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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) 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**	▲ COURT USE ONLY ▲
Attorney for Petitioner: 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: mark@rklawpc.com	**Case No. 2017SA292**
PETITIONERS' OPENING BRIEF	

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 _____ 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
Mark G. Grueskin
Attorney for Petitioners

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STATEMENT OF THE ISSUES

Whether Initiative #69, which creates many new procedures concerning congressional redistricting, violates the single subject requirement for ballot initiatives by authorizing – as a substantive matter and for the first time – "communities of interest" based on voters' race or language group, changes that will fundamentally alter the purpose of congressional representation in Colorado.

Whether, in light of the Proponents' undisputed drafting error, Initiative #69 violates the single subject requirement by focusing redistricting protections to be afforded to minority voters on matters that are unrelated to the drawing of district lines – such as their right to register to vote, access polling places, and cast ballots.

STATEMENT OF THE CASE

A. Statement of facts.

Initiative #69 is an initiative that seeks to revise the manner in which congressional districts are drawn. Initiative #69 transfers redistricting from the General Assembly to an appointed commission, provides for a public hearing process, sets forth the process for nonpartisan staff to draw, and the commission to adopt, maps, and provides for judicial review of the adopted map or, if there is not agreement as to a map, sets forth how to involve the Supreme Court in advancing the mapping process.

Initiative #69 also included, for the first time in Colorado's history of drawing districts at any level, racial and language group "communities of interest" as a consideration in drawing congressional districts. This change was an intentional change to the transfer of redistricting power.

In contrast, Initiative #69 also redirected the protections to be afforded to minority communities but did so by means of a typographical error. Instead of including a statutory reference to Section 2 of the Voting Rights Act, 52 U.S.C. §10301, the Proponents directed the commission and its staff (and by inference, the Supreme Court) to require compliance with the Act, "in particular ~~42 U.S.C. sec. 1973~~ 52 U.S.C. sec. 10101." Proposed C.R.S. §2-1-102(1)(a)(II).

The problem is, 52 U.S.C. §10101 is the citation to a key section of the Civil Rights Act of 1960, not the Voting Rights Act of 1965. Further, that section of the Civil Rights Act protects minority access to the process of casting ballots rather than guarding against vote dilution as the Voting Rights Act does. Thus, the Proponents changed the law in a way they did not anticipate, making it all the more likely that voters would be unknowing in adopting such a change too.

B. Statement of the Case, Course of Proceedings, and Disposition Below.

Kathleen Curry and Bill Hobbs (hereafter "Proponents") proposed Initiative 2017-2018 #69 (hereafter "#69"). A review and comment hearing was held before

representatives of the Offices of Legislative Council and Legal Services. Thereafter, the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for the Title Board.

A Title Board hearing was held on November 20, 2017 to establish the Proposed Initiative's single subject and set a title. On November 27, 2017, Petitioner filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title. The rehearing was held on December 6, 2017, at which time the Title Board denied the Motion for Rehearing. The Board's title states:

> *Shall there be a change to the Colorado Revised Statutes concerning 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 2 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 redistricting plans to purposefully advantage or disadvantage any political party or person; specifying procedures that the commission must follow, including requiring the commission's work be done in public meetings and requiring the commission's nonpartisan staff to prepare and present plans; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission, and additionally requiring the affirmative vote of at least 2 commissioners not affiliated with either of the state's 2 largest parties to approve or adopt a redistricting plan?*

SUMMARY

Initiative #69 contains at least three subjects: (1) creating a redistricting commission and related procedures for setting congressional districts; (2) legalizing two "communities of interest" that would explicitly authorize race-based districting and a similar category, language group, that does not speak to the affected voters' policy concerns; and (3) altering – and weakening – the principal focus of legal protection to be applied by the commission and this Court.

The subtlety of the community of interest changes in #69 highlights why they raise the concerns at the heart of the single subject requirement. They are so hidden as to surprise voters – in the same manner as legislative staff and the Title Board who missed these issues altogether. They will be held out to minority groups as an enticement to gain their support, as Proponents insist that they were included to "protect" members of such groups. Thus, both evils to be addressed by the single subject requirement are present here.

As to the second single subject issue raised, this case poses a matter of first impression. If Proponents are surprised by an element contained in their proposal, won't the same necessarily be true of voters? If so, Proponents' typographical error, focusing the type of protections to be afforded by the commission and this Court, is just such a surreptitious legal aspect of #69. Thus, it is a separate subject.

LEGAL ARGUMENT

A. Standard of review; preservation of issue for appeal.

The Court gives the Title Board's decision all legitimate presumptions in favor of the propriety of its actions, but it will overturn the Board anytime it has clearly erred. *In re Title, Ballot Title & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶8, 333 P.3d 76. The matters in an initiative must be necessarily and properly connected rather than disconnected or incongruous. *In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶15, 374 P.3d 460. However, the fact that provisions in a measure share a "common characteristic" is not enough to convert untethered amendments into a single subject. *In re Title, Ballot Title & Submission Clause and Summary for Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 2002).

The review of a title is not based on the merits of the proposed initiative and does not focus on how an initiative might be applied if enacted, but the Board and this Court must examine the measure's wording to determine if the title complies with constitutional and statutory provisions governing title setting. *Id*. at ¶11. This review considers the single subject requirement's two purposes: (1) to ensure that measures pass based on the arguments for and against the single subject itself; and (2) to prevent voters from being surprised that they inadvertently adopted a

measure that had been hidden in a complex measure. *Id*. at ¶¶13-14. In construing an initiative for this limited purpose, the Court uses usual rules of statutory construction, including the requirement that terms be given their plain meaning. *In re Title, Ballot Title 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

The issues raised in this appeal were preserved below. Motion for Rehearing at 4-6 (#69's change to communities of interest to be represented by legislators); Dec. 6, 2017 Transcript of Rehearing before Title Board (hereafter "Tr.") at 6:16-9:2 (#69's redirection of minority group protections, focused on Civil Rights Acts rather than Voting Rights Act) (attached hereto as Exhibit 1); *see* 3:14-17 and 28:12-14 (incorporating as to #69 arguments made on Initiative #67).

