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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to §1-40-107(2), C.R.S. (2017)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #69 ("Congressional Redistricting")

Petitioners: ROBERT DURAY and KATINA BANKS,

v.

Respondents: BILL HOBBS and KATHLEEN CURRY,

and

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

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Supreme Court Case No.: 2017SA292

RESPONDENTS' ANSWER 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 3,402 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 Bill Hobbs and Kathleen Curry ("Proponents"), registered electors of the State of Colorado and the proponents of Initiative 2017-2018 #69 ("Initiative #69"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Answer Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #69 and in response to the Opening Brief submitted by Petitioners Robert DuRay and Katina Banks ("Opponents").

SUMMARY OF ARGUMENT[1]

In the face of sophisticated partisan gerrymandering that has become a scourge against our democracy, Initiative #69 proposes to establish an independent commission that draws fair and competitive congressional districts. Congressional redistricting is a distinct subject, and the provision of redistricting criteria to be used in drawing district lines is an essential piece of any congressional redistricting measure. Accordingly, this Court has already recognized that modifying redistricting criteria falls within the single subject of a redistricting measure.

Because the concept of establishing redistricting criteria in a redistricting measure is not controversial, Opponents rely on critical false premises as the sole

[1] Pursuant to C.A.R. 28(b), Proponents' Answer Brief omits the statement of the issues and statement of the case, not because Proponents agree with Opponents' recitation of such sections, but because they were addressed in Proponents' Opening Brief.

foundation for their single subject argument. First, Opponents characterize Initiative #69 as holding itself out as merely a procedural measure when Initiative #69 readily acknowledges its goal of ending political gerrymandering by, among other things, establishing fair criteria. Second, Opponents incorrectly contend that the inclusion of race and language group factors in the communities-of-interest criterion will "fundamentally alter" congressional representation in Colorado, even though those factors are already considered under both existing state and federal law. This argument also ignores the other redistricting criteria and contrary federal law in presuming without any support that Initiative #69 authorizes redistricting based solely on race. Third, Opponents insinuate that the pin citation to the United States Code somehow alters the protections afforded under the Voting Rights Act when Initiative #69 plainly requires adherence to the Voting Rights Act in its entirety and such adherence is independently required by federal law.

Opponents' reliance on these false premises highlights that their Opening Brief is nothing more than a misguided argument about the merits of Initiative #69. Under Colorado law, Initiatives cannot be held hostage to arguments about their merits or future application because these arguments are reserved for the campaign trail and are decided at the voting booth. Nevertheless, Opponents' opportunistic cries of "race-based districting" fall flat considering the brief submitted by *amicus*

curiae Campaign Legal Center ("CLC"), a nationally renowned nonprofit that fights against the disenfranchisement of minority voters resulting from partisan gerrymanders.[2]

In short, to hold that the Title Board clearly erred under these circumstances would stretch the limits of the single subject rule beyond reason and would undercut Coloradans' fundamental right of initiative. The single subject rule was never intended to force Colorado citizens to undertake the impossible task of passing several piecemeal measures in order to achieve such a discrete and worthy goal of ending partisan gerrymandering of congressional districts. The Court should deny the Petition and affirm the Title Board's setting of the Titles for Initiative #69.

ARGUMENT

Initiative #69 Contains a Single Subject.

A. Standard of Review/Preservation.

Opponents' recitation of the standard of review omits statements of law reflecting the appropriate deference owed to the Title Board in setting titles. Proponents believe the standard of review is more accurately and completely set forth in their Opening Brief.

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[2] *See* http://www.campaignlegalcenter.org/issues/280 (outlining CLC's redistricting mission).

Proponents agree that the first issue presented by Opponents in their Opening Brief was preserved for appeal. With respect to their second issue concerning the pin citation to the Voting Rights Act, Opponents did not raise this issue in their Motion for Rehearing, and therefore Proponents question whether they have properly preserved the issue for appeal. Opps.' Opening Br. at 6 (citing only to transcript of the hearing, not to the Motion for Rehearing); *see* § 1-40-107, C.R.S. (giving appellate rights to those filing or supporting a motion for rehearing).

