SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: June 2, 2016 4:33 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 #133 ("Colorado Legislative 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. 2016SA154**
PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2015-2016 #133 ("COLORADO LEGISLATIVE 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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s/ Mark G. Grueskin
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SUMMARY

Proponents state, "the single subject of Initiative #133 is redistricting in Colorado." Resp. Op. Br. at 6. This statement vastly oversimplifies the measure, as #133 is not just about redistricting. It is about restructuring – a restructuring of sensitive government functions and elemental constitutional protections.

Specifically, Initiative #133:

- reconfigures the independent commission that addresses state senate and house reapportionment and reorients its appointments, decision making methodology, staff duties, hearing processes, and appeal mechanisms;
- 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 #133 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. This measure allows for only an all-or-nothing choice that violates the single subject requirement.

LEGAL ARGUMENT

Initiative #133 is a massive overhaul of the state legislative reapportionment process. The measure addresses appointing authorities, new staff responsibilities, additional limits on and grants of authority to the commission, super-majority requirements, open meetings requirements, lobbyist disclosure requirements, and a new structure for appeals from commission decisions (as well as from its deadlocks). In addition, Initiative #133 deals with two additional subjects.

I. Changing the Supreme Court Nominating Commission's constitutionally assigned task is a second subject of Initiative #133.

Initiative #133 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 9. This overly broad statement is incorrect. The issue here is the restructuring of a voter-approved commission. Initiative #133 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. 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 9. 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 #133. About this, the Court has been crystal clear for two decades. *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996). 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. Currently, Supreme Court Nominating Commission members do not seek out political balance or ponder redistricting software acumen or consider political negotiating skills. Initiative #133 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, #133 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.

II. Restricting political rights of volunteer lobbyists and others is yet another subject of Initiative #133.

Proponents justify their lobbyist ban this way: "prohibiting lobbyists who are directly involved in influencing the political process is properly connected to Initiative #133's central purpose" of "depoliticiz[ing] redistricting through a new redistricting process." Resp. Op. Br. at 11-12.

Inasmuch as one need only be a "registered lobbyist" to be prohibited from setting districts at both levels, the measure does not tie influence of officials to the setting of their districts. Here's how it reaches deep into the well of governmental policy making.

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 constrained 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 #133, 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 9 (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

In setting a title for a measure that makes major changes in the way in which state legislative districts are set, the Board 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 #133.

Respectfully submitted this 2nd day of June, 2016.

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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 #133 ("COLORADO LEGISLATIVE REDISTRICTING COMMISSION")** was sent this day, June 2, 2016, via ICCES to counsel for the Title Board and the Proponents:

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