B. The first subject of Initiative #69 is a new procedure for redistricting.

Initiative #69 addresses multiple procedures that relate to the redistricting process. Among its various provisions, it:

- establishes the redistricting commission, Proposed C.R.S. §2-1-103(1);
- establishes the processes for appointing commissioners, Proposed C.R.S. §2-1-103(2)-(8);
- provides the commission rule making process, Proposed C.R.S. §2-1-104(5);

- requires certain public access to commission proceedings, Proposed C.R.S.§2-1-104(6), (7);
- establishes the super-majority requirement for commission action, including the required partisan make-up of a super-majority, Proposed C.R.S. §2-1-104(9);
- addresses how and when maps can be drawn by staff, Proposed C.R.S. §2-1-105(1), (5);
- establishes the public hearing schedule required before a map may be approved, Proposed C.R.S. §2-1-105(2)-(4);
- provides for judicial review of district boundaries, Proposed C.R.S. §2-1-105 (7); and
- sets a default mechanism for triggering judicial review if there is no super-majority approving a map, Proposed Proposed C.R.S. §2-1-105(8).

In many ways, the issues presented in this appeal reflect the same type of structural changes the Court found to violate the single subject requirement in *In re Proposed Initiatives 2001-2002 #43 and #45*, 46 P.3d 438 (Colo. 2002) (hereafter "*In re #43 and #45*"). Initiatives #43 and #45, like their predecessor measures from an earlier election cycle, sought to "establish[] a battery of procedures" –

there, to change the process by which citizens could exercise the right to petition proposed laws and amendments onto the ballot. *In re #43 and #45*, 46 P.3d at 444, citing *In re Proposed Initiative Petitions*, 907 P.2d 586, 590 (Colo. 1995). Even an exhaustive "battery of procedures" comprised a single subject. *Id.*

If the Proponents were only setting up the procedures for redistricting through a commission, the same could be said of their measure. By Proponents' own admission, however, Initiative #69 is not a procedural change. In fact, Proponents informed the Board that their initiative addresses "a laundry list of things beyond procedural" changes to redistricting. Tr. at 17:21-22.

Proponents maintain they "have never taken the position that this measure is simply procedural." *Id*. at 17:22-23. They do not dispute, then, that their measure revamps both the redistricting process and substantive law and protections.

C. The second subject of Initiative #69 is authorization for district setting by "communities of interest" relating solely to race or language group.

Initiative #69 does not relate solely to procedures of redistricting. It makes what seems, at first reading, to be an innocuous change by amending the language that specifies eligible communities of interest as follows:

> The preservation of communities of interest, including RACIAL, ethnic, LANGUAGE GROUP, cultural, economic, trade area, geographic, and demographic factors….

Proposed C.R.S. §2-1-102(1)(b)(II).

In doing so, however, Initiative #69 also reflects the measures considered in *In re #43 and #45*. Where the proposals in that case subtly switched their focus to alter the substantive rights of voters, they violated the single subject requirement. In addition to the procedures around petitioning, these two initiatives modified "the **content** of initiatives and referendums by eliminating the single-subject requirement." *Id.* (emphasis in original). This change was not a matter of "mere implementation or enforcement" but instead was a "distinct substantive provision[]." *Id.* at 445.

The change to the substantive rights of voters transcended the changes to the mere processes under which initiative and referendum rights were to be used. "The procedural measures govern **how** a proponent exercises his right to petition. The single-subject requirement, in contrast, controls **what** an initiative placed on the ballot may contain." *Id.* at 446 (emphasis in original). The substantive change to the single subject requirement was a material revision of a then-existing right. "The elimination of this (single subject) requirement, therefore, **fundamentally alters the permissible scope** of measures placed before the voters for their approval or rejection." *Id.* (emphasis added).

Using a procedural restructuring to overshadow a major substantive change of rights or functions is exactly what the single subject requirement was intended

to prevent. The "danger associated with omnibus initiatives is the voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Id.* at 442, citing C.R.S. §1-40-106.5(1)(e)(II) and *In re #30, supra*, 959 P.2d at 825 (noting the single subject requirement sought to obviate the risk of "uninformed voting caused by items concealed within a lengthy or complex proposal"). As to petitions, the Court found the measure would likely be considered by voters as one "purporting to deal with procedural aspects of the right to petition" that, in fact, also "drastically altered the substance of measures on the ballot." 46 P.3d at 446. The change to substantive law, in addition to the panoply of changes to the petition process, offended a key concern at the heart of the single subject mandate.

As noted above, Initiative #69's Proponents admit it is a "laundry list" of substantive changes, one item on that list being the use of racial/language group communities of interest to determine the basis for congressional representation. This change is a marked departure from existing law. For instance, in 2011, when presented with a map that aligned Hispanics in southern (Pueblo and San Luis Valley) and north-central Colorado (Morgan and Weld Counties), the district court refused to link towns and counties based primarily on the race of many of their inhabitants. "[T]he court found that race was the predominant consideration in the

drawing of the… maps, creating a significant concern as to the constitutionality of the maps." *Hall v. Moreno*. 2012 CO 14 ¶25, citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("[A]ll laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized").

In other words, the setting of district boundaries cannot now – without the change contemplated by Proponents – be based on the assumption that a group's race (Caucasian or African-American or Hispanic) or its primary language (English or Spanish or Vietnamese) reflects a common, shared legislative agenda. A focus on racial (or language group) communities of interest runs leadlong into the underpinnings of fair and effective representation. "The recognition of **nonracial communities of interest** reflects the principle that a **State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates** at the polls.'" *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433 (2006) (citations omitted) (emphasis added). Thus, racial communities of interest are unauthorized precisely because they presume that race is a reasonable way of grouping citizens, rather than looking to their shared policy concerns or needs.

Further, Initiative #69 expressly purports to put an end to gerrymandering. "[P]olitical gerrymandering, whereby legislative districts are purposefully drawn to favor one political party or incumbent politician over another, or to accomplish political goals, must end." Proposed C.R.S. §2-1-101(1). The measure asserts that the public has an interest "in prohibiting political gerrymandering." Proposed Colo. Const., Proposed C.R.S. §2-1-105(2).

Yet, by authorizing racial and language group communities of interest, the measure embraces "the racial gerrymander – 'the deliberate and arbitrary distortion of district boundaries… for [racial] purposes.'" *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (citations omitted). It thus authorizes the very practice that it purports to prohibit – the practice of gerrymandering district lines. Yet, this inconsistency is obscured by the shiny object of a new commission and its procedures.

And it is no argument that the drawing of districts according to racial considerations will co-exist with non-racial considerations. "The racial predominance inquiry concerns the actual considerations that provided the essential basis for the lines drawn, not *post hoc* justifications the legislature in theory could have used but in reality did not." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 799 (2017). Nothing in #69 requires a district to be drawn to meet the needs of multiple communities of interest or even non-racial as

well as racial communities of interest. The measure thus authorizes the use of race alone to decide how districts are drawn.

