

<p>SUPREME COURT OF COLORADO  2 East 14th Ave.  Denver, CO 80203</p> <hr/> <p>Original Proceeding  Pursuant to Colo. Rev. Stat. § 1-40-107(2)  Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and  Submission Clause for Proposed Initiative  2017-2018 #50 (“Congressional  Redistricting”)</p> <p><b>Petitioners: Robert DuRay and Katina  Banks,</b></p> <p>v.</p> <p><b>Respondents: Kathleen Curry and Toni  Larson,</b></p> <p><b>and</b></p> <p><b>Title Board: Suzanne Staiert; Glenn  Roper; and Sharon Eubanks</b></p>	<p>DATE FILED: November 15, 2017 4:39 PM</p> <p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Petitioners:  Mark G. Grueskin, #14621  RECHT KORNFELD, P.C.  1600 Stout Street, Suite 1400  Denver, CO 80202  Phone: 303-573-1900  Facsimile: 303-446-9400  Email: <a href="mailto:mark@rklawpc.com">mark@rklawpc.com</a></p>	<p><b>Case No. 2017SA260</b></p>
<p><b>PETITIONERS’ OPENING BRIEF ON PROPOSED INITIATIVE  2017-2018 #50 (“CONGRESSIONAL REDISTRICTING”)</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:

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

Choose one:

It contains 2,383 words.

It does not exceed 30 pages.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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*

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Mark G. Grueskin

*Attorney for Petitioners*

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## STATEMENT OF ISSUES PRESENTED

Whether the Board erred by setting a title that fails to mention that political party insiders will appoint two-thirds of the new Congressional redistricting commission, when the Proponents have used the issue of political insider control of the redistricting process as a primary reason for the initiative itself, thus conceding that this issue is a “central feature” of the initiative.

## STATEMENT OF THE CASE

### **A. Statement of Facts.**

Initiative #50 takes the redistricting process currently allocated by law to the General Assembly, Colo. Const., art. V, §44, and assigns it to a new commission that is charged with drawing district lines for Colorado’s members of the U.S. House of Representatives. This ballot title, however, fails to inform voters that the political party control about which its sponsors complain bitterly is a central element of this initiative. Specifically, the measure directs the leadership of the state’s two largest political parties to appoint two-thirds of the commission that redraws the district lines for state senate and state house of representatives every ten years. Proposed C.R.S. §2-1-103(6), (6)(a).

The title mentions that their appointees are to be affiliated with these two parties but, unlike the existing legislative reapportionment commission for state legislative districts, the appointments under #50 will not be made by persons

elected by voters (in the case of legislative leadership and the governor) or appointed by constitutional officials (in the case of the chief justice of the Supreme Court) to positions of governmental authority and responsibility. Instead, the Proponents legitimize parties' political grab, all the while bemoaning the influence that parties allegedly exercise today.

**B. Nature of the Case, Course of Proceedings, and Disposition Below.**

Kathleen Curry and Toni Larson (hereafter "Proponents") proposed Initiative 2017-2018 #50 (the "Proposed Initiative"). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, the Proponents submitted final versions of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

A Title Board hearing was held on October 4, 2017, at which time a title was set for 2017-2018 #50. On October 11, 2017, Petitioners Robert DuRay and Katina Banks filed a Motion for Rehearing, alleging that #50 contained multiple subjects and the titles set were prejudicial, incomplete, and misleading and failed to reflect the complete intent of the Proponents and the central features of the Proposed Initiative. The rehearing was held on October 18, 2017, at which time the Title Board granted in part and denied in part the Motion for Rehearing.

The title, as revised by the Board, states:

Shall there be a change to the Colorado Revised Statutes concerning federal congressional redistricting, and, in connection therewith, establishing a congressional redistricting commission to perform the responsibility of the state legislature to redraw congressional boundaries following each federal census; specifying 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; establishing factors for the commission to use in drawing districts; requiring the commission to consider political competitiveness after all other factors; prohibiting drawing plans to purposefully advantage or disadvantage any political party or person; developing procedures to be followed by the commission, including requiring that the commission's work be done in public meetings and requiring nonpartisan staff of the commission to prepare and present plans; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; and specifying procedures for the finalization and approval of a plan?

