

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 2017-
2018 #48

Petitioners: ROBERT DURAY and
KATINA BANKS,

v.

Respondents: KATHLEEN CURRY and
TONI LARSON,

and

Title Board: SUZANNE STAIERT, SHARON
EUBANKS, and GLENN ROPER.

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Supreme Court Case No.:
2017SA259

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 1,909 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, as applicable, 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/ Benjamin J. Larson
Benjamin J. Larson, #42540

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Respondents Kathleen Curry and Toni Larson ("Proponents"), registered electors of the State of Colorado and the proponents of Initiative 2017-2018 #48 ("Initiative #48"), 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 #48.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board clearly erred in setting the Titles for Initiative #48 when the Titles accurately and succinctly state that the initiative changes the methods of appointment of the commission that redraws state legislative boundaries and describe the commission's resulting political composition, without detailing the process by which that political composition is achieved?

STATEMENT OF CASE

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

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. of the title setting for Initiative #48. Proponents filed Initiative #48 with the Secretary of State on September 22, 2017. The Title Board, on behalf of the Secretary of State, held a title hearing on October 4, 2017, finding that Initiative #48 contains a single subject and setting the Titles.

Petitioners Robert DuRay and Katina Banks ("Opponents") filed a motion for rehearing, contending that Initiative #48 contains more than one subject, in part, because it utilizes a panel of senior judges to select a pool of candidates from which the commissioners are appointed to the Independent Legislative Redistricting Commission (the "Commission"). *See R.*, pt. 2, pp. 25-26.¹ Opponents also argued that the Titles should be amended in two respects. *Id.* at pp. 26-28. The rehearing was held on October 18, 2017, at which the Title Board denied Opponents' motion on the single subject issue and granted, in part, their motion on the title setting, amending the Titles accordingly. On October 25, 2017, Opponents petitioned this Court pursuant to section 1-40-107(2), C.R.S. for review of one aspect of the Titles set by the Title Board. Opponents do not appeal whether Initiative #48 contains a single subject.²

II. Statement of Relevant Facts.

Initiative #48 amends the Colorado Constitution's existing provisions addressing redistricting in Colorado. As stated in proposed section 46, the central

¹ Citations to the Title Board Record are to the three-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.

² On November 3, 2017, the Title Board moved to supplement the record on appeal with evidence of its compliance with section 1-40-106(3.5), C.R.S. The Court denied the motion but granted a limited remand for the Title Board to comply with section 1-40-106(3.5), C.R.S. The limited remand does not affect the issue on appeal and therefore the Court did not alter the briefing schedule on appeal.

purpose of Initiative #48 is to end the practice of political gerrymandering in the state legislative redistricting process. *See R.*, pt. 2, p. 4. Initiative #48 proposes to do so by replacing the existing Reapportionment Commission with an independent commission that is politically balanced, with four commissioners from the state's largest political party, four commissioners from the state's second largest political party, and four commissioners who are not affiliated with either of the state's two largest political parties. *See R.*, pt. 2, pp. 4, 6, proposed art. V, §§ 46, 48(2)(a)-(c), C.R.S.

To ensure their independence, the four independent commissioners are appointed from a pool of candidates recommended by a panel of three senior judges. *See R.*, pt. 2, p. 8, proposed art. V, § 48(6)(d). The Commission then utilizes nonpartisan legislative staff and fair criteria to divide the state into legislative districts that are not drawn to purposefully advantage or disadvantage any political party. *See R.*, pt. 2, pp. 4-5, proposed art. V, § 46(1)(b)-(c), § 47. Any act of the Commission, including the approval of a redistricting plan, must be accomplished through a supermajority vote of 8 out of the 12 commissioners. *See R.*, pt. 2, p. 14, proposed art. V, § 48.3(9).

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

An amendment to the Colorado constitution concerning state legislative redistricting, and, in connection

therewith, renaming the commission that redraws state legislative boundaries; changing the qualifications and methods of appointment of members of the commission; providing for the appointment of 12 commissioners, 4 of whom are registered with the state's largest political party, 4 of whom are registered with the state's second largest political party, and 4 of whom are not registered with either of the state's two largest political parties; requiring the commission to consider political competitiveness, to the extent possible, after meeting the other requirements for redistricting; prohibiting drawing plans to purposefully advantage or disadvantage any political party or person; specifying procedures that the commission must follow, including requiring that the commission's work be done in public meetings and requiring the nonpartisan staff of the commission to prepare and present plans; and requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission.

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

SUMMARY OF ARGUMENT

The Titles of Initiative #48 succinctly and fairly address Initiative #48's overhaul of the state legislative redistricting process in Colorado. Because Initiative #48 replaces the current process for state legislative redistricting with an entirely new process, the Titles cannot possibly include all the initiative's details while adhering to the brevity requirement. Opponents nevertheless contend that the Titles should also explain that the 8 major party members of the Commission

are appointed by party leadership, rather than by partisan-elected officials, as is the case with 7 of the 11 members of the reapportionment commission.

