SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: January 24, 2018 5:18 PM
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 #68 ("State Legislative 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. 2017SA294**
PETITIONERS' ANSWER 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:

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s/ Mark G. Grueskin
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I. The creation of "racial and language group communities of interest" is a separate subject from the process and structure associated with a new redistricting commission.

A. Initiative #68's central purpose is the creation of a new procedural scheme for redistricting.

The brief of amicus, Campaign Legal Center ("CLC"), best explains why this measure contains at least two subjects in describing its perception of problems associated with gerrymandering. Amicus Brief in Support of Respondents at 3-8. Independent redistricting commissions (or "IRCs" as they are referred to in the Amicus Brief) "remove self-interest from the process… (and) have been shown empirically to improve multiple indicators of democracy." *Id*. at 8. CLC asserts:

- "when IRCs are used," districts reflect "partisan fairness;"
- "IRCs produce more districts that are decided by 10 points or less;" and
- districts "drawn by IRCs produce legislatures" that are "more responsive."

Id. at 9-10. Thus, according to CLC, change emanates from the commission.

CLC stresses its contention that commission-drawn maps are better for the electoral system because a commission decides districts' boundaries. The purpose of this ballot measure is thus aptly summarized by CLC: Initiative #68 is "designed to introduce an Independent Redistricting Commission (IRC) to prevent a single

political party from unilaterally controlling the redistricting process." *Id*. at 1. The changed *structure* for redistricting is the primary purpose of the initiative crafted by Proponents.

Proponents have earlier admitted the same thing. Their Opening Brief in this appeal makes the point that an earlier, but parallel version of this measure, was Initiative #48. *See* Proponents' Opening Brief, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #68*, at 5. In the appeal of #48's ballot title, Proponents told the Court that the measure's "central purpose" was:

> to end the practice of political gerrymandering… Initiative #48 proposes to do so **by replacing the existing Reapportionment Commission with an independent commission that is politically balanced**, with four commissioners from the state's largest political party, four commissioners from the state's second largest political party, and four commissioners who are not affiliated with either of the state's two largest political parties.

Proponents' Opening Brief, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #48* (Case No. 2017SA259) , at 3 (emphasis added). That element of #48 is likewise at the center of Initiative #68. Thus, unlike Respondent's circumspect contentions here (that the commission's procedures and structure, coupled with new redistricting standards, comprise a single subject), there can be little question that this measure, too, focuses on changing the *structure* for redistricting.

The change of a governmental body's structure can bear no necessary or proper relationship to a new legal standard that is not central to, or does not emanate from, the change in structure with its attendant procedural overhaul. The purposes of an initiative "must be interrelated" to find that a measure contains only one subject. *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). The connection between those purposes must be self-evident; it is not enough if they are "revealed only through a close reading of the initiative and an appreciation of its complex text and how its sections interrelate." *Id*. at 1079. In any event, a new commission process and structure is not "interrelated" with the creation of racial and language group communities of interest.

A water-related initiative appeared to be "a simple proposal to reorganize and consolidate" a governmental function, *Kemper v. Hamilton*, 172 P.3d 871, 875 (Colo. 2007), but the potential far-reaching effects of a new standard – "the creation of a public trust standard" – meant that the initiative violated the single subject requirement. *Id*. at 876. That standard, coupled with "the subject of reorganizing existing natural resource and environmental protection divisions, programs, boards, and commissions" comprised "separate and discrete subjects" that did not meet the test of a single subject. *Id*. at 875.

This water measure was not the first where a broad subject violated the single subject mandate because new legal standards, in addition to procedural changes, were included in the measure. Another initiative that sought to change both procedural and substantive provisions relating initiatives, referenda, and recall petitions also changed applicable key legal standards, and in so doing, violated the single subject requirement. The legal standards that changed included rules of construction (how "shall" was to be interpreted in legal provisions pertaining to petitions) as well as changed standards of judicial review (imposing the "strictest scrutiny and full enforcement" relating to petitioning violations). *In re Title for Proposed Petition Adding Section 2 to Article VII*, 900 P.2d 104, 109 (Colo. 1995). These new standards, even though they were loosely related to the general topic of the initiative, were nonetheless hidden from the view of voters and were not sufficiently part of the measure's designated subject – "concerning the petition process" – to survive even the deference typically accorded to Title Board decisions. *See id*. at 111.

Notably, the Court did not find – and did not even attempt to analyze – whether the new legal standards would lead to drastically different results for contested petitions. It was enough that these changed legal standards raised the prospect of voter surprise and fraud at the heart of the single subject requirement. C.R.S. §1-40-106.5(e)(II).