Proponents insist that this form of gerrymandering is "to protect" members of racial minorities. Tr. at 18:16. Racial gerrymandering is still racial gerrymandering, even when done "for remedial purposes." *Shaw, supra*, 509 U.S. at 657.

This is not, despite what Proponents may suggest, an argument about #69's merits. This change to the resulting legislative representation is clearly a single subject violation. For example, where a measure created a tax on beverage containers and also altered legislators' authority by means of "a prohibition on the General Assembly's constitutional legislative powers afforded under article V of the Colorado Constitution" over entities to be funded with the tax proceeds, the Court held that the measure could not go forward. *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1080 (Colo. 2010). The initiative's change to legislative capacity sought to "deprive the legislators [that voters] elect from exercising any authority" as to the specified government entities and thus prevented them from fully representing their electorate. *Id.* at 1079. The combination of topics was a "subterfuge [that] is precisely what the constitutional prohibition against multiple subjects was designed to prevent." *Id.*

In the same manner, "reapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race," *Shaw*, *supra*, 509 U.S. at 650, changes the representation of districts in Congress. A change to the formatting of the legislative branch of government, through a race-based justification for district boundaries, is a major change in how, or whether, legislators will represent all voters in their districts.

> When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Id. at 648. Such districting is therefore directly related to the effectiveness of legislative representation.

Proponents' attempt to embed racial and language group communities of interest in our Constitution is unrelated to the details of a redistricting procedural overhaul. As such, it is a second subject. *See In re #76, supra*, 2014 CO 52, ¶¶33-34 (initiative that revised election-related procedures for recall of elected officials included a second subject by authorizing recall petitions to force the firing of appointed officials and government employees). The Title Board fails to achieve its mission where it grants a title for a measure containing a key element that is

"concealed." *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257, 261 (Colo. 1999).

This particular element was sufficiently concealed that it evaded any review or mention by the legislative staff when it conducted its review and comment hearing on #69. The same is true for the Title Board's review when the Board set the title in the first instance. Given these professionals' oversights, voters cannot be expected to discover and appreciate the change that is being made to a central basis for redistricting and thus legislative representation. The Board's single subject determination must therefore be reversed.

D. The third subject of Initiative #69 is the redirection of the protection against vote dilution in the redistricting process to a separate statute's protection of the right to vote.

The initiative purports to embrace the protections of existing federal law that relate to redistricting but, due to a typographical error by Proponents, directs the courts to focus on an unrelated statute. Thus, for the first time, the Court must decide whether the prioritization of legal protections, if misstated by Proponents in their final initiative text, comprises a subject that is hidden from voters. Put slightly differently, if Proponents were surprised to learn that they set an emphasis on a manner of legal construction of their initiative that does not apply to

redistricting at all, will voters also be surprised to find that they have changed the way in which minority voters are protected too?

The initiative states districts shall:

> ~~Compliance~~ COMPLY with the federal "Voting Rights Act of 1965", **in particular** ~~42 U.S.C. sec. 1973~~ **52 U.S.C. sec. 10101.**

Proposed C.R.S. §2-1-102(1)(a)(II) (emphasis added). Section 2 of the Voting Rights Act was codified, as reflected here, at 42 U.S.C. §1973.

As addressed at the rehearing on this ballot title, 52 U.S.C. §10101 is a provision in the Civil Rights Act of 1960 ("CRA") rather than the Voting Rights Act of 1965 ("VRA"). Tr. at 7:8-8:17. It protects access to the polls that might otherwise be blocked based on a person's race.

> [T]he CRA of 1960, 42 U.S.C. §1971 has been further amended and re-codified at 52 U.S.C. §10101…. The statute in its current form addresses racial discrimination by providing that "[a]ll citizens of the United States . . . shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude."

Jimenez v. Junius Real Estate, 2017 U.S. Dist. LEXIS 87504 at *13 (S.D.N.Y. June 17, 2017), citing 52 U.S.C. § 10101(a)(1). The CRA thus addresses deprivations of the right to vote due to acts of election officials in denying access to the polls or setting arbitrary conditions on the right to register to vote. *Louisiana v. United States*, 380 U.S. 145, 153 (1965).

The VRA provides an entirely different form of election related protection. *See Duncan v. La. State*, 2016 U.S. Dist. LEXIS 49705 at *14 n.8 (E.D. La., April 1, 3, 2016) (explaining nature of different forms of discrimination addressed by CRA and VRA). The VRA protects against the setting of districts in a way that dilutes the aggregated voting power of minority groups. *See Beauprez v. Avalos*, 42 P.3d 642, 649 (Colo. 2002), citing 42 U.S.C. §1973 (predecessor statute). The cited section of the VRA has since been re-codified at 52 U.S.C. §10301 and is applied to prevent a legislature's race-based redistricting. *See Berry v. Kander*, 191 F. Supp. 3d 982, 986-87 (E.D. Mo. 2016), citing *Miller v. Johnson*, 515 U.S. 900, 911, 916 (1995) (to establish violation VRA – what is now 52 U.S.C. §10301, plaintiff must show "that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district").

By directing the specific attention of, among others, the newly created commission and the Supreme Court to the CRA ("in particular 52 U.S.C. sec. 10101"), the Proponents have included a surreptitious element in their measure that most voters will not be able to identify or understand. The "in particular" language is a form of definition of the main focus to be given to the amendment in its implementation. A definition can, by itself, violate the single subject requirement.

In re #43 and #45, supra, 46 P.3d at 448 (definition of "petition" concealed an exclusion from petition rights and was a second subject). The concealment of a measure's scope, whether due its definitions, *id.*, or its lack of definitions, *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2005) (striking initiative due to the measure's "facial vagueness" and omission of definitions), violates the single subject requirement.

Even if the highlighting of the CRA does not comprise a definition, it certainly reflects a prioritization that directs the way in which this initiative is to be construed and applied. This Court may not be able to know, much less state, how the wrong statutory citation will affect redistricting in 2021. It need only observe that this is a surreptitious element of the measure, one that evaded the attention of the legislative staff when it reviewed the measure,[1] the undersigned when he reviewed the measure's predecessors, Tr. 4:1-15, and the Proponents when they finalized their measure.