On October 25, 2017, the Petitioners timely filed a petition for review before this Court pursuant to C.R.S. §1-40-107(2).

### **C. Summary**

The Title Board must set a fair title that informs voters of an initiative's central features. When the Proponents focus on a key element, such as getting politics out of redistricting, and then – in a unprecedented way – turn a key part of the process over to political party bosses, that fact should be related by the ballot title. Its omission was an error.

## **D. Legal Argument**

### **1. Standard of review; preservation of issue for appeal**

The Title Board is charged with setting a ballot title that “express the true intent and meaning” of a proposed initiative and “unambiguously state the principle of the provision sought to be added, amended, or repealed.” C.R.S. 1-40-106(3)(b). The title must be “fair, accurate, and **complete.**” *In re Title, Ballot Title, & Submission Clause for 2011–2012 No. 3*, 2012 CO 25, ¶ 8, 274 P.3d 562 (emphasis added). While the Court engages in all legitimate presumptions in favor of the Board’s decision, ballot titles that “contain a material and significant **omission**, misstatement, or misrepresentation” do not meet the statutory test above and must be returned to the Board for correction. *In re Title, Ballot Title & Submission Clause & Summary for 1997-98 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998) (emphasis added).

The matter at issue in this appeal was raised below and thus preserved for appeal. *See* Motion for Rehearing at 4-5.

### **2. The title fails to inform voters that a commission that is supposedly a response to political party control of redistricting is, in fact, controlled by the two major political parties.**

The ballot title fails to state that the representatives of the two largest political parties on the commission are appointed by the two parties themselves. Proposed C.R.S. §2-1-103(6), (6)(a) (appointees named by party chairpersons or



party leadership, depending on the authority provided in political parties' rules). In a measure that is billed as creating an "independent" commission, the fact that the Proponents have handed over a governmental function as important as redistricting to private entities – two political clubs called major political parties – is something voters would presumably need to know in evaluating the measure. Yet, the titles are silent on this key issue.

At least for Colorado's only district-drawing commission (the Reapportionment Commission that draws state legislative lines), the appointments are made by constitutional officers – members of the general assembly, the governor, and the chief justice. Colo. Const., art. V, §48(1)(b). All of these officers take oaths to uphold the Constitution of the United States and the Constitution of the State of Colorado. Further, all must act in a manner that is consistent with constitutional provisions or statutes that provide for ethical behavior in office and accountability for official acts. *See, e.g.*, Colo. Const., art. VI, §23(3)(d) (any "justice or judge of any court of record... may be removed or disciplined for willful misconduct in office... or violation of any canon of the Colorado code of judicial conduct); art. XXIX, §§2(1), 3(1) (ethical standards adjudicated before Independent Ethics Commission apply to members of the General Assembly and the Governor, as a "public officer"); C.R.S. §24-18-106 (rules of conduct for members of the general assembly); C.R.S. §24-18-108 (rules

of conduct for public officers and state employees); C.R.S. §24-18-112 (board of ethics for executive branch); C.R.S. §24-18-113 (board of ethics for the general assembly); C.R.S. §24-18.5-101(5) (authorizing Independent Ethics Commission against officials who act in their governmental capacity for private gain).

But political parties are answerable only to the political insiders that Proponents rail against in their measure. Ironically, the Proponents' website shows the mascots of the two major political parties – an elephant and a donkey – dividing up Colorado.<sup>1</sup> This is hardly the only way in which the Proponents themselves emphasize the centrality of political party involvement in their own redistricting process. They have painted their measure as a step that is divorced from the evils of political party involvement in the map-drawing process:

- “Our citizen initiatives take map drawing out of the hands of political insiders....”<sup>2</sup>
- “Our initiatives aim to end the practice of backroom dealing and shady politics where political operatives, in smoke-filled rooms, decide the outcome of elections before you even cast your ballot.”<sup>3</sup>

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<sup>1</sup> <http://fairdistrictscolorado.org/> (last viewed November 15, 2017) (attached hereto as Exhibit 1. The attached exhibit is also found as an exhibit to the Motion for Rehearing on Initiative 2017-2018 #50).