It is no surprise, then, that the Court is particularly sensitive to the "danger associated with omnibus initiatives." *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 No. 43 and 45*, 46 P.3d 438, 442 (Colo. 2002). Initiative #68 is also an omnibus measure, dramatically changing the structure by which redistricting decisions are made as well as key criteria to be used in formatting districts and legislative representation. In both instances, "the inadvertent passage of a surreptitious provision" is a real risk. *Id*. And, as Proponents admitted before the Title Board, their measure is a virtual "laundry list" of substantive changes, and there is no reason to think that voters will be aware of each significant item on this list. Dec. 6, 2017 Transcript of Rehearing before Title Board 17:21-22 (Exhibit 1 to Objectors' Opening Brief). In attempting to rebut their combination of subjects, they effectively do so before this Court as well. "Initiative #68 then goes on to do several things that are not merely procedural." Proponents' Opening Brief at 12.

Redistricting initiatives are no exception to this rule. The initiative considered by this Court in 2016 sought to bring congressional and state legislative redistricting under the same structural entity. One of the Court's considerations in finding a single subject violation was the fact that the two tasks, under existing law, were "governed by different standards" and the initiative "would establish new constitutional criteria to be used for congressional redistricting." *In re Title,*

Ballot Title, & Submission Clause for 2015-2016 #132, 2016 CO 55, ¶33, n. 4, 374 P.3d 460. This measure has a comparable set of changes, and the Court should find that, for its own reasons, it also violates the single subject requirement.

B. The use of racial communities of interest is not simply an embodiment of existing law.

Proponents contend that, because current law refers to "ethnic" and "demographic" communities of interest, the inclusion of racial and language group communities of interest is not a material change to the law. Proponents' Opening Brief at 13-14; CLC Amicus Brief at 13-14.

First, if Proponents did not intend a material change to the law, why did they include this language? If the new language at issue here means the same thing as the language that already exists in the Constitution, this part of the proposal would have no effect whatsoever. But the courts do not presume that different language is intended to mean the same thing as pre-amendment language. "[T]he use of different terms signals an intent on the part of the General Assembly to afford those terms different meanings." *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003). Courts presume that the language used in amending the law is intended to have a substantive effect. *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 597 (Colo. 2005). Statutes and constitutional provisions cannot be read as if certain words simply did not exist. *Turbyne v.*

People, 151 P.3d 563, 567 (Colo. 2007). Thus, Proponents' attempt to argue that their changes to Colorado law are just restating current law is inconsistent with accepted rules of construction.

For years, the courts have rejected the notion that "racial communities of interest" are an acknowledged basis for redistricting or even "communities of interest" to any degree.

> **[T]he Defendants and Intervenors spent much time outlining the racial community of interest shared by black** citizens in Georgia. The problem with this tack is that, while partially convincing, **such a community of interest is barred from constitutional recognition**. To urge this racial identification as a justification for the shape of the Eleventh District is tantamount to simply admitting that race was the overriding consideration in its creation…. It is based on superficial, racially founded generalizations about what matters to black Georgians. That is, it trafficks in racial stereotypes. We find it ironic and troubling that the state and federal government should expend such effort to convince the Court "that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls."

Johnson v. Miller, 864 F.Supp. 1354, 1376 (S.D. Ga. 1994) (emphasis added), citing *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (U.S. 1993).

When this district court holding was appealed to the United States Supreme Court, the appellants there – much like Proponents and CLC here – argued that "redistricting by definition involves racial considerations." *Miller v. Johnson*, 515 U.S. 900, 913 (1995). The Court would have none of it.

> It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but **it does not follow from this that individuals of the same race share a single political interest.** The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens, the precise use of race as a proxy the Constitution prohibits.

Id. (internal citations and quotation marks omitted); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1031 (1994) ("explicit race-based districting embarks us on a most dangerous course"). Thus, the notion that race has an historic and legitimate basis for use in setting districts – *by way of "racial communities of interest"* – is simply at odds with the case law in this area.

Proponents cite *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108 (Colo. 2011) for the propositions that race is imbued in districting and, in Colorado, "changed ethnic and cultural demographics in this area of the state (Aurora) are unquestionably valid 'community of interest' concerns." *Id*. at 111. Proponents did not point out, however, that the Court noted that growth in Latino population, cited by the commission and addressed by the Court, had occurred "across the state" and was a factor for the commission's "overall" consideration in districts statewide. *Id*. Thus, race was not actually a factor in a specific district community of interest.

