

**SUPREME COURT, STATE OF COLORADO**

2 East 14<sup>th</sup> 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 #133

**Petitioners:** 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.:  
16SA154

**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 **2,776** 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 #133 ("Initiative #133"), 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 #133.

### **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Whether the Title Board erred in finding that Initiative #133 contains a single subject when Initiative #133 addresses state legislative redistricting in Colorado by restructuring and renaming the current Colorado reapportionment commission as the Colorado redistricting commission and directs the redistricting commission to redistrict state legislative districts pursuant to the procedures and criteria set forth therein?

### **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 #133. Proponents filed Initiative #133 with the Secretary of State on April 8, 2016. The Title Board, on behalf of the Secretary of State, held a title hearing on April 20, 2016, finding that Initiative #133 contains a single subject and setting the Titles.

Petitioner Donna R. Johnson ("Ms. Johnson") filed a motion for rehearing on April 27, 2016, contending that Initiative #133 contains more than one subject. The rehearing was held on April 28, 2016, at which the Title Board denied Ms. Johnson's motion. On May 5, 2016, Ms. Johnson petitioned this Court pursuant to C.R.S. § 1-40-107(2) for review of the single subject issue.

## **II. Statement of Relevant Facts.**

Initiative #133 amends the Colorado Constitution's existing provisions addressing redistricting in Colorado. *See* Colo. Const. art. V, §§ 44-48. Currently, the Colorado Constitution assigns state legislative redistricting tasks to the inaptly named Colorado reapportionment commission. Colo. Const. art. V, §§ 44, 48. As stated in proposed section 44, the central purpose of Initiative #133 is to end the practice of political gerrymandering through a new redistricting process. *See* R., pt. 1, p. 2.<sup>1</sup> Initiative #133 proposes that this is best achieved by restructuring and renaming the current Colorado reapportionment commission as the Colorado redistricting commission and directing it to redistrict state legislative districts using nonpartisan staff members to draw maps according to the procedures and criteria set forth therein. *See* R., pt. 1, pp. 2-11, §§ 45, 47, 48. Initiative #133 also sets

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<sup>1</sup> Citations to the Title Board Record are to the two-part, certified copy of the Title Board Record submitted with the Petition. Because the Title Board Record is not paginated, page number references are to the electronic page number.

forth the number and eligibility of commissioners; how they are appointed; and subjects the redistricting commission to open meeting laws. *See R.*, pt. 1, pp. 2-6, § 45(2)-(4), (7), (8).

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

An amendment to the Colorado constitution concerning state legislative redistricting, and, in connection therewith, restructuring the state commission that sets boundaries for state senatorial and representative districts to require at least 4 of the 12 commissioners be affiliated with a minor political party or unaffiliated with any political party; prohibiting commissioners from being registered lobbyists or members or candidates for the U.S. Congress or the Colorado legislature; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; adding competitiveness as the final criteria to be used in drawing state legislative districts; establishing a procedure to set legislative district boundaries if the commission is unable to adopt a plan; and requiring that the commission's work be done in public meetings.

*See R.*, pt. 2, p. 22.

### **SUMMARY OF ARGUMENT**

The single subject of Initiative #133 is redistricting in Colorado. Initiative #133 addresses this subject by restructuring and renaming the Colorado reapportionment commission as the Colorado redistricting commission and setting forth its authority and procedures for redistricting state legislative districts. Put simply, it replaces the old process of redistricting state legislative districts with a



new process. Redistricting in Colorado is not an overly broad or overreaching category, and all of the subsections of Initiative #133 are logically connected to its single subject. Consequently, Colorado voters will not be surprised by any of the provisions of Initiative #133. Ms. Johnson's concerns about the substantive merits of Initiative #133 are irrelevant to the single subject inquiry.