In fact, Proponents' twice admitted this incorrect citation was "a drafting error." Tr. at 23:8, 23:17. The Proponents noted that the Legislative Council failed to bring this drafting error to their attention. *Id*. They even asked the Title

[1] The Review and Comment memorandum on Initiative #68, prepared by Legislative Council Staff and Office of Legislative Legal Services, is silent on this issue. *See https://leg.colorado.gov/sites/default/files/initiatives/2017-2018%2520%252369.002.pdf.*

Board if, as part of the titling process, they could correct this error. Tr. at 23:19-20.

Proponents also tried to explain their failure to cite the correct statute by stating that they simply omitted "et seq." after their reference to 52 U.S.C. §10101. Tr. at 23:9-11. If that were really the case, the phrase "in particular" would never have been included, as its meaning is the exact opposite of the meaning of "et seq." *Compare* Merriam-Webster's Collegiate Dictionary 903 (11th ed. 2008) ("in particular" means "in distinction from others: SPECIFICALLY") with *Moser v. State Dep't of Revenue,* 213 P.3d 1061, 1065 (Kan. 2009) ("The term 'et seq.' is an abbreviation for the Latin term meaning 'and the following ones'"), citing Black's Law Dictionary 592 (8th ed. 2004). A legal citation to a single statutory section literally cannot be both "in distinction from others" and also include all "the following ones."

This confusing explanation reflects the fact that, when pressed, Proponents could not say why they had included the limiting phrase, "in particular." As one acknowledged, "I don't recall the use of why – of why the draft just says 'in particular,' why that was called out." Tr. at 25:2-4. Yet, the reason an initiative's designated representatives must attend the rehearing is to ensure that the Title Board can get just this type of input about the measure.

> [T]he Title Board's meeting on a motion for rehearing may be the only stage in the title setting process at which a detailed discussion occurs regarding whether the measure contains a single-subject, whether proponents made substantive changes after the review and comment hearing beyond those in direct response to questions or comments by the legislative council, and whether the title as initially adopted is clear and best reflects the true import of the measure.

In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, and 69, 2013 CO 1 ¶25, 293 P.3d 551. The measure's designated representatives thus "ensur[e] that the Board has access to the information it needs to resolve the substantive issues raised at any meeting concerning a proposed initiative." *Id*. at ¶28.

The Title Board cannot set a title if a significant element of the Proponents' submitted version is so unclear as to defy understanding. C.R.S. §1-40-106.5(d), (e)(II) (single subject requirement was designed to "prevent or inhibit… misleading practices" and "to prevent surprise and fraud from being practiced upon voters"); *see In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #29*, 962 P.2d 252 (Colo. 1998) (affirming Board's refusal to set a title, given proponents' submission of conflicting drafts to Title Board that, alternatively, included and omitted one subsection). Provisions that are concealed from voters promote "uninformed voting" and thus are contrary to the central purpose of the single subject requirement. *See #29, supra*, 972 P.2d at 261.

Ultimately, an initiative violates the single subject mandate, and the Board violates its constitutional duty to enforce this requirement, where the Board cannot discern the meaning of a key provision of the measure. As a result of this lack of clarity at the Board level, "the general understanding of the effect of a 'yes' or 'no' vote [on the measure] will be unclear." *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 468 (Colo. 1999), citing C.R.S. § 1-40-106(3)(b). The Board simply refused to address the issue, finding that the entire Voting Rights Act could apply to the new redistricting scheme. *See* Tr. at 26:23-27:1. The Board cannot simply pretend that a major legal change is of no effect and set the titles as if Proponents had not erred in this way.

If the goal of the single subject requirement is to prevent voter surprise, C.R.S. §1-40-106.5(e)(II), the very real potential for that surprise cannot be denied where an initiative's proponents are themselves unaware until the Title Board rehearing that they are changing the law in a particular way. Given that 52 U.S.C. §10101 redirects the focus of voter protection from preventing vote dilution to preventing impediments to voter access to the polls, this mistake is significant. The trouble is, voters will not perceive the existence of this change in the law or be aware that a "yes" vote will help to enact it. As such, the Board should have

refused to set a title for a measure that, as drafted, surprised even the Proponents due to their undisputed drafting errors.

CONCLUSION

The fact that the single subject violations in #69 require understanding of certain federal laws is not an argument that the measure complies with the single subject requirement. The delicate mechanisms that work to assure fair and effective representation after a redistricting are changed in important ways here. As a result, Colorado will both have more race-based mapping and less actual protection of minority groups due to this measure. The Proponents are free to introduce such changes to voters; they simply cannot do so as part of a complex procedural measure that will conceal the key legal changes on which voters are asked to cast ballots. The Proponents should separate these subjects so that the resulting measures each comprise a clear, single subject for petition signers and voters to consider.

The Court should reverse the decision of the Title Board.

Respectfully submitted this 4th day of January, 2018.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS' OPENING BRIEF** was sent this day, January 4, 2018, via Colorado Courts Electronic Filing to Counsel for the Title Board and to Counsel for the Proponents at:

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BEFORE THE COLORADO TITLE SETTING BOARD

DATE FILED: January 4, 2018 5:12 PM

Robert David DuRay and Katina Banks, Objectors

vs.

Bill Hobbs and Kathleen Curry, Proponents.

MOTION FOR REHEARING ON INITIATIVES 2017-2018 #67, #68 and #69

December 6, 2017

TITLE BOARD:
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P R O C E E D I N G S

CHAIR STAIERT: That takes us to 2017-2018 #67 State Legislative Redistricting.

If the Proponents could come forward and let us know you're here.

MR. LARSON: Good morning. Ben Larson from Ireland Stapleton here on behalf of Proponents Bill Hobbs and Kathleen Curry, proponents of 67, 68, and 69 who are here today.

CHAIR STAIERT: And this is a Motion for Rehearing filed by Mr. Grueskin.

And did you want to come on up and let us know if there's anything you want to highlight.

MR. GRUESKIN: Thank you, Madam Chair.

Mark Grueskin on behalf of the Objectors to the ballot title on Initiative No. 2017-2018 #67, Robert DuRay and Katina Banks.

The Motion for Rehearing alleges three single-subject violations, two of which have been before the Board before, and while I'm happy to go through that, given your agenda, I'll bet you'd be happier if I didn't and simply incorporated any comments relative to those arguments from the hearings on Initiatives #48 and 50. So with the Board's permission, I will do that.

CHAIR STAIERT: Thank you.

