

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203

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

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2017-
2018 #95 ("Congressional Redistricting")

Petitioners: RANDOLPH E. PYE and
MAX S. GAD,

v.

Respondents: ROBERT DURAY and CARLA
CECILIA CASTEDO RIBERO

and

Title Board: SUZANNE STAIERT, JASON
GELENDER, and GLENN ROPER.

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Supreme Court Case No.:
2018SA29

PETITIONERS' 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 2,482 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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Petitioners Randolph E. Pye and Max S. Gad ("Petitioners"), registered electors of the State of Colorado, through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Opening Brief in opposition to the title, ballot title, and submission clause (the "Title(s)") set for Initiative 2017-2018 #95 ("Initiative #95").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether Initiative #95 violates the single subject requirement when it fundamentally alters the Colorado Supreme Court's authority by requiring it to approve illegal redistricting maps.

Whether Initiative #95 violates the single subject requirement when it politicizes the judicial branch by requiring the Chief Judge of the Colorado Court of Appeals to select half of the commissioners, including four of the six partisan commissioners.

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 #95. Proponents Robert DuRay and Carla Cecilia Castedo Ribero filed Initiative #95 with the Secretary of State on January 5, 2018. The Title Board, on behalf of the Secretary of State, held a title hearing on January

17, 2018, finding that Initiative #95 contains a single subject and setting the Titles. R., p. 39.¹

Petitioners timely filed a motion for rehearing ("Motion for Rehearing"). R., pp. 31-37. The rehearing was held on February 7, 2018, at which the Title Board granted the Motion for Rehearing as to clear title issues, but denied it as to single subject issues. R., p. 39. On February 14, 2018, Petitioners petitioned this Court pursuant to section 1-40-107(2), C.R.S., seeking review of certain single subject issues. Petition for Review, p. 4.

II. Statement of Relevant Facts.

Initiative #95 proposes to create a new system for drawing congressional districts. Initiative #95 transfers congressional redistricting responsibilities from the General Assembly to an appointed commission (the "Commission"). R., p. 3, proposed art. V, § 44(3). The Commission is comprised of 12 members, half of whom are selected by the Chief Judge of the Colorado Court of Appeals. R., pp. 4-5, proposed art. V, § 44(4)(d). The Chief Judge's selections include two unaffiliated commissioners, two commissioners registered with the state's largest political party, and two commissioners registered with the state's second largest political party. *Id.*

¹ Record citations are to the electronic page number.

Initiative #95 requires the Commission to adopt a redistricting map by supermajority. R., p. 6, proposed art. V, § 44(6). Initiative #95 provides no incentive for Commissioners to reach supermajority consensus. Rather, it disincentives supermajority consensus because, absent a supermajority, the commissioners (and only the commissioners) get to submit competing maps to the Colorado Supreme Court. R., p. 6, proposed art. V, § 44(8)(b). In that case, Initiative #95 expressly requires the Supreme Court to choose the map that is the "most" legal, without modification, even if the map is otherwise illegal. *Id.*

SUMMARY OF ARGUMENT

Initiative #95 has two subjects apart from the stated subject of congressional redistricting. First, Initiative #95 strips the Colorado Supreme Court of its final authority to construe the legality of congressional redistricting maps. The plain language of the measure requires the Court to adopt a map without revision, even if the map violates the Colorado Constitution, the U.S. Constitution, or federal law. This fundamental change to the judiciary, which is buried in the procedural review provisions, contradicts the measure's stated purpose of increasing accountability in the redistricting process. It is therefore the epitome of a surreptitious provision coiled within the folds of a measure.

Second, tasking the judiciary with selecting half of the commissioners for congressional redistricting, including four of the six partisan commissioners, injects the judiciary into the politically charged congressional redistricting process. This politicization of the judiciary constitutes a second subject under *In re Title, Ballot Title, & Submission Clause for Initiative 2015-16 #132 and #133*.

ARGUMENT

Initiative #95 Contains Multiple Subjects.

I. Standard of Review; Preservation of Issues on Appeal.

While the Court employs all legitimate presumptions in favor of the propriety of the Title Board's actions, it will overturn the Title Board where it has clearly erred. *In re Title, Ballot Title & Submission Clause for 2013-2014 #76, 2014 CO 52*, ¶ 8. 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. The single subject requirement forbids the joining of "incongruous subjects in the same measure," and thereby ensures "each proposal depends on its own merits for passage." *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002) (quoting *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076, 1078 (Colo.1995)) (internal quotations omitted). Accordingly, a measure has multiple

subjects if it has "two distinct and separate purposes which are not dependent upon or connected with each other." *Id.* (quoting *Public Rights in Water II*, 898 P.2d at 1078-79) (internal quotations omitted).