B. Initiative #69's Provisions Establishing Redistricting Criteria Do Not Constitute a Second Subject.

In *In re 2015-2016 #132/#133*, this Court drew the single-subject blueprint for initiatives that separately address state legislative and congressional redistricting. In doing so, the Court expressly recognized that a redistricting initiative can properly provide the criteria to be used in drawing district lines. *In re Title, Ballot Title, and Submission Clause for 2015-2016 #132/#133*, 374 P.3d 460, 466 (Colo. 2016). Opponents' Opening Brief ignores the Court's statements altogether, and instead holds fast to the position that modifying the existing communities of interest criterion and requiring adherence to the Voting Rights Act of 1965 ("Voting Rights Act") constitutes a second subject. As squarely addressed in Proponents' Opening Brief, these arguments fail because they are rooted in three false premises, each of which will be addressed in turn.

1. Initiative #69 Does Not Hold Itself Out as Merely a Procedural Measure.

Opponents mischaracterize Initiative #69 as holding itself out as merely a procedural measure, and therefore contend that Initiative #69 should be limited only to addressing redistricting procedures. Opps.' Opening Br. at 6-8. Opponents are forced to make this argument in light of *In re 2015-2016 #132/#133*, where the Court expressly recognized that a redistricting measure can address both procedural aspects of redistricting, in addition to substantive aspects such as redistricting criteria and the political composition of the Independent Congressional Redistricting Commission (the "Commission"). *In re 2015-2016 #132/#133*, 374 P.3d at 466.

In mischaracterizing Initiative #69 as holding itself out as procedural, Opponents ignore the plain language of the measure, including the legislative declaration, which, as outlined in Proponents' Opening Brief, trumpets the measure's purpose of ending political gerrymandering by, among other things, establishing an independent commission to draw districts using fair criteria. *See* Props.' Opening Br. at 11-12 (quoting legislative declaration). Opponents also ignore other substantive aspects of the measure that neither Opponents, nor this Court, has ever taken issue with. For example, Opponents' Opening Brief fails to acknowledge that Initiative #69 (and all of its previous iterations) establish other

redistricting criteria, including prohibiting the partisan gerrymandering of districts and requiring the Commission to maximize political competitiveness to the extent possible. *See* R., p. 3, proposed § 2-1-102, C.R.S. Opponents refuse to acknowledge these other substantive aspects of Initiative #69 because doing so would reveal Opponents' argument for what it is—an attack against the merits of the specific criteria at issue. Nevertheless, Opponents' attack on the merits of Initiative #69 is disingenuous considering they did not object to the exact same criteria as presented in 2017-2018 #48 and #50.

In ignoring the plain language of Initiative #69 that evince its substantive nature, Opponents make several statements that defy logic. For example, Opponents contend that Initiative #69 tries to "overshadow a major substantive change" and that changes to redistricting criteria "are so hidden as to surprise voters." Opps.' Opening Br. at 4, 10. However, the legislative declaration is by no means hidden—it leads off the measure. Of course, Initiative #69 also reflects the changes to the redistricting criteria, which are in the first substantive section of the measure, in ALL-CAPS. R., pt. 1, p. 3, proposed § 2-1-102, C.R.S.

Opponents bolster their hollow procedural arguments by incorrectly contending that legislative staff and the Title Board "missed these issues" that were hiding in plain sight. Opps.' Opening Br. at 4. This statement is not supported

anywhere in the record. Rather, the Title Board explained that it simply did not believe the changes to the communities-of-interest criterion were of any significant consequence. Opps.' Opening Br., Ex. 1, Tr. 25:21-26:10 (explaining that addition of race and language group factors was not a "major shift" because these factors are already considered in the communities-of-interest criterion).