MR. GRUESKIN: So that would bring me, then -- and the two arguments involved are that Initiative 67 converts the Supreme Court to a -- away from an appellate role as is its want and as is understood by voters, as well as policy makers, and, secondly, that Initiative 67 violates Article VI on the prohibition on other public offices to be held by judges, namely here, unlike Initiative 68 which uses retired judges, this one uses senior judges, provides for their compensation and makes no limitation on their ability to sit on matters that may or may not involve parties or interests that have matters before the Redistricting Commission.

So -- and I would just, for purposes of ease, ask that my comments on Initiative #67 be incorporated when the Board addresses 68 and 69, again, to hopefully streamline your process.

So let me jump then, with the Board's permission, to the third argument. And I have an admission here. The allegation as made in the response, which is not part of your packet, but the response from the Proponents' counsel, and I have sought to misrepresent and confuse the Board and the issues here.

So I will make an admission; that the issue raised in the third part of our Motion for Rehearing is

one I just flat missed when we first talked about 48 and 50. When I read 48 and 50, maybe as you did, you saw that race and language groups were now designated as official communities of interest for redistricting purposes, and I thought, Oh, how nice. Perhaps you thought the same. Because I didn't raise it in my Motions for Rehearing on 48 and 50, and you didn't raise it during those hearings as even an issue, that was relevant to single subject or the titling of these measures, although did you include competitiveness which, as we point out in our motion, is an issue that had already been embraced by the courts and, therefore, probably fell in the less than critical arena. But nonetheless, the Board included competitiveness and other than refining that language, we didn't object.

But if you take a look at your packet and go to the end, the memorandum done by staff, legislative staff in the review and comment hearing, they missed it too, so we don't have to feel so bad. And I will represent to the Board that the memoranda on Initiative 48 and 50 missed it too.

So as lawyers we talk about coiled in the folds and surreptitious measures about what voters will or won't understand. Rarely do we actually have to make a public admission that we are one of those voters who

got snookered.

Because this is a major change, not to just redistricting. This is a major change to how representative government's going to go forward. And if we're going to approve racial communities of interest, which have never been approved. They're not in the Colorado Constitution for state legislative matters. They are not in the Constitution, constitutional analysis for congressional redistricting. Then what we are doing is saying that it is okay to district by race because legislative concerns are a function of the color of one's skin or, alternatively, the language that one speaks, that what you think is what you look like or what you say and how you say it, as opposed to what are issues that are relevant to the populace of a proposed or an existing district, and that is a fundamental change from where we have always been.

More to the point, because I don't want the argument that this is a merits-based argument, this is a departure, a radical departure from what has been approved by both the United States Supreme Court and the Colorado Supreme Court in terms of how districts are drawn in order to provide for fair and effective representation of constituents.

And that is relevant because if we are

going to fundamentally change the nature of how representative government is structured to allow for and authorize the use of race as the proxy for positions, then we will change the nature of what representative government is, and that is not, as we point out in some of the citations from the United States Supreme Court, that -- that is not a place that the United States Supreme Court has ever gone.

The Proponents are correct that when invoking the analysis under the Voting Rights Act and the Equal Protection Clause, the question becomes, or has been, whether or not there is a predominant use of race. Well, if there is the ability to use race as the sole community of interest for a district, that is the predominant use of race.

And I would argue to you that this measure undermines racial protections in yet another way. And this too is something that has been missed in all of the previous analysis by legislative staff, by the title board, and by yours truly. But I think it is relevant to the extent that the suggestion is made that there is no -- that there is no major impact based on this language.

And here's -- here's what it is. And with the Board's permission, I have two handouts that I'd

like to provide to Mr. Ward for purposes of the Board's consideration right now.

The protections that are invoked in the measure -- and here I would turn the Board to page 2 of the measure -- talk about the criteria for districting, and they point to, depending upon the measure, boundaries. They point to communities of interest. They point -- they point to the Voting Rights Act of 1965, quote, in particular 52 U.S.C. Section 10101. No one ever asked what does Section 10101 say in the review and comment hearings or in these hearings. So I am providing 52 U.S.C. 10101, which is not a provision out of the Voting Rights Act. You can take a look at the references in text on page 3 of the handout for 10101. This is a provision out of the Civil Rights Act of 1960, not out of the Voting Rights Act of 1965. What does this protect, 10101? This protects against race being used as a physical or functional barrier to the right to vote. You can't use literacy tests. You can't keep people out of polling places because of their race or their color or -- or otherwise.

So what the Proponents have done is to have isolated communities of color as communities of interest and then said your protections are that you get to vote on election day. Section 2 of the Voting Rights Act,

which has been embraced for many decades by the Colorado Supreme Court and by the United States Supreme Court, is recodified as 52 U.S.C. 10301, which I have also provided to you, cited as recently as May of this year by the United States Supreme Court in the decision of Cooper versus Harris, found at 137 Supreme Court 1455 where the Court, speaking through Justice Kagan, noted two provisions of the Voting Rights Act Section 2 and Section 5 are involved in this case, citing Sections 10301 for Section 2 and 10304 for Section 5.

Justice Kagan went on to say Section 2 prohibits any "standard practice or procedure" that "results in a denial or abridgement of the right to vote on account of race," citing Section 10301(a), which you will find on your second handout. She continued "we have construed that then to extend to vote dilution." That is the standard, not 10101.

So you have race identified as a community of interest, which will necessarily extend into the representative act of legislators, whether they are state legislators or members of Congress. And you have undermined the ability. Whether the Voting Rights Act applies is not a function of what gets written here, but what the kind of protection by using in particular the kind of protection that has been isolated is the

physical act of being able to vote, not the right to protect against vote dilution.

Now, the proponents suggestion, Oh, this is all -- this is all much ado about nothing because the decision last year that took their initiative that combined redistricting and reapportionment and also that isolated just reapportionment and found them to violate single-subject requirement, noted, quote, "to the extent Initiatives 132 and 133 modify criteria to be used in drawing legislative districts and several other things, such changes to the legislative redistricting process constitute a single subject, but they don't point you to that key language that is found in their citation of that decision to the extent Initiatives 132 and 133.

So, remember, 132 and 133 didn't use this race-based communities of interest. The only thing 132 and 133 did was to take a preexisting criteria and layer in what the Supreme Court had already noted, both in reapportionment and congressional redistricting, as a legitimate consideration, that being competitiveness, and added that onto the top.

So this acknowledgement fortifies the point that I'm making here, as does the fact that when the Court found 132 to violate the single-subject requirement, it noted the difference between

congressional and redistricting and noted that the reason that it was finding there to be multiple subjects is that there were distinct processes derived from distinct sources of constitutional authority and governed by different standards.

