

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 #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 ▲

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

Supreme Court Case No.:
2017SA294

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 3,371 words.

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

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

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

TABLE OF CONTENTS

STATEMENT OF ISSUE PRESENTED FOR REVIEW1

STATEMENT OF CASE1

 I. Nature of the Case and Proceedings before the Title Board.1

 II. Statement of Relevant Facts.2

SUMMARY OF ARGUMENT6

ARGUMENT7

 Initiative #68 Contains a Single Subject.7

 A. Standard of Review/Preservation.....7

 B. The Single Subject of Initiative #68 Is State Legislative Redistricting in
 Colorado.....9

CONCLUSION16

TABLE OF AUTHORITIES

Cases

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <i>Hall v. Moreno</i> , 270 P.3d 961 (Colo. 2012) | 15 |
| <i>In re Apportionment of the Colo. Gen. Assembly</i> , 332 P.3d 108 (Colo. 2011). | 13, 14 |
| <i>In re Title, Ballot Title, and Submission Clause for 2009-2010 #45</i> , 234 P.3d 642 (Colo. 2010)..... | 8 |
| <i>In re Title, Ballot Title, and Submission Clause for 2011-2012 #3</i> , 274 P.3d 562 (Colo. 2012)..... | 8 |
| <i>In re Title, Ballot Title, and Submission Clause for 2013-2014 #89</i> , 328 P.3d 172 (Colo. 2014)..... | 7, 8, 9, 12 |
| <i>In re Title, Ballot Title, and Submission Clause for 2015-2016 #132/#133</i> , 374 P.3d 460 (Colo. 2016) | 6, 10 |
| <i>In re Title, Ballot Title, and Submission Clause for Proposed Initiative 1996 #6</i> , 917 P.2d 1277 (Colo. 1996) | 8 |
| <i>In re Title, Ballot Title, and Submission Clause Pertaining to a Proposed Initiative Pub. Rights in Waters II</i> , 898 P.2d 1076 (Colo. 1995) | 9 |
| <i>Thornburg v. Gingles</i> , 478 U.S. 30 (U.S. 1986)..... | 13 |

Statutes

| | |
|---------------------------------|------|
| § 1-40-106.5(1)(a), C.R.S. | 9 |
| § 1-40-107(2), C.R.S..... | 1, 2 |

Constitutional Provisions

| | |
|------------------------------------|----|
| Colo. Const. art. V, § 1(5.5)..... | 9 |
| Colo. Const. art. V, § 47(3)..... | 14 |

Respondents Kathleen Curry and Bill Hobbs ("Proponents"), registered electors of the State of Colorado and the proponents of Initiative 2017-2018 #68 ("Initiative #68"), 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 #68.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board clearly erred in finding that Initiative #68 contains a single subject when Initiative #68 addresses state legislative 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 #68. Proponents filed Initiative #68 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 #68 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

#68 purportedly contains more than one subject. *See R.*, pt. 2, pp. 6-9.¹ 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 arguments and raising a new argument not raised in their Motion for Rehearing. Notice of Appeal at 4.

II. Statement of Relevant Facts.

Initiative #68 amends the Colorado Constitution's existing provisions addressing state legislative redistricting in Colorado. *See R.*, pt. 1, pp. 2-16. As stated in proposed section 46 of article V, the central purpose of Initiative #68 is to end the practice of political gerrymandering of state legislative districts. *See R.*, pt. 1, p. 2. Initiative #68 employs various means to achieve its purpose. For example, it replaces the existing Reapportionment Commission with the Independent Legislative 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.*, pt. 1, p. 4, proposed art. V, § 48(2)(c).

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

Additionally, the Commission utilizes nonpartisan legislative staff and fair criteria to divide the state into legislative districts that are politically competitive and that are not drawn to purposefully advantage or disadvantage any political party. *See R.*, pt. 1, pp. 2-3, proposed art. V, §§ 46(1)(b)-(c), § 47. 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.*, pt. 1, p. 12, proposed art. V, § 48.3(9). If the Commission fails to approve a plan, an unmodified staff-drawn plan is submitted to this Court for approval. *See R.*, pt. 1, pp. 14-16 proposed art. V, §§ 48.5(2), (6)(d), (7)(a)-(b).