## **ARGUMENT**

### **Initiative #133 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 #133 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 contains 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, the single subject of Initiative #133 is redistricting in Colorado. Initiative #133 proposes to change the redistricting process in Colorado by instituting a new redistricting commission that utilizes nonpartisan staff to draw plans for state legislative districts. Redistricting in Colorado is by no means an overly broad or overarching category. While Ms. Johnson has raised concerns as to the merits of the nominating process for the redistricting commission, 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 #133 are properly connected to the single-subject of redistricting in Colorado. Proposed section 44 sets forth the purpose of the initiative, which is to end political gerrymandering in Colorado by creating a new, independent redistricting commission that is free from political pressures and relies on nonpartisan staff to draw plans for state legislative districts.

Proposed subsection 45(1) directs the redistricting commission to adopt competitive plans for state legislative districts through a public process that is not intended to favor any political party or politician. Proposed subsections 45(2)-(8) address the number of and eligibility requirements and appointment process for the commissioners, and also set forth the rules by which the redistricting commission operates. For example, subsection 45(7) subjects the commission and nonpartisan staff to various open meeting requirements and limits *ex parte* communications.

Proposed section 47 adds competitiveness as the final criteria to be used in drawing redistricting plans. Proposed section 48 establishes the process by which redistricting plans are drawn by nonpartisan staff, submitted to the redistricting commission, and filed with this Court for approval.

While Proponents believe all of these provisions are necessary to accomplish Initiative #133's purpose, at a minimum, they "tend to effect[] or to carry out one general object or purpose," which is to create a new redistricting process in Colorado. *In re #89*, 328 P.3d at 177. Because all of its provisions are related to the central purpose of creating a new redistricting process in Colorado, Initiative #133 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 change the redistricting process through the new redistricting commission 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 #133's provisions because they are all directly connected to its central purpose. As reflected in its Titles, Initiative #133 sets forth in plain terms the redistricting commission's responsibilities, how it will be constituted, and the criteria and processes for redistricting state legislative districts. Any argument that voters will be surprised by purported negative policy ramifications of Initiative #133 is unpersuasive 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.

Ms. Johnson nevertheless contends that Initiative #133 has multiple subjects. Notice of Appeal, p. 4. Ms. Johnson first contends that permitting the supreme court nominating commission to provide a list of 10 applicants to fill the last 4 seats on the new redistricting commission amounts to a separate subject because it will politicize the nominating commission. Notice of Appeal, p. 4. This argument addresses the purported policy ramifications of Initiative #133 and is therefore irrelevant to the single subject inquiry. *In re #89*, 328 P.3d at 176.

Nevertheless, Ms. Johnson's position on the purported policy ramifications is illogical. Initiative #133 does not alter the composition or selection process for the

supreme court nominating commission. Rather, the attorney members of the nominating commission will continue to be appointed by majority action of the governor, the attorney general, and the chief justice, with the non-attorney members appointed by the governor. Colo. Const. art. VI, § 24(4). Nominating commission eligibility remains limited by political party affiliation and political involvement. *See id.* at § 24(2), (4) (limiting number of commissioners from any one party and prohibiting elected public officials and elected political party officials from sitting on the nominating commission).

As Ms. Johnson recognizes in her Motion for Rehearing, the purpose of the constitutional amendment establishing the nominating commission was to depoliticize the judicial nominating process by establishing these nominating and eligibility requirements. *See R.*, pt. 2, p. 11. Here, the central purpose of Initiative #133 is the same—to depoliticize redistricting. Ms. Johnson cannot explain how the supreme court nominating commission can successfully leave politics aside in nominating judicial officers, but at the same time will inject politics into redistricting, when the nominating commission's appointment process and eligibility requirements remain unchanged. Moreover, 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. This is an untenable result.