So the issue of standards wasn't somehow lumped into the process of redistricting as an always and forevermore a single subject. The Court simply noted that what they did last time didn't violate the single subject, insofar as it used existing criteria and layered in something that the Court had already acknowledged to be a legitimate criteria under existing law.

And, therefore, we ask that you find that this is at least two subjects and return it to the Proponents. If you have questions.

CHAIR STAIERT: Any questions?

MR. ROPER: I have -- I have a couple of questions. So the existing language, I believe, includes ethic -- ethnicity as a factor. What, in your view, is the -- what kind of change is -- comes by adding race when ethnicity is already included?

MR. GRUESKIN: The response, I believe, Mr. Roper, is that ethnicity and race are not the same --

MR. ROPER: I understand that.

MR. GRUESKIN: -- same thing and, therefore, they cover different interests and address different prior ways in which voting -- excuse me -- representational interests have been minimized or to use the language of the United States Supreme Court in terms of this case law, there's been dilution of voting interests. I don't think there has ever been an ethnicity case that I'm aware of that -- that hinged on whether or not you were from Lithuania or you were from Guatemala.

MR. ROPER: Also you've mentioned language group, and it seems like your argument has been focused just on race. Do you have a separate concern about language group or is it just a concern about racial?

MR. GRUESKIN: I do. I think -- I think the same concerns apply because, again, the -- the very notion that we could have language group districts so there would be individuals who are elected based on constituencies that had a single unifying language as opposed to a single unifying interest or set of interests before the legislative body suggestions that everyone who speaks Spanish thinks exactly the same about every issue that comes before the legislature. It's just not true.

So I appreciate your question because I -- you're right -- I minimized but didn't mean to minimize except to streamline the process, the fact that language groups are every bit as problematic and, honestly, the courts have found that to be the case where, albeit typically it happens in more localized rather than a congressional district and council districts, legislative districts, but courts -- courts have frowned upon language groups just as they've frowned upon using language, just as they've frowned upon using race as the criteria by which districts can be set.

CHAIR STAIERT: But isn't that same argument then true of ethnicity, aren't they -- I mean, couldn't you say the same thing? You're just assuming everybody of the same ethnic background believes the same thing?

MR. GRUESKIN: I think you raise a really good question. I'm not aware that Colorado has ever set districts based on ethnicity. I'm not aware of any currently prevailing case law that has legitimized districting based on ethnicity. So that's absolutely correct. It happens to be, however, something that's currently in the law and, therefore, to the extent that the proponents argue that somehow 132 and 133 decided that the existing criteria are not problematic, it's possible. But I -- I -- I think that what you're

talking about is what are the criteria that go too far? And we know based on a case law that race is certainly one and language group, probably based upon whatever the circuit court is as well.

MR. ROPER: Final question I had is within that subject Section 3 it talks about communities of interest and lists these areas items, and they're connected by "and." Does that mean that it is -- is it your understanding, does that mean that the -- the -- the -- the Redistricting Commission in evaluating these needs to take them all into account or can it pick and choose among the different factors and -- and use that as the deciding factor for creating redistricting?

MR. GRUESKIN: I think that the way redistricting has been done, at least in my experience, is that the courts pick and choose to determine which type of category applies to a proposed or to a district as drawn rather than saying that all of them need to apply to each district.

MR. ROPER: Thank you.

MS. EUBANKS: I have a couple questions. If I understand your argument correctly, I mean, in terms of the -- the criteria based on race or language group for your arguments that perhaps those are -- because it's such a major change to the way

redistricting has been done in the past that that's a separate subject. Is part of your argument also in terms of referring to the earlier measures that the Supreme Court already has ruled on, that -- would your argument also be that any measure that added criteria that wasn't in those earlier measures would be a separate subject? I mean, just because they weren't included in what the Court said was a single subject at that point in time in terms of those various components of those measures, whether or not -- I mean, if it wasn't race, if it wasn't language group, it was something else, I don't know, the color of your hair, I don't know, but is that part of your argument also is that the Court said it was only this criteria and that any change to the criteria would constitute a separate subject?

MR. GRUESKIN: I agree with half of your question-sized statement.

MS. EUBANKS: Okay.

MR. GRUESKIN: Which is the Court said as to these criteria it's a single subject as presented to us to the extent that 132 and 133 do this.

MS. EUBANKS: Okay.

MR. GRUESKIN: I don't think that any -- let's use water policy concerns, for instance.

MS. EUBANKS: Okay.

MR. GRUESKIN: If that were a community of interest, which it could be, and it has been, I don't think that there's any sort of suspect class; there's no -- it doesn't run so contrary to the accumulated case law and to the body of law, statutory and constitutional, that it would somehow strike voters as being a surreptitious measure. It doesn't strike me that a policy-related concern, if you had a different type of categorization that had absolutely nothing to do with representational unity, but was simply a way of lumping people together that the Court had frowned on or as in the instance of an equal protection claim, you know, required narrow tailoring for.

In other words, you have to show -- if you're going to use race under the United States Supreme Court decisions, you have to have solid evidence or good reason. Well, this - this is -- this will be used as that good reason which is what the United States Supreme Court cites in order to justify race-based districting if the State of Colorado should adopt this.

People ought to decide separately the mechanism, the process. And the Proponents suggest that this really isn't a process that they're measuring, even though the quote that they use from the 132, 133

decision talks about how all of these things are part of the state legislative redistricting process. When you lump this type of substantive change in with a myriad of procedural changes, one is intended to mask the other. And the one that nobody's caught is the one that got masked.

MS. EUBANKS: So if I understand from your response that -- that it's the nature of these particular criteria that is such a substantial change that it constitutes a separate subject, and in the future there could be other criteria that might fall in this category, but there might be other criteria that isn't such a substantial change that it wouldn't constitute a single separate subject?

MR. GRUESKIN: I think you've summed it up better than I've stated it.

MS. EUBANKS: Thank you.

MR. GRUESKIN: Thank you.

CHAIR STAIERT: Let's hear from the proponents.

MR. LARSON: Good morning.

I think to start I would like to incorporate my arguments with respect to the first two issues raised by movants with respect to Initiatives 67, 68, and 69, just to save time. Is that okay?

CHAIR STAIERT: Yeah, that would be great.

MR. LARSON: So then I will move on to the third argument raised by movants which relates to the inclusion of race and -- race and language groups in considering communities of interest.