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 Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014). 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.

The determination of the single subject requirement is not based on the merits of an initiative or how an initiative might be applied if enacted. *In re 2001-02 #43*, 46 P.3d at 443. However, the Title Board and this Court "must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated." *Id.* In making this assessment, the Court applies the 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 single subject issues raised by Petitioners on appeal were preserved below in their Motion for Rehearing. R., pp. 31-32.

II. Stripping the Supreme Court of Its Authority to Ensure the Legality of Redistricting Maps Is a Separate Subject.

The powers of the government of the State of Colorado are divided into three distinct departments: the legislative, executive, and judicial. Colo. Const., Art. III. "By long-standing law, the final authority to construe the constitution and the laws of this state lies with the judiciary." *Bd. of Cty. Comm'rs of Adams Cty. v. Indus. Comm'n*, 650 P.2d 1297, 1298-99 (Colo. App. 1982), *rev'd on other grounds*, 690 P.2d 839 (Colo. 1984) (citing *People v. Martin*, 36 P. 543 (Colo. 1894)).

More specifically, in the redistricting context, "the Colorado Supreme Court exercises ultimate review . . . to determine whether [the redistricting map] comports with the United States Constitution, or the Colorado Constitution, since such review is, and has always been, a judicial function." *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316 (Colo. 1975) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60); *see also Hall v. Moreno*, 2012 CO 14, ¶ 6 (recognizing the Court's critical role in assessing "whether the adopted map satisfies all constitutional and statutory criteria").

Here, Initiative #95 seeks to disturb this longstanding balance of powers by making fundamental changes to the judiciary's authority to review redistricting maps. Initiative #95 proposes two different tracks for judicial consideration of

redistricting maps. Track 1 occurs where the Commission initially approves a redistricting map by supermajority. R., p. 8, proposed article V, § 44(8)(a)(I). In this instance, a "qualified appellant" may appeal to the Supreme Court for review to ensure the map meets redistricting requirements set forth by federal statute, the United States Constitution, and the Colorado Constitution.² *Id.* If the map is illegal, the Court returns the map to the Commission with directions as to how to achieve compliance. *Id.* If the Commission adopts compliance changes by supermajority, then this process repeats itself. *Id.* at § 44(8)(a)(II).

However, in Track 1, if the Commission cannot adopt compliance changes by supermajority, then any qualified appellant can propose changes, and the Supreme Court "must adopt the proposed changes that are most responsive to the directions it provided to the citizens' commission." R., p. 8, proposed article V, § 44(8)(a)(III). There is no mechanism by which the Supreme Court can order changes to put the maps in legal compliance if none of the proposed changes do so. Instead, the Supreme Court must approve one set of proposed changes without revision. *Id.*

The more troubling scenario occurs in Track 2, where the Commission fails to approve an initial map by supermajority. R., p. 8, proposed article V, §

² Initiative #95 limits who can challenge redistricting maps to "qualified appellants" as defined at section 44(2)(e).

44(8)(b). In this instance, Initiative #95 allows the commissioners (and only the commissioners) to submit competing maps to the Court and requires the Court to choose the map that most closely complies with federal and state law, even if the map is otherwise illegal. *Id.* (in the absence of supermajority agreement on an initial map, providing that the "supreme court must" resolve the matter "by approving the map that, based on the record established before the commission, most closely complies with the redistricting factors in this section 44") (emphasis added).³

In this Track 2 scenario, the Court is hamstrung because it has no discretion or authority to order even a single round of changes for legal compliance. The Court's lack of discretion and authority is established by the plain language of the measure. The intent and application of Initiative #95's judicial review provisions is also evident when contrasting Initiative #95 to its sister legislative redistricting measure, Initiative #96, which expressly permits the Court to reject and return maps that are illegal. *See* 2017-18 Initiative #96, proposed article V, § 48(3)(c).