C. Adding a racial "community of interest" will change more than district lines; by its nature and fundamental purpose, it determines the efficacy of legislative representation.

The nature of a community of interest does not depend on or fundamentally look to, race. A community of interest is "defined by actual shared interests." *Miller, supra*, 515 U.S. at 913. A district's key community of interest may "regularly evolve" so the districts set "address the most pressing issues of the day." *Hall v. Moreno*, 2012 CO 14, ¶48, 270 P.3d 961. To set districts based on race (rather than using actual issues that matter most to people) changes the nature of redistricting, but more importantly, the nature of the resulting legislative representation. For those reasons, the initiative's use of this standard for redistricting is its own subject.

Thus, the entire reason for using communities of interest in redistricting is to facilitate "the underlying purpose of maximizing fair and effective representation" of voters who will ultimately be a legislator's constituents. *Id.* at ¶46. In other words, redistricting is directly related to governance, and the drawing of district boundaries determines whether that representation will reflect the policy needs of the district.

As an example, this Court reviewed the basis for one district that was drawn to achieve a specific policy end, which policy end was achieved after redistricting.

"This success, and the example that it provides, should guide the application of the communities of interest factor as courts strive to draw districts that maximize fair and effective representation to tackle the challenges of today and tomorrow – and not the challenges of yesterday." *Id.* at ¶49. It is the job of elected officials, in representing constituents from specific districts, to "guard their interests, support their rights, express their opinions, make known their wants, redress their grievances, and introduce a pervading popular influence throughout all the operations of the government." *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1242 (Colo. 2003), citing Joseph Story, *Story's Commentaries on the Constitution* § 291 (1833).

Basing districts on legislative issues is unrelated to solely using a racial community of interest as the basis for a legislator's district. Districts drawn for that purpose are unrelated to matters that may or need to come before a legislative body; instead, such districts presume "that members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls." *Shaw, supra*, 113 S.Ct. at 2827. That this stereotype is hidden in a complex redistricting format means that voters will not know that the basis for them to be heard at the legislature will have reverted to an outmoded stereotype.

Notwithstanding CLC's allegation to the contrary, districts do not have to be drawn using all of the discretionary factors that are available. *See* CLC Amicus Brief at 16. Courts can use a single community of interest to establish district lines. *See, e.g.*, *In re Reapportionment of the General Assembly*, 828 P.2d 185, 195-96 (Colo. 1992) (requiring unification of one community of interest, based on common economic concerns, to comprise a house district). Likewise, nothing in Initiative #68 prevents a single community of interest from being the basis for a districting decision, once mandatory criteria are satisfied.

D. This single subject decision is not controlled by the Court's 2016 opinion which considered different redistricting criteria.

Proponents allege that the Court's decision on a previous redistricting initiative controls this case. The wording of the Court's decision on one of the subjects in that matter, however, leaves the question explicitly open.

In the 2016 case, the Court held that one subject of that initiative was the "process" that the proponents developed. Proponents cite this sentence:

> **To the extent Initiatives #132 and #133 modify the criteri**a 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**.

In re #132, supra, 2016 CO 55, ¶18 (emphasis added). However, Proponents do not state in their Opening Brief that the 2016 proposal simply used the then-existing criteria for redistricting – from the statute that predated the initiative and from the case law that authorized competitiveness to be used. The Court was clearly aware that it did and so stated. *Id.* at ¶33, n.4; *see also Moreno, supra*, 2012 CO 14, ¶58 ("we believe that it was proper for the trial court to consider competitiveness in addition to the enumerated non-constitutional factors"); *In re Reapportionment, supra*, 332 P.3d at 111 ("competitiveness… may be considered once all constitutional criteria have been met").

The Court's opinion was clear: redistricting was one subject "to the extent that Initiatives #132 and #133" did various things including to "modify the criteria" for the drawing of district lines. But the initiatives there simply codified or recodified existing law; they did not change or create or add important new standards in the way that Initiative #68 does. *Cf. Advisory Opinion to the Attorney General re Indep. Nonpartisan Comm'n to Apportion Legislative & Cong. Dists.*, 926 So. 2d 1218, 1225 (Fla. 2006) (creation of a new redistricting commission and change in "standards applicable to districts" so as to authorize single-member districts, held to violate Florida's single subject requirement). Therefore, the Court's opinion in *In re #132* did not decide and does not control the question presented here.

E. Possible protections under federal law against racial packing of districts – or any other use of racial communities of interest – are irrelevant to a single subject analysis.

