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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' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 3,289 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

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Respondents Kathleen Curry and Bill Hobbs ("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 Opening Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #69.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board clearly erred in finding that Initiative #69 contains a single subject when Initiative #69 addresses congressional redistricting, and, in accordance therewith, establishes the criteria to be used by the redistricting commission in drawing district lines?

STATEMENT OF CASE

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

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. of the title setting for Initiative #69. Proponents filed Initiative #69 with the Secretary of State on November 3, 2017. The Title Board, on behalf of the Secretary of State, held a title hearing on November 15, 2017, unanimously finding that Initiative #69 contains a single subject and setting the Titles.

Petitioners Robert DuRay and Katina Banks ("Opponents") filed a motion for rehearing ("Motion for Rehearing"), raising two arguments as to why Initiative

#69 purportedly contains more than one subject. *See* R., pp. 19-23.[1] The rehearing was held on December 6, 2017, at which the Title Board unanimously denied Opponents' Motion for Rehearing. On December 13, 2017, Opponents petitioned this Court pursuant to section 1-40-107(2), C.R.S., seeking review of the single subject question, albeit while dropping one of their two arguments and raising a new argument not raised in their Motion for Rehearing. Notice of Appeal at 4.

II. Statement of Relevant Facts.

Initiative #69 amends existing Colorado statutory provisions addressing congressional redistricting in Colorado. *See* R., pp. 2-16. As stated in proposed section 2-1-101, C.R.S., the central purpose of Initiative #69 is to end the practice of political gerrymandering of congressional districts. *See* R., p. 2. Initiative #69 employs various means to achieve its purpose. For example, it establishes an Independent Congressional Redistricting Commission (the "Commission"), which is politically balanced and includes four independent commissioners who are not affiliated with either of the state's two largest political parties. *See* R., pp. 2, 4, proposed §§ 2-1-101(2), -103(c), C.R.S.

[1] Citations to the Title Board Record are to the certified copy of the Title Board Record submitted with the Petition. Because the Title Board Record is not paginated, page number references are to the electronic page number.

Additionally, the Commission utilizes nonpartisan legislative staff and fair criteria to divide the state into congressional districts that are politically competitive and that are not drawn to purposefully advantage or disadvantage any political party. *See* R., pp. 2-3, 13-14, proposed §§ 2-1-102(1), -105(1), (4), C.R.S. Any act of the Commission requires the affirmative vote of 8 of the 12 commissioners, including the vote of 2 independent commissioners for any act to approve or adopt a plan. *See* R., p. 13, proposed § 2-1-104(9), C.R.S. If the Commission fails to approve a final plan, an unmodified staff-drawn plan is submitted to the district court for approval. *See* R., p. 15, proposed § 2-1-105(8), C.R.S.

Specific to the issue on appeal, Initiative #69 also establishes for the Commission a modified version of the existing criteria used by courts in reviewing congressional redistricting plans. For example, proposed section 2-1-102(1)(b)(II) adds race and language group as factors to be considered in the criterion for preserving communities of interest. *See* R., p. 3. These factors are in addition to those already included in the communities-of-interest-criterion, including ethnic, cultural, economic, trade area, geographic, and demographic factors. *See id.* Additional criteria are also included in proposed section 2-1-102, including requiring the Commission, to the extent possible after meeting other criteria, to

maximize the number of politically competitive congressional districts and prohibiting the Commission from drawing district lines to purposefully advantage or disadvantage any political party or person. *See* R., p. 3. Initiative #69 also keeps intact criteria currently used by courts, including compliance with the Voting Rights Act, equal population, compactness, and county and municipal integrity. *See id.*

The Title reads as follows:

> 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.

See R., p. 25.

Initiative #69 is a companion measure to Initiative 2017-2018 #67 ("Initiative #67"), which separately addresses state legislative redistricting in Colorado.[2] Initiatives #67 and #69 follow on the heels of Initiative 2017-2018 #48 ("Initiative #48) and Initiative 2017-2018 #50 ("Initiative #50"), which also separately address state and congressional redistricting, respectively.