Because Opponents' underlying premise that Initiative #69 masks itself as procedural measure is false, the cases cited by Opponents are inapposite. Opps.' Opening Br. at 7, 9-10 (citing *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43 and 45*, 46 P.3d 438 (Colo. 2002)). In *2001-02 #43 and #45*, there was no disputing that the purported central focus of the measures was liberalizing petitioning procedures, yet the measures addressed substantive initiative rights in obscure provisions. For example, the measures contained a substantive provision that, while not expressly saying so, effectively barred the wholesale repeal of TABOR. *Id.* at 447. The Court reasoned that this substantive provision limiting citizen initiative rights was wholly unrelated to, and in fact directly at odds with, the central purpose of liberalizing initiative procedures. *Id.* Consequently, the measures were the "epitome of surreptitious." *Id.*

Here, the differences are stark. First, voters will not be surprised that Initiative #69 addresses redistricting criteria because Initiative #69 expressly recognizes its central purpose of ending political gerrymandering by implementing fair criteria. Moreover, Initiative #69, which addresses a topic as narrow as the decennial redrawing of district lines for only congressional districts, cannot reasonably be compared to omnibus measures with generic, overarching themes such as "water" or "petitioners' rights". *2001-02 #43 and #45*, 46 P.3d at 442-43 (citing *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076 (Colo. 1995)). Regardless, the criteria at issue—adding race and language group to the communities-of-interest criterion and recognizing the application of the Voting Rights Act—are directly related to the central purpose of ending political gerrymandering because these criteria guard against the dilution of minority groups for political gain. Accordingly, *2001-02 #43 and #45* bears no resemblance to the facts here.

In sum, the Court should reject Opponents' false premise that Initiative #69 holds itself out as merely a procedural measure and should deny the Petition.

2. Including Race and Language Group Factors in the Communities-of-Interest Criterion Will Not Fundamentally Alter How Congressional Districts Are Drawn.

In their Opening Brief, Opponents wildly speculate that future map drawers will apply only the race and language group factors in the communities-of-interest criterion and ignore all other redistricting criteria in violation of both the Colorado and United States Constitutions in order to "use race alone to decide how districts are drawn." Opps.' Opening Br. at 13. As an initial matter, this argument, which concerns Opponents' unfounded beliefs about how the redistricting criteria will be applied by map drawers in the future, goes straight to the merits and future application of Initiative #69 and must be rejected. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014).

To the extent that Opponents also incorrectly insinuate that it is unconstitutional to consider race and language groups in preserving communities of interest, this argument must be rejected because issues of constitutionality are irrelevant to the single subject inquiry. *In re Title, Ballot Title & Submission Clause for 1997-98 #10*, 943 P.2d 897, 901 (Colo. 1997) ("Any problems in the interpretation of the measure or its constitutionality are beyond the functions assigned to the title board.").

In addition to these threshold legal deficiencies with Opponents' argument, the underlying premise that Initiative #69 will fundamentally change how districts are drawn in violation of the U.S. Constitution is false. First, as set forth in detail in CLC's and Proponents' opening briefs, race and language groups are already considered in drawing district lines both under federal law pursuant to the Voting Rights Act and under state law pursuant to the existing ethnicity and demographic factors in the communities-of-interest criterion. CLC's Br. at 11-15; Props.' Opening Br. at 12-14. Initiative #69 merely takes the affirmative step of expressly codifying the consideration of these factors, along with several other existing factors, in preserving communities of interest.

Suzanne Staiert, the chair of the Title Board and its representative from the Colorado Secretary of State's Office, had no problem recognizing this deficiency in Opponents' argument. At the rehearing, she stated as follows:

> I don't view [the addition of race and language group factors] as a major change, and to the extent that I suppose we did, I don't know that that would affect the single subject. I think we already redistrict according to communities of interest, and we consider ethnicity, and this might be a little bit different. But the fact of the matter is that we list by district in the redistricting ethnicity/race, and then we say how many people fall into that when we do redistricting on our current maps. So I just don't see it as a major shift. But, again, even if it was, I think that that's an issue for the campaign and the voters.