However, the critical information for voters is that these commissioners are not independent, which the Titles clearly explain in outlining their political affiliations with the state's two largest political parties, along with the 4 independent commissioners' non-affiliation with either such party. Furthermore, the titles clearly state that the initiative is "changing the qualifications and methods of appointment of members of the commission". In balancing clarity with brevity, the Title Board wisely elected to describe the end result of the political composition of the Commission, not the process by which that balanced composition is achieved. Accordingly, the Court should defer to the Title Board's considerable discretion in setting Titles and deny the Petition.

ARGUMENT

The Titles Are Fair, Clear, Accurate, and Complete.

A. Standard of Review.

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 375 P.3d 123, 125 (Colo. 2006). Accordingly, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title

Board's actions." *Id.* Thus, the Court will "only reverse the Title Board's decision if the titles are 'insufficient, unfair, or misleading.'" *Id.* (quoting *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014)). To make this determination, the Court "employ[s] the general rules of statutory construction and accord[s] the language of the proposed . . . titles their plain meaning." *Id.* The Court's role is "not to consider the merits, efficacy, construction, or future application of a proposed initiative, but instead to determine whether the Title Board fulfilled its duty of ensuring that the [titles] meet constitutional requirements." *Id.*

B. The Titles Properly Balance Clarity and Brevity.

The Title Board's job in setting titles is "to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice in pursuit of the initiative rights of Colorado citizens." *In re Title, Ballot Title & Submission Clause for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999). While titles must be "fair, clear, accurate, and complete," they need not set out every detail of the initiative. *In re Title, Ballot Title & Submission Clause for 2005-2006 #73*, 135 P.3d 736, 740 (Colo. 2006). Rather, section 1-40-106(3)(b), C.R.S. requires that ballot titles be brief. Therefore, the Title Board "often cannot describe every feature of a proposed initiative in a title or ballot title and

submission clause and simultaneously heed the mandate that such documents be concise." *In re Title, Ballot Title & Submission Clause for 1997-98 #62*, 961 P.2d 1077, 1083 (Colo. 1998).

Here, the Titles fairly, clearly, accurately, and completely address Initiative #48's overhaul of the state legislative redistricting process in Colorado. *See R.*, pt. 2, p. 22. The Titles inform voters that the initiative changes the method and process for appointing commissioners, identify the number of commissioners who will sit on the Commission, and describe their respective political affiliations or non-affiliations. *Id.* The Titles next outline the critical aspects of how the Commission goes about approving plans, including the requirement that any act of Commission must be done by supermajority. *Id.*

Because Initiative #48 replaces the current process for state legislative redistricting with an entirely new process, the Titles cannot possibly include all of the initiative's details, nor should they, as the Titles would be unwieldy and would violate the brevity requirement. Opponents nevertheless contend that the Titles, which are already relatively lengthy, should also explain that the 8 major party commissioners are appointed by party leaders, rather than by partisan-elected officials (legislators and the governor) as is the case with 7 of the 11 members of

the reapportionment commission. *See* Colo. Const. art. V, § 48 (1)(b) (describing appointment process for reapportionment commission).

However, the critical information for voters is that—like the political appointees to the reapportionment commission—8 of the 12 commissioners on the Commission are not independent, which the Titles clearly describe in identifying the political affiliations of these commissioners. *See* R., pt. 2, p. 22. Likewise, the Titles also describe that the remaining 4 commissioners are not affiliated with either of the state's two largest political parties. *Id.* Although the titles clearly state that the initiative changes the method of appointing commissioners, the process by which this balanced political composition is achieved is not critical information for voters.

Further, adding an explanation of how the non-independent commissioners are appointed would fairly necessitate an explanation of the detailed process by which the independent commissioners are appointed and would bloat the Titles to lengths that would be unhelpful to voters. *See* R., pt. 2, pp. 7-10, proposed art. V, § 48(6) (describing process for appointment of 4 independent commissioners).

As drafted, the Titles inform voters that the method for appointing commissioners is changing, and the Titles identify the political affiliations of each of the commissioners. This is sufficient information for voters regarding the

critical element at issue, i.e., the political composition of the Commission. If Opponents truly believe that using unelected party leaders to appoint commissioners is significantly different from and inferior to using elected officials to appoint commissioners, they are free to make that an issue in opposing Initiative #48. However, it is not the Title Board's or this Court's role to judge the merits of Initiative #48. Nor should an opponent's opinion on the merits of an initiative's particular details set the bar for what must be captured in its titles.

In short, nothing about the Titles is clearly unfair or misleading. Accordingly, the Court should defer to the Title Board's considerable discretion in setting Titles and deny the Petition.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's setting of the Titles for Initiative #48.

Respectfully submitted this 15th day of November, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2017, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was duly filed with the Court and served via CCEF upon the following:

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