These two sets of measures are conceptually similar, with certain differences in their particulars that are not relevant to this appeal. In fact, the measures are substantively identical concerning the issue now on appeal, i.e., the criteria to be considered in drawing district lines. While Opponents appealed the Title Board's actions on Initiative #48 and #50, they never argued, either to the Title Board or to this Court, that the modification of existing redistricting criteria constituted a second subject. On December 18, 2017, this Court denied Opponents' Petitions on Initiative #48 and #50 and affirmed the Title Setting for measures that contain the

[2] Opponents' appeal of the title setting for Initiative #67 is currently before the Court in Case No. 2017SA293. Also pending before the Court is Opponents' appeal of the title setting for Initiative 2017-2018 #68 ("Initiative #68") (Case No. 2017SA294), which, like Initiative #67, addresses state legislative redistricting. Initiative #68 is substantively identical to Initiative #67 for purposes of the issues now on appeal. Proponents will be moving forward with only one of these two state legislative redistricting measures.

exact same redistricting criteria that Opponents now contend constitute a second subject. *See In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #48,* No. 2017SA259; *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #50,* No. 2017SA260.

SUMMARY OF ARGUMENT

As reflected in its Title, the single subject of Initiative #69 is congressional redistricting. Initiative #69 addresses this subject by establishing an Independent Congressional Redistricting Commission and by setting forth the Commission's authority and criteria used in redistricting congressional districts. Establishing the redistricting criteria to be used by the Commission is directly and necessarily related to congressional redistricting. This Court recognized as much in *In re Title, Ballot Title, and Submission Clause for 2015-2016 #132/#133,* 374 P.3d 460, 466 (Colo. 2016).

Nevertheless, Opponents now contend that providing for the protection of race and language groups in the existing criterion for preserving communities of interest constitutes a second subject. Opponents' argument is rooted in their misguided belief that race and language groups should not be recognized in preserving communities of interest. While Proponents disagree with this

sentiment, Opponents' argument goes to the merits of Initiative #69—an issue that is not relevant to the single subject inquiry.

Likewise, Opponents' protestations about Initiative #69's pin citation to the Voting Rights Act also go to the merits of the measure and have nothing to do with whether Initiative #69 contains a single subject. Opponents' argument is also a moot point because Initiative #69 requires compliance with the Voting Rights Act in its entirety, and such compliance is mandated under federal law, regardless of what the measure says. If Opponents nevertheless disagree with the Colorado statute recognizing the Commission's obligation to comply with the Voting Rights Act, Opponents should take that up on the campaign trail, not with this Court.

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.

In reviewing the Title Board's decision on single subject, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89,* 328 P.3d 172, 176 (Colo. 2014) (quoting *In re Title, Ballot Title, and Submission*

Clause for 2009-2010 #45, 234 P.3d 642, 645 (Colo. 2010)). Consequently, the Court "liberally construe[s] the single subject requirement and 'only overturn[s] the Title Board's finding that an initiative contains a single subject in a clear case.'" *Id.* (quoting *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012); *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 1996 #6*, 917 P.2d 1277, 1280 (Colo. 1996)).

In addition to this deferential standard, the Court's review of the Title Board's single subject decision is limited to the narrow inquiry of the "plain language of the initiative to determine whether it comports with the [single subject requirement]." *In re 2013-2014 #89*, 328 P.3d at 176 (citing *In re 2011-2012 #3*, 274 P.3d at 565). The Court does not consider the initiative's merits and does not review its "efficacy, construction, or future application." *In re 2013-2014 #89*, 328 P.3d at 176 (internal quotation omitted).

With respect to preservation of the issues on appeal, Opponents raised their first issue on appeal in their Motion for Rehearing to the Title Board. R., pp. 21-23. However, their second issue on appeal was not raised in their Motion for Rehearing, and therefore Opponents cannot cite to anywhere in the record where this argument was raised.

B. The Single Subject of Initiative #69 Is Congressional Redistricting in Colorado.

Pursuant to article V, section 1(5.5) of the Colorado Constitution and section 1-40-106.5(1)(a), C.R.S., ballot initiatives must contain a single subject. A proposed initiative contains a single subject "if the initiative tends to effect or to carry out one general object or purpose." *In re 2013-2014 #89*, 328 P.3d at 177 (quoting *In re Title, Ballot Title, and Submission Clause Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995)). "An initiative meets this requirement as long as the subject matter of the initiative is necessarily or properly connected. Stated differently, so long as an initiative encompasses related matters it does not violate the single subject requirement." *Id.* (internal citations and quotations omitted) (emphasis in original).