The authority cited by Ms. Johnson in support of her nominating commission argument is inapposite. R., pt. 2, p. 12 (citing *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997-1998 #64*, 960 P.2d 1192 (Colo. 1998) ("*In re #64*"). In *In re #64*, the central purpose of the proposed initiative was to address the qualifications of judicial officers. *In re #64*, 960 P.2d at 1197. However, the proposed initiative also overhauled the judicial discipline commission, which is wholly unrelated to the qualifications of judicial officers because the commission's members are not judicial officers and it is tasked with investigating and enforcing the Colorado Judicial Code of Conduct, not with establishing judicial qualifications. *Id.* at 1199-1200. In addition to altering the qualifications and method of selection for membership on the judicial discipline commission, the initiative in *In re #64* changed the home rule powers of the City and County of Denver with regard to the Denver county court and immunized persons from liability for criticizing judges, along with other measures that were wholly unrelated to its central purpose of addressing the qualifications of judicial officers. *In re #64*, 960 P.2d at 1197.

In contrast, here, the proposed independent redistricting commission is the cornerstone of Initiative #133, and therefore the process by which its commissioners are appointed is directly related to its single subject. In fact, the redistricting process created by Initiative #133 would be incomplete if it failed to address how redistricting commissioners are nominated. Utilizing the judiciary branch in the nominating process is also not unusual, as evidenced by the fact that the chief justice is currently charged with nominating four members of the current Colorado reapportionment commission. Colo. Const. art. V, § 48(1). Additionally, unlike in *In re #64*, which overhauled the judicial discipline commission, Initiative #133 does not change the composition or manner of selection of the supreme court nominating commission. It simply directs the nominating commission to provide a list of 10 nominees to the redistricting commission every 10 years. Proposed subsection 44(8)(a)(III). Therefore, *In re #64* is inapposite.

Finally, Ms. Johnson contends that prohibiting "registered lobbyists" from sitting on the redistricting commission is a separate subject. Notice of Appeal, p. 4. This is also incorrect because the central purpose of Initiative #133 is to depoliticize redistricting through a new redistricting process. Therefore, prohibiting lobbyists who are directly involved in influencing the political process



is properly connected to Initiative #133's central purpose.<sup>2</sup> Prohibiting the membership of certain individuals involved in politics is also commonplace for a commission that is intended to be apolitical. For example, the voter-adopted constitutional amendment establishing the supreme court nominating commission (referenced by Ms. Johnson in her Motion for Rehearing) prohibits elected public officials and elected political party officials from serving on the nominating commission. Colo. Const. art. VI, § 20(4). These prohibitions, particularly the prohibition of elected political party officials, cover broad swaths of individuals involved in politics in order to ensure the nominating commission's political independence. *See* Formal Op. Att'y Gen. No. 04-03 (April 12, 2004).

The authority Ms. Johnson cites in support of her lobbyist argument is not persuasive. *See* R., pt. 2, p. 13. (citing *In re Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 460, 462 (Colo. 2003) ("*In re #32 and #33*"). In *In re #32 and #33*, the purpose of the initiatives was "to liberalize the procedure for initiative and referendum petitions," yet the initiatives barred all

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<sup>2</sup> A lobbyist is one who receives payment or reimbursement of expenses for lobbying, which is defined as "communicating directly, or soliciting others to communicate, with a [certain enumerated politicians or their staff] for the purpose of aiding in or influencing" the drafting of or action on any bill or rulemaking. *Black v. Southwestern Water Conservation Dist.*, 74 P.3d 462, 468 (Colo. App. 2003) (quoting C.R.S. § 24-6-301(3.5)(a)). Consequently, lobbying is a political function.

lawyers from serving on the Title Board. 76 P.3d at 461 (emphasis added). The Court reasoned that narrowing the categories of individuals who can serve on the Title Board was a separate subject because such prohibition has no nexus with liberalizing the procedure for initiative and referendum petitions. *Id.* at 462-63.

In contrast, the central purpose of Initiative #133 is not to liberalize the process for redistricting; rather, its central purpose is to depoliticize redistricting. Therefore, the lobbyist prohibition is directly related to Initiative #133's central purpose.

In sum, Initiative #133 contains a single subject.

### **CONCLUSION**

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's setting of the Titles for Initiative #133.

Respectfully submitted this 19<sup>th</sup> day of May, 2016.

IRELAND STAPLETON PRYOR & PASCOE, PC

*s/ Kelley B. Duke*

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 19<sup>th</sup> 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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