The difference between the proposed role of the judiciary under Initiative #95 and the current role of the judiciary in reviewing congressional redistricting

³ The redistricting criteria in section 44(7) include compliance with federal criteria for equal population and adherence to the Voting Rights Act, in addition to compliance with the enumerated state constitutional criteria.

maps is stark. The judiciary's current role is to ensure the legality of congressional redistricting maps. *Hall v. Moreno*, 2012 CO 14, ¶¶ 33-34 (describing the role of the trial court and the Colorado Supreme Court in ensuring the legality of redistricting maps) ("In order to determine a lawful remedy, the trial court must consider the evidence presented by the parties, hear and make credibility determinations with respect to the expert and lay testimony before it, consider all proposed plans, and ultimately adopt a legal redistricting scheme.") (stating that the Supreme Court's role is to "review the remedy selected by the trial court to determine whether it is lawful") (emphasis added).

This Track 2 scenario is particularly troubling because the chances of the triggering circumstances occurring, i.e., the failure of a supermajority approval of an initial map, are high. In contrast to competing redistricting measures, such as Initiative 2017-18 #69, where failure to reach a supermajority results in the submission of an unmodified, nonpartisan staff-drawn plan for court consideration, Initiative #95 provides no incentive for commissioners to reach a supermajority. In fact, Initiative #95 disincentives the commissioners—particularly the partisan, major-party commissioners—from reaching supermajority because then the commissioners are free to submit their own competing maps from which the Court

must select one without modification.⁴ See Initiative #95, proposed article V, § 48(8)(b).

While Proponents are free to amend the Colorado Constitution in order to disturb the judiciary's longstanding authority as the final arbiter of the legality of redistricting maps, such change must be achieved through a separate ballot measure. See *In re Title, Ballot Title, & Submission Clause for Initiative 2015-16 #132 and #133*, 2016 CO 55, ¶¶ 19, 35 (holding that the transfer of power from one branch of government to a redistricting commission constitutes a second subject). This change constitutes a second subject because stripping the Court of its authority to ensure the legality of redistricting maps directly contradicts Initiative #95's purported purpose of ensuring accountable decision making by the Commission. R., p. 2, proposed art. V, § 44(1)(c). Moreover, this change is achieved through convoluted judicial review provisions buried deep within the measure. Consequently, like the measure in *In re #43* that purported to liberalize the petitioning process while also eliminating the protections of the single subject requirement, Initiative #95 is the epitome of a surreptitious measure that will surprise voters. See *In re #43*, 46 P.3d at 446 (concluding that obfuscating the

⁴ In this way, the Commission is cleverly set up to fail in order to maintain the status quo, where the well-funded and well-organized major parties battle before the courts to establish a congressional redistricting map.

repeal of the constitutional protection of the single subject requirement within a measure aimed at liberalizing petitioning procedures violated the single subject requirement).

III. Requiring the Judicial Branch to Select Half the Commissioners Is a Separate Subject.

The power to draw congressional districts is a legislative function that is vested in the General Assembly. Colo. Const. art. V, § 44. Here, proposed article 5, § 44(4)(d) of Initiative #95 shifts significant redistricting responsibilities to the judiciary by requiring the Chief Judge of the Colorado Court of Appeals to select half of the Commission's members, including four of the six partisan commissioners. R., p. 3.

In *In re 2015-16 #132 and #133*, this Court reasoned that imposing politically charged responsibilities on a separate, apolitical constitutional body constituted a second subject. 2016 CO 55, ¶ 25. Moreover, the incursion on the independent judiciary is much greater here than was proposed in *In re 2015-16 #132 and #133*. In that case, the Supreme Court Nominating Commission was to be tasked with recommending a pool of candidates from which the already-appointed commissioners would select the four unaffiliated commissioners. 2016 CO 55, ¶¶ 6, 26. Whereas, here, Initiative #95 requires the judiciary to make the final selection for half of the Commission's members, including four of the six

partisan commissioners.⁵ This level of intrusion constitutes a second subject under *In re 2015-16 #132 and #133*. See 2016 CO 55, ¶ 25.

CONCLUSION

WHEREFORE, Petitioners respectfully request that, based on the foregoing arguments and authorities, this Court find that Initiative #95 violates the single subject requirement and that the Title Board lacked jurisdiction to set the Title.

Respectfully submitted this 6th day of March, 2018.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson

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⁵ To the extent Proponents contend that the judiciary is already involved in the selection of commissioners to the Colorado Reapportionment Commission in the state legislative redistricting context, that constitutional provision at article V, section 48(1)(b) was added prior to the advent of the single subject requirement in 1994. *In re 2001-02 #43*, 46 P.3d at 440 (describing history of single subject requirement).

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of March, 2018, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was duly filed with the Court and served via CCEF upon the following:

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