<sup>2</sup> <http://fairdistrictscolorado.org/the-problem/> (last viewed November 15, 2017) (attached hereto as Exhibit 1. The attached exhibit is also found as an exhibit to the Motion for Rehearing on Initiative 2017-2018 #50).

- “It’s time that Colorado communities, not politicians, draw their districts.”<sup>4</sup>
- “[P]oliticians and political appointees must be removed from the redistricting process....”<sup>5</sup>
- “Political parties or incumbents sometimes draw district lines for their own benefit at the expense of proportionality and fair representation.”<sup>6</sup>

How important is this information? The Proponents’ website actually depicts a character who, in response to the question, “What is gerrymandering?” says:<sup>7</sup>

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<sup>3</sup> See the attached Exhibit 1 and the Motion for Rehearing on Initiative 2017-2018 #50 at Exhibit 1, Page 5.

<sup>4</sup> See the attached Exhibit 1 and the Motion for Rehearing on Initiative 2017-2018 #50 at Exhibit 1, Page 1.

<sup>5</sup> <http://fairdistrictscolorado.org/the-solution/> (last viewed on November 15, 2017) (the language on the website currently reads, “[P]oliticians must be removed from the redistricting process.” Proponents have altered their terminology after these exhibits were shared with the Title Board by means of the Motion for Rehearing).

<sup>6</sup> See the attached Exhibit 1 and the Motion for Rehearing on Initiative 2017-2018 #50 at Exhibit 1, Page 7.

<sup>7</sup> See the attached Exhibit 1 and the Motion for Rehearing on Initiative 2017-2018 #50 at Exhibit 1, Page 3.



If that is not an acknowledgement that this topic area is not well understood and that voters and petition signers need more information about #50 – and specifically, who will be making the appointments to the commission, nothing could be. *See In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 281 (Colo. 2006) (Court reviewed initiative proponents’ website in order to determine the purposes of the proposed initiative).

Further, Proponents characterize redistricting as “weird and wonky.”<sup>8</sup> An under-descriptive ballot title does not address what Proponents admit is a topic that is not generally understood, meaning that an under-inclusive ballot title bears the very real possibility there will be voter misunderstanding of this initiative.

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<sup>8</sup> *See* <http://fairdistrictscolorado.org/> (last viewed November 15, 2017) (attached hereto as Exhibit 1. The attached exhibit is also found as an exhibit to the Motion for Rehearing on Initiative 2017-2018 #50).

At bare minimum, voters should know #50 allocates important authority to partisan insiders who, according to Proponents, are motivated to use their power (and presumably their roles as governmental appointing authorities) for political advantage. A ballot title is invalid where it is “so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶34 (Colo. 2016). This title lacks the necessary detail to highlight for voters that this measure embraces political parties as the appointing authority for the overwhelming proportion of the commission’s members.

Certainly, the Title Board has highlighted the role played by political parties in other ballot titles. In 2002, when the Board set a title for Amendment 27 dealing with campaign finance (now Article XXVIII of the Colorado Constitution), the title set stated:

An amendment to the Colorado constitution concerning campaign finance, and, in connection therewith, reducing the amount of campaign contributions that persons may make to candidate committees, political committees, and **political parties**; establishing contribution limits for small donor committees; prohibiting candidate committees and **political parties** from making or accepting certain contributions; restricting the amount of contributions **political parties** and political committees may accept from certain sources....

Legislative Council of the Colorado General Assembly, Research Pub. No. 502-2, *Analysis of Statewide Ballot Issues and Recommendation on Retention of Judges at*

33 (2002);<sup>9</sup> *see also In re Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 320 (Colo. 1994) (in challenge on other grounds, Court upheld title that referred four times political parties and the acts of or prohibitions that applied to them).