The purpose of the single subject requirement is twofold. First, it prevents the enactment of combined, unrelated measures that would fail on their individual merits. *In re 2013-2014 #89*, 328 P.3d at 177. Second, it protects against voter surprise by the inadvertent passage of surreptitious provisions hidden within a complex initiative that has multiple, unconnected purposes. *Id.* at 177-78.

Here, Opponents contend that Initiative #69's provision of the criteria to be used by the Commission in drawing district lines constitutes a second subject. However, establishing redistricting criteria is part and parcel to a redistricting

measure. In fact, this Court has already recognized as much. *In re 2015-2016 #132/#133*, 374 P.3d at 466. In addressing the redistricting measures at issue in *2015-2016 #132/#133*, the Court stated:

> To the extent Initiatives #132 and #133 modify the criteria to be used in drawing legislative districts, subject the restructured commission to open meetings and open records laws, require a two-thirds vote of commissioners to approve any action of the commission, change the process for drafting and approving redistricting plans and the process for supreme court review of such plans, and allow the reconfigured commission to adopt rules to govern its administration and operation—such changes to the state legislative redistricting process collectively constitute a single subject.

Id. (emphasis added). The Court correctly reasoned that it would make little sense to establish a new redistricting commission without also providing for the criteria to be used by the commission. *See id.*

Moreover, because the establishment of redistricting criteria is directly and necessarily related to congressional redistricting, voters will not be surprised by the redistricting criteria set forth in Initiative #69. This reality likely explains why Opponents have never previously made the strained argument that a redistricting measure cannot modify redistricting criteria. For example, Opponents did not make such an argument, either to the Title Board or to this Court, on Initiative #48 or Initiative #50, despite these measures containing the exact same redistricting criteria used in Initiative #69.

Nevertheless, Opponents now contend that modifying the existing communities-of-interest criterion to provide for the protection of race and language groups constitutes a second subject. Because the Court has already rejected such an argument, Opponents employ various tactics in attempt to confuse the issue.

First, Opponents incorrectly characterize Initiative #69 as merely being a procedural measure. *See* Motion for Rehearing, R., pp. 21-23; Notice of Appeal at 4. Proponents have never taken this position, which contradicts the face of the initiative itself. The legislative declaration makes clear that Initiative #69's aim is to end political gerrymandering, not merely to change redistricting procedures, and reads, in pertinent part, as follows:

> The people of the State of Colorado find and declare that, in order to ensure fair congressional representation, the practice of political gerrymandering, whereby congressional districts are purposefully drawn to favor one political party or incumbent politician over another, or to accomplish political goals, must end.
>
> ***
>
> The people further find and declare that the citizens of Colorado are best served by drawing districts using fair criteria, by drawing districts that do not advantage or disadvantage any political party, and by maximizing the number of politically competitive districts.

R., p. 2, proposed § 2-1-101, C.R.S. (emphasis added).

Initiative #69 then goes on to do several things that are not merely procedural, such as establishing a Commission that is politically balanced, requiring maps to be drawn by nonpartisan staff, and requiring the Commission's work to be done in public meetings. R., pp. 3, 12-14, proposed §§ 2-1-103(3), -104(7)(a), -105(1), (4), C.R.S. Moreover, as clearly called out in the legislative declaration, Initiative #69 sets forth redistricting criteria to be used, including maximizing the number of politically competitive districts and prohibiting plans from being drawn to purposefully advantage or disadvantage any political party. Because Initiative #69 is not merely a procedural measure, voters will not be surprised that Initiative #69 addresses substantive aspects of redistricting, including redistricting criteria.

Opponents' second argument is rooted in their misguided belief that race and language groups should not be considered in preserving communities of interest. *See* Motion for Rehearing, R., pp. 21-23. While Proponents disagree with this sentiment, Opponents' argument goes to the merits of Initiative #69—an issue that is not relevant to the single subject inquiry. *2013-2014 #89*, 328 P.3d at 176.