Opps.' Opening Br., Ex. 1, Tr. 25:21-26:9.

Second, because Opponents cannot deny that race is already a necessary consideration in complying with existing redistricting laws, they make the baseless assertion that adding race as one of many factors in communities-of-interest criterion somehow authorizes map drawers to rely solely on race. Opps.' Opening Br. at 13. This argument is meritless. As recognized by CLC, the argument demonstrates "a fundamental misunderstanding of the racial-gerrymandering doctrine" because it ignores that Initiative #69 includes race as "one of many factors considered in future Colorado redistricting." CLC's Br. at 16.

In fact, Opponents' argument presumes that future map drawers will break the law and ignore several mandatory criteria, including equal population, compactness, contiguity, county and municipal integrity, consideration of other community-of-interest factors, and the prohibition against partisan advantage. *See* R., p. 3, proposed § 2-1-102, C.R.S. Perhaps most perplexing, Opponents' argument presumes that map drawers will also violate the Federal Voting Rights Act, the application of which is expressly recognized in the measure itself. *See* R., p. 3, proposed § 2-1-102(a)(II), C.R.S.

Moreover, if Opponents' logic were applied to the existing communities-of-interest criterion, the conclusion would be that Colorado law currently authorizes map drawers to draw district lines based solely on ethnicity simply because

ethnicity is one of the many existing communities-of-interest factors. Of course, this is not true from either a legal or practical perspective, as map drawers must adhere to other existing factors in the communities-of-interest criterion and to other separate criteria. *See, e.g.*, *Hall v. Moreno*, 270 P.3d 961, 969-970 (Colo. 2012) (discussing application of redistricting criteria).

Because nothing in Initiative #69 authorizes map drawers to redistrict based solely or predominantly on race, the authorities cited by Opponents are inapposite. Opps.' Opening Br. at 12-14 (addressing cases where maps were drawn based predominantly on race) (citing *Shaw v. Reno*, 509 U.S. 630 (1993); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006)).

Opponents' citation to the *Perry* case is particularly off-base. There, the U.S. Supreme Court found a Section 2 Violation under the Voting Rights Act because Texas cracked and diluted a Latino population in order to preserve the seat of a Republican congressman. 548 U.S. at 423-24, 442. This is precisely the type of political gerrymandering that Initiative #69 is designed to prevent by barring political gerrymanders outright and by including race and language group in the considerations for preserving communities of interest. The specific language Opponents quote from *Perry* merely stands for the proposition that race cannot be

the sole redistricting consideration, particularly at the expense of compactness in combining two far-flung minority groups into one district to purportedly offset the cracking of a compact minority population elsewhere. Opps.' Opening Br. at 11. This quote further demonstrates the wisdom of Initiative #69, which demands the application of various criteria, including compactness.

In short, the Court should reject Opponents' argument as to the alleged impacts and merits of Initiative #69's redistricting criteria because such arguments are not only irrelevant to the single subject inquiry, but also wrong.

3. The Pin Citation to the Voting Rights Act Does Nothing to Impact the Act's Applicability.

Opponents' final argument is based on the false premise that Initiative #69's pin citation to the initial section of the Voting Rights Act, rather than to what is referred to as "Section 2," alters "the prioritization of legal protections." Opps.' Opening Br. at 15. As an initial matter, Opponents incorrectly contend that 52 U.S.C. § 10101 does not comprise part of the Voting Rights Act. Opps.' Opening Br. at 16. While section 10101 originated in the Civil Rights Act of 1957 (not the 1960 Act as Opponents contend), that section was amended as part of the Voting

Rights Act of 1965 and was codified as amended at 42 U.S.C. § 1971, and then subsequently editorially reclassified at 52 U.S.C. § 10101.[3]

