be a "registered lobbyist" at either the state or federal level to be prohibited from setting districts at both levels, the measure does not tie influence of officials to the setting of their districts. It simply puts those who advocate for any legislative change in a prohibited category for eligibility on the redistricting commission. Thus, a state lobbyist who never speaks with a congressperson cannot help set district lines, even though she has no reason to influence decisions made by the U.S. House of Representatives.

Second, Proponents have looked carefully at Colorado's lobbying law, *see* Resp. Op. Br. at 13 n.4, and must be aware that persons are required to register as lobbyists even when they have no role in somehow leveraging politicians and "the political process." For instance, persons who advocate concerning "any rule, standard, or rate of any state agency having rule-making authority" must register as a lobbyist. C.R.S. § 24-6-301(3.5)(a)(IV). The breadth of lobbying registration laws in Colorado is such that specialists and technicians may become lobbyists when their voice is heard about a possible regulatory change, something totally distinct from Respondents' concern for the "political process." Nevertheless, their ability to become politically involved in this way is curtailed if, in their professional lives, they petition government.

In addition, given recent changes to the lobbying law, every lawyer who advocates for legislative change as part of his profession is subject to treatment as a "lobbyist" with the attendant reporting and disclosure responsibilities. C.R.S. § 24-6-302(8) ("Notwithstanding any other provision of this part 3, an **attorney who is a professional lobbyist** is required to disclose information about the clients for whom he or she lobbies in accordance with this part 3 to the same extent as a professional lobbyist who is not an attorney") (emphasis added). Thus, despite the Proponents' attempt to limit this Court's holding in *In re Title for 2003-2004 #32 and #33*, 76 P.3d 460 (Colo. 2003), which found that the restriction of political rights of lawyers to sit as "ballot title setters" was separate from a change in initiative procedures, that case is more on point than ever. Under #132, all lawyers who advocate concerning any legislative, agency standard, rate, or rule making change are excluded from membership on the new redistricting commission. As such, this Court's analysis in *#32 and #33* is more compelling, not less.

Proponents also use certain prohibitions on membership, found in the amendment creating the Supreme Court Nominating Commission, to justify their ban of lobbyists. Resp. Op. Br. at 14 (relating to elected public officials and party officials). But as noted above, that amendment was adopted prior to the adoption of the single subject requirement. Whether that limit would have survived a single subject challenge is beyond this Court's inquiry here.

Regardless, participation on the Supreme Court Nominating Commission is not a political act. That Proponents confuse it with one goes to the heart of why they do not see a single subject problem with this aspect of their initiative. Participation on the Nominating Commission is a rare civic act, focusing solely on candidates' qualifications and capacity to act in an appellate judicial role. It is not, and has never been, about political advocacy or positioning and thus would never have triggered the single subject concerns in *#32 and #33*.

CONCLUSION

The Title Board overlooked the historic, legal, and functional disconnect between state and federal redistricting in coming to a decision that this measure represents one subject. The Board also overlooked this Court's precedent on curtailing political involvement as part of a "political reform" and changes to commissions that are entirely distinct from the avowed subject of an initiative. Given its errors, the Court should reverse the single subject decision of the Title Board on Initiative 2015-2016 #132.

Respectfully submitted this 2nd day of June, 2016.

/s Mark Grueskin
Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #132 ("COLORADO REDISTRICTING COMMISSION")** was sent this day, June 2, 2016, via ICCES to counsel for the Title Board and the Proponents:

LeeAnn Morrill
Matthew Grove
Grant Sullivan
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Kelley B. Duke
Benjamin J. Larson
Ireland Stapleton Pryor & Pascoe, PC
717 Seventeenth Street, Suite 2800
Denver, CO 80202

/s Erin Holweger