Proponents and CLC both protest mightily that any racial gerrymandering would be addressed by protections in the Voting Rights Act and the 14th Amendment. Proponents' Opening Brief at 15-16; CLC Amicus Brief at 15-17.

Of course, their point is irrelevant in a single subject analysis. The Court's "inquiry is limited… to determining whether the constitutional prohibition against initiative proposals containing multiple subjects has been violated." *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #64*, 960 P.2d 1192, 1197 (Colo. 1998) (citation and internal quotation marks omitted). The single subject analysis does not address the measure's "future application," *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶8, 333 P.3d 76, and, by extension, the manner of resolving future litigation to resolve whether the initiative has been applied or misapplied.

The question in this proceeding is not whether the measure will work in tandem with – or be rescued from its own express wording by – federal law. The question is whether the text of the measure allows "the voters to answer[] 'yes' or 'no' to a straightforward, single subject proposal." *Id.* at ¶10. The provision about racial and language group communities of interest is hardly an ancillary detail or a

technical element facilitating implementation of the measure if adopted by voters. This provision recasts the role of representative government, based on the redrawing of district lines, as focusing on race and language rather than issues that will come before the legislative body. This change is a single subject violation. *Id*. at ¶33 (voters would be surprised by, and a single subject violation arose from, initiative that expanded recall of elected officials to non-elected officials). Provisions such as this one present a "risk of uninformed voting caused by items concealed within a lengthy or complex proposal" – hence, the single subject violation. *In re Title, Ballot Title & Submission Clause for 1997-1998 No. 30*, 959 P.2d 822, 825 (Colo. 1998).

Where a measure both changes a legal standard (as Initiative #68 does) and also revamps the procedures, powers, and composition of a commission (as Initiative #68 does as well), it violates the single subject requirement. *Hamilton, supra*, 172 P.3d at 875-76; *see also In re #64, supra,* 960 P.2d at 1199-1200 (change in common law defamation standard applicable to judicial officers and change to Commission on Judicial Performance process and powers). It is this inquiry that determines the single subject dispute before the Court, not one that looks to possible future remedies under the U.S. Constitution and federal law.

II. Proponents' drafting error, which redirects the emphasis of Voting Rights protections in redistricting, is a third subject.

Proponents' defense of the language in their measure that focuses their commission and this Court on an unrelated statute is limited.

They first contend that the issue was not mentioned in the motion for rehearing. Proponents' Opening Brief at 15. They concede that it was addressed "based on oral arguments by (Objectors') counsel at the hearing on such motion." *Id*. The pertinent test is whether an issue was raised "either in their motion for rehearing or at the rehearing before the Board." *In re Ballot Title 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000). As there is no question the matter was raised at rehearing, this issue is properly before the Court.

Proponents also contend that this is really a challenge to Initiative #68's merits. Proponents' Opening Brief at 15-16. In truth, until their title had been set, Proponents did not realize that their measure commands an unexpected focus, one that is unrelated to redistricting. *See* Objectors' Opening Brief at 15-17. This is hardly a merits argument. Instead, this change in the legal protections that are supposed to adhere in the district-setting process (through the commission) and the legal review process (through the judiciary) are significant elements of the initiative. In fact, they are the very protections that Proponents and CLC point to assure the Court that race will not be used to pack voters of any race into a limited

number of districts. If their defense about racially oriented districts is material, then so is their drafting error that undermines that defense – in a way that voters will never notice. This error is a single subject violation because their measure will lead to "voter surprise or uninformed voting." *In re Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995). It is not a merits argument.

CONCLUSION

Initiative #68 is a trap for the unwary. Advanced as a set of procedures that promote a healthy democracy, this measure authorizes communities of interest – and thus districts and the resulting representation by legislative representatives – based on the presumption that race is a proxy for one's view on legislative issues. This presumption will go unseen by most voters, many of whom would likely change their vote on the measure if they knew of this provision.

In the same way, Proponents' typographical error is material. It changes the way in which their commission and this Court will prioritize protections for voters. Any constitutional prioritization in a redistricting provision must be given effect. *In re Reapportionment, supra*, 332 P.3d at 110-111. If Proponents were surprised by the fact of their inadvertent change, the same is certainly true of less informed voters. Surprise for one is surprise for all.

Initiative #68 violates the single subject requirement. It should be returned to Proponents for correction.

Respectfully submitted this 24th 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' ANSWER BRIEF** was sent this day, January 24, 2018, via Colorado Courts Electronic Filing to Counsel for the Title Board and to Counsel for the Proponents at:

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