

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 #50

Petitioners: ROBERT DURAY and
KATINA BANKS,

v.

Respondents: KATHLEEN CURRY and
TONI LARSON,

and

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

▲ COURT USE ONLY ▲

ATTORNEYS FOR RESPONDENTS:
Kelley B. Duke, #35168
Benjamin J. Larson, #42540
IRELAND STAPLETON PRYOR & PASCOE, PC
717 17th Street, Suite 2800
Denver, Colorado 80202
Telephone: 303-623-2700
Facsimile: 303-623-2062
E-mail: kduke@irelandstapleton.com
blarson@irelandstapleton.com

Supreme Court Case No.:
2017SA260

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 1,794 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

TABLE OF CONTENTS

STATEMENT OF ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF CASE	1
I. Nature of the Case and Proceedings before the Title Board.	1
II. Statement of Relevant Facts.	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
The Titles Are Fair, Clear, Accurate, and Complete.....	5
A. Standard of Review.	5
B. The Titles Properly Balance Clarity and Brevity.....	6
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<i>In re Title, Ballot Title & Submission Clause for 1997-98 #62, 961 P.2d 1077</i> (Colo. 1998).....	6
<i>In re Title, Ballot Title & Submission Clause for 1999-2000 #29, 972 P.2d 257</i> (Colo. 1999).....	6
<i>In re Title, Ballot Title & Submission Clause for 2005-2006 #73, 135 P.3d 736</i> (Colo. 2006).....	6
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 #156, 375 P.3d 123</i> (Colo. 2006).....	5
<i>In re Title, Ballot Title & Submission Clause for 2013-2014 #89, 328 P.3d 172</i> (Colo. 2014).....	5, 6

Statutes

C.R.S. § 1-40-106	6
C.R.S. § 1-40-107	1, 2

Respondents Kathleen Curry and Toni Larson ("Proponents"), registered electors of the State of Colorado and the proponents of Initiative 2017-2018 #50 ("Initiative #50"), 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 #50.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board clearly erred in setting the Titles for Initiative #50 when the Titles state that the initiative changes the methods of appointment of the commission that redraws congressional 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 #50. Proponents filed Initiative #50 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 #50 contains a single subject and setting the Titles.

Petitioners Robert DuRay and Katina Banks ("Opponents") filed a motion for rehearing, contending that Initiative #50 contains more than one subject, in part, because it prohibits congresspersons and candidates for congress from sitting on the Independent Congressional Redistricting Commission (the "Commission"). *See R.*, pt. 2, pp. 29-30.¹ Opponents also argued that the Titles should be amended in two respects. *Id.* at pp. 30-32. 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 #50 contains a single subject.

II. Statement of Relevant Facts.

Initiative #50 amends the Colorado statutes addressing congressional redistricting in Colorado. As stated in proposed section 2-1-101, C.R.S., the central purpose of Initiative #50 is to end the practice of political gerrymandering in the congressional redistricting process. *See R.*, pt. 2, p. 6. Initiative #50 proposes to do so by establishing an independent commission to carry out the responsibility of the

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.

state legislature to redraw congressional boundaries. R., pt. 2, p. 8, proposed section 2-1-103, C.R.S. The Commission 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. 6, 8, proposed §§ 2-1-101, -103(3)(a)-(c), C.R.S.

The Commission utilizes nonpartisan legislative staff and fair criteria to divide the state into congressional districts that are not drawn to purposefully advantage or disadvantage any political party. *See* R., pt. 2, p. 7, proposed section 2-1-102(1)(a)(III), C.R.S. 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. 16, proposed section 2-1-104(9), C.R.S.

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

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.

See R., pt. 2, p. 25.

SUMMARY OF ARGUMENT

The Titles of Initiative #50 succinctly and fairly address Initiative #50's overhaul of the congressional redistricting process in Colorado. Because Initiative #50 creates a new process for congressional redistricting, the Titles cannot possibly include all of 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 Summary 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 #50's overhaul of the congressional redistricting process in Colorado. *See R.*, pt. 2, p. 25. The Titles inform voters that Initiative #50 establishes a new congressional

redistricting commission and specifies the method and process for appointing commissioners. *Id.* The Titles 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 #50 establishes a new process for congressional redistricting, 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.

However, the critical information for voters is that 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. 25. 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, p. 8, proposed section 2-1-103(7), C.R.S (describing process for appointment of 4 independent commissioners).

As drafted, the Titles inform voters that Initiative #50 establishes the method of appointment for the commissioners, 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 balanced 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 #50. However, it is not the Title Board's or this Court's role to judge the merits of Initiative #50. 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 sum, 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 #50.

Respectfully submitted this 15th day of November, 2017.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson

Kelley B. Duke, # 35168

Benjamin J. Larson, #42540

**ATTORNEYS FOR
PROPOSERS/RESPONDENTS**

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:

Mark G. Grueskin
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
mark@rklawpc.com
Attorneys for Petitioners

LeeAnn Morrill
Matthew Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Attorneys for Title Board

/s/ Hannah Pick

Hannah Pick