Thus, it was important for voters to know what political parties could do in terms of the political contributions they accepted and the political contributions they made. In the same manner, it is important that voters know what political parties would do under #50 in terms of making appointments of 2/3 of the supposedly apolitical commission.

The Proponents maintained below that it is enough that the voters are informed of the partisan affiliations of the appointed commissioners. In *Cook v. Baker*, 214 P.2d 787 (Colo. 1950), the Board considered a measure revising the state civil service system that provided, in part, for appointment of a commission.

There shall be a civil service commission of three members, **not more than two of whom shall be members of the same political party**, appointed by the governor with the consent of the senate for six year overlapping terms expiring January 31st of odd numbered years, and removable by the governor for cause.

*Id.* at 788 (emphasis added). The Board's overly inclusive ballot title did not include any reference to the partisan composition of the commission, but the Court found it lacked the brevity required by law. In reformulating the title, the Court

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<sup>9</sup> <http://hermes.cde.state.co.us/drupal/islandora/object/co:27119/datastream/OBJ/view> (last viewed on November 12, 2017).

tacitly agreed with the Board and excluded the partisan affiliations of the commission members, focusing instead on describing the appointing authority. The Court-mandated title stated, “An act to amend section 13 of article XII of the state Constitution, by providing for a state civil service, and a civil service commission **to be appointed by the governor** with the consent of the senate and removable by the governor for cause....” *Id.* at 791 (emphasis added). The identity of the person or persons *controlling the appointments* to this commission in #50, particularly since they are the very people against whom Proponents rail, is likewise more important than vaguely describing the parties to which they belong.

## CONCLUSION

For the reasons stated, this ballot title lacks a critical element of Initiative #50 – indeed, a provision that belies its evident mantra – and the Board should correct the title to reflect that fact.

Respectfully submitted this 15<sup>th</sup> day of November, 2017.

*/s Mark Grueskin*

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**ATTORNEY FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS’ OPENING BRIEF ON PROPOSED INITIATIVE 2017-2018 #50 (“CONGRESSIONAL REDISTRICTING”)** was sent the 15<sup>th</sup> day of November, via Colorado Courts E-Filing to counsel for the Title Board and to Counsel for the Respondents at:

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*/s Erin Holweger* \_\_\_\_\_



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## WHAT IS GERRYMANDERING?

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Our citizen initiatives take map drawing out of the hands of political insiders and shine a light on the redistricting process by creating a more open, public process. It also gives unaffiliated voters and non-major parties a real opportunity to engage, yielding far more competitive and common-sense districts.

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## What's wrong with the current system?

Redistricting is a fiercely contested issue, primarily due to gerrymandering. Political parties or incumbents sometimes draw district lines for their own benefit at the expense of proportionality and fair representation. Some argue that this practice contributes to the present lack of competitive elections. Uncompetitive elections can in turn discourage participation. Also, district lines sometimes minimize the influence of minority voters by disproportionately consolidating them within single districts or splitting them across several districts. In both the 2000 and 2010 redistricting cycles, divided state legislatures were unable to approve congressional redistricting plans, and as a result, final maps were drawn by state courts and not by a transparent process.

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## How will the Fair Districts Colorado initiatives fix the current system?

The Fair Districts Colorado initiatives will create new, independent commissions to redistrict both the state legislature and the U.S. Congress. Consisting of Republicans, Democrats and those unaffiliated with either major party, a supermajority vote will be required to prevent one party from hijacking the process. To minimize the "stuff the ballot box dynamic", by which both parties attempt to get their "Independents" on the commission, our initiatives use senior / recently retired judges to identify truly independent finalists. Fair Districts Colorado takes the district map-drawing from partisan political operatives and puts it in the hands of non-partisan staff to draw district boundaries. The commission's and its staff's business must be conducted in open, public meetings to ensure transparency (no more back-room deals and less partisan gamesmanship). Colorado law already recognizes several nationally-recognized good government criteria. We want to add competitiveness, once those other criteria are ensured.