I would first just like to say that as an initial matter I disagree with movement -- movants' argument about 132 and 133 with respect to whether we are simply -- I think the argument was really that we were replacing existing criteria or doing something with the existing criteria. We were not doing that in 132 and 133. There were certainly new criteria that were being added, and the language from the Court is very clear that to the extent we are modifying the criteria that is certainly directly related to redistricting, and -- and to the extent that movants also argue that we are simply making this a procedural measure is incorrect on many levels. And I want to clarify.

Do you all have our response in opposition? Okay.

These measures do a laundry list of things that are above and beyond procedural, and we have never taken the position that this measure is simply procedural. And so because I think on its face there is no question that modifying criteria fits within the

single subject, I do believe that movants have taken a tactic to confuse the issue. And where I really take issue or offense is when movants contend that what we are doing by including race and language groups within multiple considerations and criteria for the one criteria, which is communities of interest, which, by the way, I believe 24 states consider communities of interest, including a laundry list of things many states -- I know states that use race and language group in considering communities of interest. When movants argue that, I think, one of the phases was race as a proxy is something that I heard, nothing in our measure makes race a proxy for districting.

Mr. Grueskin knows and I know that the inclusion of race and language groups in the communities of interest is to protect those communities of interest. And to argue that somehow considering race is unconstitutional is flat wrong. It is unconstitutional to say race is the predominant factor in considering communities of interest.

So, for example, if our measure said we will redistrict based on race. That's it. That is absolutely inaccurate representation of what our measures do. There are several other factors to be considered just within the community of interest factor,

along with things like compactness.

So I think what I got and gleaned from some statements that were made with respect to race as proxy and the fact that -- inferring that this is somehow going to allow us to redistrict based predominantly on race, that those statements are wrong, just as I think Mr. Roper was asking a question, well, of course we've got ethnic groups in there and ethnic groups existed in the -- exists in the existing law. Does that then mean that we can redistrict based solely on ethnic groups? No, it doesn't. Because that's not what the measure says. And, of course, all of this is overlaid by the fact that we have to comply with the Constitution, which is in the measure itself, and it would be unconstitutional to consider race as the sole factor for redistricting.

So I think that -- I believe what movants are trying to do is to confuse the issue with respect to the -- the purpose and the inclusion of the race and language groups in protecting communities of interest. And that, as I said, it ultimately comes down to a merits argument.

If movants believe that we should not -- that we should ignore race and language groups in trying to preserve communities of interest, then they're free

to argue that. And we disagree with that because we think it's important to consider those groups in preserving communities of interest and in protecting their rights. But if they want to argue against that, they're free to do that. But that's -- that goes to the merits, and that's not pertinent to the Title Board's consideration.

CHAIR STAIERT: Thank you.

Any questions?

MR. ROPER: One question I did have. You heard Mr. Grueskin's reference to the -- the particular U.S. Code section that you referenced not being part of the Voting Rights Act of 1965. Anything you want to say about that?

MR. LARSON: I would say that I think it would be accurate. My understanding is that that provision is -- is typically considered part of the Voting Rights Act. I think it would be more accurate to include et seq. after that citation, and I believe the -- the Board has authority to make technical changes to the measure, and we would be fine with adding et seq. to make that a more accurate statement.

MR. ROPER: Thank you.

CHAIR STAIERT: All right. Thank you.

MR. LARSON: Thank you.

CHAIR STAIERT: You want that --

MR. GRUESKIN: Just a minute briefly, Madam Chair.

CHAIR STAIERT: Sure.

MR. GRUESKIN: The Board's authority to fix clerical errors doesn't extend to changing the substance of the measure, and that's exactly what -- you've been asked to fix what they've done five times. This is the fifth measure. It's the third of five measures before you. They presumably did it with knowledge and intent. And to the extent that they -- to the extent that they now say they didn't actually know the part of the statute that they were citing, A, that ought to give you pause, but, B, the fact that it was never discussed in front of legislative staff would, I believe, deprive you from somehow changing their measure to expand coverage or specify coverage.

It would make no sense to say in their measure covered by the federal -- by the Voting Rights Act of 1965, particularly the entire statute, which is what they're asking you to do by adding et seq. They had an idea about the right they wanted covered, they should have been clear about it, and they were clear about it. They want -- they want you to fix their error or to add to their measure. That's not something I

believe that you have the jurisdiction to do.

As to the other comments made by Mr. Larson, I think I anticipated them and I'm not going to take your time unless you want me to.

MS. EUBANKS: I -- I do have one question. In terms of a statement that Mr. Larson made, in terms of the assertion that under the communities of interest criteria that race and language groups are currently considered is -- would you agree with that statement or not?

MR. GRUESKIN: I'm not a -- I'm actually not aware of any state that calls out racial groups for use as a matter of communities of interest. I'm not saying there's not some. Every state does it differently. For instance, the first -- very first version of this measure back in November 2015 was one that was taken from Iowa that specifically said that racial groups could not be -- voting strength could not be enhanced or diluted. So I believe that the proponents have looked at other states, and I'm not in a position to say what those states are or whether or not they, in fact, used this. But I am in a position to say that the United States Supreme Court has never sanctioned the use of race as a community of interest, and the quotation from the LULAC case that we provide in our Motion for

Rehearing says just the opposite, it's the nonracial groups that comprise communities of interest, not race.

MS. EUBANKS: Thank you.

CHAIR STAIERT: Go ahead.

MR. HOBBS: My name is Bill Hobbs. I'm one of the designated representatives. I do want to respond to one narrow point. Mr. Grueskin has pointed out a drafting error and as somebody who was involved in the drafting, I just want to make a record about that. The citation that he refers to, 52 United States Code, Section 10101, that should say et seq. And that's a drafting error that was not pointed out by legislative counsel. I was not aware of it. It's actually -- there are other citations that are exactly like that that do say 10101 et seq. And one example is Section 1-7-103(5)(b)(sic). That's the full citation. It's just simply a drafting error. I want to make a record of that.

And I -- I do think the Board has the opportunity to correct that, even if -- and even if the Board decides not to do that, I just wanted to make the record that that should -- the full citation would -- would end with et seq.

MR. ROPER: What was that statutory reference?

MR. HOBBS: 1-7-1003(5)(b). I think there may be others, and I'll -- and I'll just add that that citation, earlier versions had a different citation that is also found in the statutes and a group of -- a group that we consulted that has expertise in this area actually corrected our citation to be the new citation, is 52 United States Code 10101 et seq. So I believe that would be the correct citation. It is found in that one section that I referenced, Mr. Roper. But I also think the old citation also appears in the statute, but I don't have that handy. Clearly it should be 101. The Voting Rights Act is not that one section. And proponents never intended to imply that the entire Voting Rights Act was simply Section 10101, but we do intend to require compliance with the Voting Rights Act, which is the substance of that provision. Thank you.