Section 10101 commences "Subtitle I—Voting Rights." Therefore, the Voting Rights Act of 1965 is commonly referred to, in law and in literature, as 52 U.S.C. § 10101 *et seq.* *See, e.g.*, § 1-7-1003, C.R.S. (referencing the "federal 'Voting Rights Act of 1965', 52 U.S.C. sec. 10101 *et seq*."); Eric Kades, *Giving Credit Where Credit Is Due: Reducing Inequality with A Progressive State Tax Credit*, 77 La. L. Rev. 359, 415, n.219 (2016) (citing the "Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 52 U.S.C. § 10101 *et seq*.)").

Nevertheless, the bigger problem with Opponents' argument is that the pin citation does nothing to alter the "prioritization of legal protections" under the Voting Rights Act, as Opponents amorphously contend. Conspicuously absent from their Opening Brief is any explanation as to how the pin citation actually alters substantive rights. Opponents cannot provide such an explanation because the plain language of Initiative #69 requires compliance with the Voting Rights Act in its entirety, regardless of what the pin citation says. R., p. 3, proposed § 2-1-102(a)(II), C.R.S. ("[T]he independent congressional redistricting commission

[3] *See* legislative history, *available at*:

http://uscode.house.gov/view.xhtml?path=/prelim@title52/subtitle1&edition=prelim

shall comply with the federal 'Voting Rights Act of 1965', in particular 52 U.S.C. sec. 10101.").[4]

In trying to make something out of nothing, Opponents inaccurately characterize the Title Board's treatment of this issue. Opps.' Opening Br. at 21 (stating that the Title Board "refused to address the [pin cite] issue" in finding that the "Voting Rights Act could apply") (emphasis added). To the contrary, the Title Board squarely addressed the issue and rejected Opponents' argument. The Title Board reasoned that the accuracy of the pin citation was a moot point because the entire Voting Rights Act does apply pursuant to the plain language of the measure. Opps.' Opening Br., Ex. 1, Tr. 27:15-19 (Sharon Eubanks rejecting Opponents' motion and remarking, "I think the language of the measure is clear that the Commission would be required to comply with the federal Voting Rights Act of 1965, and we don't need to make a change to the text of the measure.")

Perhaps most importantly, however, compliance with the Voting Rights Act is required regardless of what Initiative #69 says, and therefore nothing in Initiative #69 alters the protections afforded by the Voting Rights Act. Section 2 of the

[4] Proponents also made this intent clear on the record, and therefore the fact that the Voting Rights Act applies in its entirety is part of the measure's legislative history. Opps.' Opening Br., Ex. 1, Tr. 24:12-16 (Bill Hobbs stating, "[W]e do intend to require compliance with the Voting Rights Act, which is the substance of that provision.").

Voting Rights Act at 52 U.S.C. § 10301 applies whether it is reflected in the pin citation or not. *Hall*, 270 P.3d at 969 (recognizing that the requirement to comply with Voting Rights Act exists independent of Colorado law).

Moreover, while Opponents' argument is vague on this point, to the extent they contend that the "in particular" language preceding the pin citation acts to heighten the protections of the Voting Rights Act, they are misguided. As the *Moreno* court recognized, the existing congressional redistricting statute, which codifies compliance with the Voting Rights Act and includes the same "in particular" language before the pin citation to Section 2, requires compliance with the Voting Rights Act and nothing more. *See* 270 P.3d at 969-70 (listing criterion as "compliance with the Voting Rights Act") (citing §§ 2-1-102(1)(a)(I)-(II), C.R.S.) Because the pin citation to the Voting Rights Act is of no consequence, the Court should reject Opponents' attempt to torpedo the measure on what is the epitome of a non-issue.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's setting of the Titles for Initiative #69.

Respectfully submitted this 24th day of January, 2018.

IRELAND STAPLETON PRYOR & PASCOE, PC

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January, 2018, a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was duly filed with the Court and served via CCEF upon the following:

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