Opponents' merits-based argument also misconstrues the effect of including race and language group factors as "fundamentally alter[ing] the purpose of congressional representation in Colorado." *See* Notice of Appeal at 4. Hyperbole

aside, Opponents are wrong. Federal law, including the Voting Rights Act, already mandates the consideration of race and language groups in the redistricting process in order to ensure that minority groups are not diluted to an extent that their voices cannot be heard. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 47-50 (U.S. 1986) (discussing consideration of minority voting group characteristics in assessing whether an electoral law improperly dilutes minority voters in violation of the Voting Rights Act). Moreover, Colorado statute currently recognizes the application of the Voting Rights Act and its protections based on race and language groups. § 2-1-102(1)(a)(II), C.R.S.

Consequently, map drawers in Colorado have properly considered race and language group factors in drawing district lines. *See, e.g.*, Memorandum in Support of Adopted Plan at 12, *available at* https://www.colorado.gov/pacific/sites/default/files/Oct_13_2011_Brief_2.pdf (discussing how the Reapportionment Commission strove to create state legislative districts that would give Latino and African-American communities a voice in the electoral process in order to comply with the Voting Rights Act). Moreover, Colorado courts also already consider race and language group factors as part of the ethnic and demographic factors in preserving communities of interest. *See In re Apportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 111 (Colo. 2011)

(applying identical state-legislative community of interest factors and discussing impact of the growth of the Latino community as an "unquestionably valid" community interest concern); *see also id.* at 113-14 (Bender, J., dissenting) (recognizing that "ensur[ing] equal and fair representation for all racial and ethnic groups" is a longstanding objective of the reapportionment process, which is achieved by ensuring "that any reapportionment plan does not result in the underrepresentation of minorities") (emphasis added).

Accordingly, the inclusion of race and language groups as part of the communities of interest criterion does not "fundamentally alter" congressional representation in Colorado as Opponents contend. Rather, their inclusion expressly codifies the protections that race and language groups should properly be afforded under Colorado and federal law. If Opponents want to argue during the campaign that minority communities, such as the Latino and African-American communities, should be ignored in preserving communities of interest, they are free to do so. While Proponents disagree with that position, it is not a single subject issue.

Finally, in what is characterized as a second issue in the Notice of Appeal, Opponents mimic their first issue by again taking issue with the redistricting criteria established by Initiative #69. Notice of Appeal at 4. While this "second

issue" was not raised in Opponents' Motion for Rehearing to the Title Board, based on oral arguments by Opponents' counsel at the hearing on such motion, it appears that Opponents object to Initiative #69 expressly calling out the Commission's obligation to comply with the Voting Rights Act. *See* R., p. 3, proposed § 2-1-102(1)(a)(II) (requiring compliance with the federal "'Voting Rights Act of 1965', in particular 52 U.S.C. sec. 10101"). Specifically, Opponents take issue with the accuracy of the pin citation to the Voting Rights Act in proposed section § 2-1-102(1)(a)(II).

However, Opponents' protestations about the pin citation to the Voting Rights Act go to the merits of the measure and have nothing to do with whether Initiative #69 contains a single subject. Opponents' argument is also a moot point because Initiative #69 requires compliance with the Voting Rights Act in its entirety, and such compliance is mandated under federal law, regardless of what the measure says. *Hall v. Moreno*, 270 P.3d 961, 969 (Colo. 2012) (recognizing that requirement to comply with Voting Rights Act exists independent of statutory criterion recognizing such requirement). Consequently, the entire premise of Opponents' second issue, i.e., that proposed section § 2-1-102(1)(a)(II) somehow changes the protections afforded by the federal Voting Rights Act, is baseless. In short, if Opponents disagree with Colorado statute recognizing the Commission's

obligation to comply with the Voting Rights Act, they should take that up on the campaign trail, not with this Court.

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 4th day of January, 2018.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson
Kelley B. Duke, # 35168
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ATTORNEYS FOR PROPONENTS/RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2018, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was duly filed with the Court and served via CCEF upon the following:

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