MS. EUBANKS: I have a question for Mr. Hobbs. In terms of how that language reads, as I'm reading from your measure, it talks about "the Commission shall comply with the federal Voting Rights Act of 1965, comma, in particular 52 U.S. Code Section 10101. So I don't view the "in particular" as the citation for the entire Voting Rights Act of 1965. I mean, it says "shall comply with the federal Voting Rights Act, and then it says "in particular 10101." Am

I reading that correctly or not?

MR. HOBBS: I don't -- I don't recall the use of why -- of why the draft just says "in particular," why that was called out. And that -- you know, what I do know is that the intention was consistent with congressional redistricting, consistent with current law in the -- for the Reapportionment Commission there has to be compliance with the Voting Rights Act. I think the intent here was just simply to provide a citation to the Voting Rights Act. So I can't really speak to why it says "in particular" a citation. All I can say is it should be the full citation with the et seq.

MS. EUBANKS: Thank you.

CHAIR STAIERT: All right. I think the Motion for Rehearing really is keyed in on the single subject, so that's the discussion before the Board. We've dealt with, as Mr. Grueskin pointed out, the bulk of his motion at prior hearings, and the new part that he brought today was, I think, C.

I don't view C 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. It doesn't change whether or not this is a single subject. So I'm comfortable denying the Motion for Rehearing.

MR. ROPER: And I agree. I feel the same way with respect to Mr. Grueskin's A and B. I would deny those for the same reasons that we did in the earlier iterations.

And then as to part C, whether or not there's some constitutional concern, I don't think that this rises to the level of a separate subject, so I would deny on that basis.

As to the reference to the Voting Rights Act of 1965, I think the language plainly would require compliance with the entire Act regardless of this -- the pointing out the "in particular," and so there was some suggestion about possibly adding et seq. I don't -- whether or not we have authority to do that, I don't think it would be necessary here because I think the language would require compliance with the Act in its

entirety regardless of any particular citation there. So I would -- I would be opposed to adding anything to that -- that section there.

MS. EUBANKS: And I'm in agreement with Mr. Roper's analysis. In terms of the first two arguments, we've dealt with those before. I'm not persuaded this time.

I -- I understand Mr. Grueskin's argument. I think it makes it difficult, based on the nature of criteria, whether or not that would be a separate subject, and so at this point I think that modifying the criteria used for redistricting is a single subject and that I would deny the Motion for Rehearing on that ground also.

In terms of the statutory citation, I agree. 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.

CHAIR STAIERT: And someone want to make a motion?

MS. EUBANKS: I would move that we deny the Motion for Rehearing on #67.

MR. ROPER: Second.

CHAIR STAIERT: All those in favor?

Aye.

So that Motion is denied.

And that takes us to 2017-2018 #68.

And if the proponents could just start by --

MR. ROPER: 68.

CHAIR STAIERT: 68. Which is state legislative redistricting.

MR. LARSON: So the arguments are the same, and I think as -- I think -- I believe Mr. Grueskin -- we're on which measure now? Sixty?

CHAIR STAIERT: 68.

MR. LARSON: I believe Mr. Grueskin asked to incorporate all of his arguments with respect to 68 and 69, and I do the same. So I believe that I have nothing more to say on either 68 or 69 Or the arguments are the same --

CHAIR STAIERT: Okay.

MR. LARSON: -- on Mr. Grueskin's motion.

CHAIR STAIERT: On 68, can we just confirm both proponents are still present?

MR. LARSON: Yes, both Proponents are here, Bill Hobbs and Kathleen Curry.

CHAIR STAIERT: All right. Thank you.

All right, Mr. Grueskin.

MR. GRUESKIN: As indicated earlier, I will

ask the Board to incorporate the comments made as to -- in hearings on 48, 50, and 67 for purposes of your consideration of 68. Thank you.

CHAIR STAIERT: Thank you.

Any questions from the Board?

I'll incorporate my statements from before.

You can go.

MR. ROPER: And this -- you know, to the extent we need to make a record, this has just the two, two issues, rather than three, but this has the converting supreme court from appellate to de novo, that argument, and then the argument about adding race and language group and -- and I would treat those the same way as in 67.

MS. EUBANKS: I agree.

CHAIR STAIERT: All right. Someone want to make a motion?

MS. EUBANKS: Sure. I move that we deny the Motion for Rehearing on #68.

MR. ROPER: Second.

CHAIR STAIERT: All those in favor?

Aye.

That takes us to 2017-2018 #69, Congressional Redistricting.

Go ahead, Counsel.

MR. LARSON: Again, Ben Larson here, and the Proponents Kathleen Curry and Bill Hobbs are both here today. And I will again incorporate all of my previous arguments on 48 and 50 with respect to the same issue that was present there and my arguments on No. 67 with respect to the last issue related to race and language groups. Thank you.

CHAIR STAIERT: Thank you

Mr. Grueskin?

MR. GRUESKIN: Thank you, Madam Chair.

Nothing to add other than to formally incorporate on this record the earlier comments on 48, 50, 67, and 68. Thank you.

CHAIR STAIERT: Thanks.

MR. ROPER: So this one has -- is very similar to 68, makes the same two arguments about converting appellate review to a de novo trial on the merits and then violating single subject through the inclusion of race and language group identification. And for the reasons that we've addressed before with the earlier measures today and then 48 and 50 earlier, I would deny the Motion for Rehearing.

MS. EUBANKS: And I agree.

CHAIR STAIERT: I also agree and will incorporate the same.

Do you want to make a motion?

MS. EUBANKS: Sure. So I move that the Title Board deny the Motion for Rehearing on No. 69.

MR. ROPER: Second.

CHAIR STAIERT: All those in favor?

Aye.

All right. That is going to take us to #66. But we have to switch out the board.

(End of requested transcription.)

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Jennifer W. Hulac, Registered Professional Reporter and Notary Public within and for the State of Colorado, do hereby certify that the foregoing constitutes a true and correct transcript of the disc provided by the Secretary of State's office.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 3rd day of January, 2018.

JENNIFER W. HULAC
Registered Professional Reporter

Jennifer W. Hulac
Notary Public
State of Colorado
Notary ID 19924014583
My commission November 5, 2020