Specific to the issue on appeal, Initiative #68 also modifies existing criteria to be used in drawing district lines. Proposed article V, section 47(3) adds race and language group as factors to be considered in the criterion for preserving communities of interest. *See R.*, pt. 1, 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 article V, section 47(4), which (1) requires compliance with the federal Voting Rights Act of 1965 ("Voting Rights Act"); (2) requires the Commission, to the extent possible after meeting other criteria, to maximize the number of politically competitive legislative districts; and (3)

prohibits the Commission from drawing district lines to purposefully advantage or disadvantage any political party or person. *See R.*, pt. 1, p. 3. Initiative #68 keeps intact existing criteria for equal population, compactness, and county and municipal integrity. *See id.*

The Title reads as follows:

An amendment to the Colorado constitution concerning state legislative redistricting, and, in connection therewith, renaming the commission that redraws state legislative boundaries; changing 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; requiring the commission to consider political competitiveness, to the extent possible, after meeting other requirements for redistricting; 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 to be done in public meetings and requiring the commission's nonpartisan staff to prepare and present redistricting plans; and 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., pt. 2, p. 11.

Initiative #68 is a companion measure to Initiative 2017-2018 #69 ("Initiative #69"), which separately addresses federal congressional redistricting in Colorado.² Initiatives #68 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 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*

² Opponents' appeal of the title setting for Initiative #69 is currently before the Court in Case No. 2017SA292. Also pending before the Court is Opponents' appeal of the title setting for Initiative 2017-2018 #67 ("Initiative #67") (Case No. 2017SA293), which, like Initiative #68, addresses state legislative redistricting. Initiative #67 is substantively identical to Initiative #68 for purposes of the issues now on appeal. Proponents will be moving forward with only one of these two state legislative redistricting measures.

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 #68 is state legislative redistricting. Initiative #68 addresses this subject by replacing the Colorado Reapportionment Commission with the Independent Legislative Redistricting Commission and by setting forth the Commission's authority and criteria for redistricting state legislative districts. Establishing the redistricting criteria to be used by the Commission is directly and necessarily related to state legislative 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 #68—an issue that is not relevant to the single subject inquiry.

Likewise, Opponents' protestations about Initiative #68's pin citation to the Voting Rights Act also go to the merits of the measure and have nothing to do with whether Initiative #68 contains a single subject. Opponents' argument is also a moot point because Initiative #68 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 Constitution 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 #68.

ARGUMENT

Initiative #68 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 quotations 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., pt. 2, pp. 5-10. 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 #68 Is State Legislative 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 #68'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 measure that

addresses state legislative redistricting. 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 state legislative redistricting, voters will not be surprised by the redistricting criteria set forth in Initiative #68. 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 #68.

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 #68 as merely being a procedural measure. *See* Motion for Rehearing, R., pt. 2, pp. 7-9; 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 #68'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 legislative representation in the state senate and the state house of representatives, the practice of political gerrymandering, whereby legislative 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., pt. 1, p. 2, proposed Colo. Const. art. V, § 46(1)(b), (c) (emphasis added).

Initiative #68 then goes on to do several things that are not merely procedural, such as altering the composition of the Commission to make it politically balanced, requiring maps to be drawn by nonpartisan staff, and requiring the Commission's work to be done in public meetings. R., pt. 1, pp. 2-4, 10, proposed art. V, §§ 46(1)(b)-(c), § 47, § 48(2)(c), § 48.3(7). Moreover, as clearly called out in the legislative declaration, Initiative #68 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 #68 is not merely a procedural measure, voters will not be surprised that Initiative #68 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., pt. 2, pp. 7-9. While Proponents disagree with this sentiment, Opponents' argument goes to the merits of Initiative #68—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

legislative 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). These federal requirements apply equally at a state level to legislative redistricting. *In re Apportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 114 (Colo. 2011) (acknowledging that any plan adopted by the Reapportionment Commission must first comply with federal law, including the Voting Rights Act).

Consequently, the existing Reapportionment Commission has historically and 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). Moreover, Colorado courts also already consider race and

language group factors as part of the existing ethnic and demographic factors in the communities of interest criterion at article V, section 47(3) of the Colorado Constitution. *See In re Apportionment*, 332 P.3d at 111 (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" legislative representation in Colorado as Opponents contend. Rather, their inclusion expressly enshrines in the Colorado Constitution 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 #68. 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 #68 expressly calling out the Commission's obligation to comply with the Voting Rights Act. *See R.*, pt. 1, p. 3, proposed art. V, § 48(4)(a) (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 48(4)(a).

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 #68 contains a single subject. Opponents' argument is also a moot point because Initiative #68 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 what is codified under Colorado law). Consequently, the entire premise of Opponents' second issue, i.e., that proposed section 48(4)(a) somehow changes the protections

afforded by the federal Voting Rights Act, is baseless. In short, if Opponents disagree with the Colorado Constitution 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 #68.

Respectfully submitted this 4th day of January, 2018.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson _____

Kelley B. Duke, # 35168

Benjamin J. Larson, #42540

**ATTORNEYS FOR
PROPOSERS/RESPONDENTS**

CERTIFICATE OF SERVICE

I hereby certify that on this 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:

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

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

/s/ Hannah Pick

Hannah Pick