

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #95 (“Congressional Redistricting”)</p> <p>Petitioners: Randolph E. Pye and Max S. Gad</p> <p>v.</p> <p>Respondents: Robert DuRay and Carla Cecilia Castedo Ribero</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; JASON GELENDER; and GLENN ROPER</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorney for Respondents: 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</p>	<p>Case No. 2018SA29</p>
<p>RESPONDENTS’ OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g).

Choose one:

It contains _____ words.

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For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

s/ Mark G. Grueskin

Mark G. Grueskin

Attorney for Respondents

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STATEMENT OF THE ISSUES

Whether Initiative #95 complies with the single subject requirement for ballot initiatives by allowing the Supreme Court to choose the maps that maximize compliance with the legal requirements under this amendment.

Whether Initiative #95 complies with the single subject requirement for ballot initiatives by using a non-constitutional official (the chief judge of the Colorado Court of Appeals) to select previously vetted applicants for half of the commission membership.

STATEMENT OF THE CASE

A. Statement of facts.

Initiative #95 creates a redistricting commission to establish congressional districts in Colorado. Specifically, #95:

- authorizes the designation of a new commission to carry out the requirement that states form districts after each decennial census;
- establishes two processes for choosing that politically balanced commission, one-half of the commissioners to be chosen by lottery and one-half to be chosen to ensure racial, gender, and geographic diversity;
- directs that commission to use specified criteria in developing districts;

- sets forth a statewide hearing process for that commission to develop a record for drawing districts;
- ensures accountability in that commission’s map development and approval process by applying Open Records, Open Meetings, and lobbying disclosure requirements; and
- provides for judicial review of the commission’s action in approving a plan or failing to reach a super-majority of commissioners to do so.

These elements of the measure are part of a whole and thus are interrelated, including the means for choosing redistricting commissioners. None of these elements of the initiative could be rationally undertaken independently. Thus, together, these provisions constitute a single subject.

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

Robert DuRay and Carla Cecilia Castedo Ribero (hereafter “Proponents”) proposed Initiative 2017-2018 #95 (hereafter “#95”). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter, the Proponents submitted final versions of the Proposed Initiative to the Secretary of State for the Title Board.

A Title Board hearing was held on January 17, 2018 to establish the Proposed Initiative’s single subject and set a title. On January 24, 2018,

Petitioners filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title. The rehearing was held on February 7, 2018, at which time the Title Board denied the Motion for Rehearing. The Board's title states:

Shall there be an amendment to the Colorado constitution concerning congressional redistricting, and, in connection therewith, establishing a commission and transferring the state legislature's responsibility to divide the state into congressional districts to the commission; establishing factors for the commission to use in drawing districts, including prioritization of shared federal public policy concerns and consideration of whether districts are drawn for the purpose of protecting an incumbent legislator or a political party; specifying the qualifications and methods of appointment for the 12 commissioners, 4 of whom must be registered with the state's largest political party, 4 of whom must be registered with the state's second largest political party, and 4 of whom must not be registered with any political party; allowing any Colorado resident to propose maps or present comments to the commission; requiring at least 8 of 12 commissioners to approve a redistricting map, but giving the 4 commissioners who are not registered with any political party the collective power to reject any map; mandating disclosure, within 72 hours, of paid lobbying of the commission; and providing for judicial review of redistricting maps, including approval of 1 map from maps submitted by individual commissioners if 8 of 12 commissioners have not approved a map?

SUMMARY

Initiative #95 is an integrated measure, provided for an interrelated system by which an independent commission will set congressional districts. The challenged provisions address: (1) how a district map is considered by this Court to determine that it maximizes compliance with all criteria; and (2) the identity of the officer who chooses six commissioners who are intended to provide the

commission with diversity relating to geographical, racial, and gender-based considerations.

The assumption that the map or maps before the Court will necessarily be unconstitutional (and that the Court would be placed in the position of choosing among only unconstitutional options) is conjecture. As such, it revolves around guesswork about how #95 will be applied and transcends the Title Board's role and this Court's role in a single subject analysis.

Additionally, #95 uses a non-constitutional officer – the chief judge of the Colorado Court of Appeals – to choose among applicants in a second round of appointments, after six commissioners are chosen by lot. Neither the body (the Court of Appeals) nor the officer (the Court of Appeals' chief judge) is established by the Colorado Constitution. Both are statutory creations. Thus, unlike certain, multi-subject initiatives that altered a branch of government or a key governmental function as well as changed the nature and essential function of a separate constitutionally created commission, the use of the chief judge to make certain appointments to the redistricting commission is not a second subject.

LEGAL ARGUMENT

A. Standard of review.

The Court gives the Title Board’s decision all legitimate presumptions in favor of the propriety of its actions, but it will overturn the Board anytime it has clearly erred. *In re Title, Ballot Title & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶8, 333 P.3d 76. The matters in an initiative must be necessarily and properly connected rather than disconnected or incongruous. *In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶15, 374 P.3d 460.

Of particular relevance to this matter, the purposes must be “dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for 2003-2004*, 76 P.3d 460, 461 (Colo. 2003). In this regard, the Board and this Court must examine the measure’s wording to determine only insofar as necessary to determine if the title complies with constitutional and statutory provisions governing title setting. *#132, supra.* at ¶11. This review of a title does not address the merits of the proposed initiative and does not focus on how an initiative might be applied if enacted. In construing an initiative for this limited purpose, the Court uses usual rules of statutory construction, including the requirement that terms be given their plain meaning. *In re Title, Ballot Title 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

B. Initiative #95 constitutes a single subject.

1. *The standard by which the Supreme Court would review redistricting maps is not a separate subject.*

Objectors argued below that the language authorizing the Court to approve “the map, based on the record established before the commission, [that] most closely complies with the redistricting factors in section 44” or “proposed changes that are most responsive to the direction it provided to the citizens’ commission” mean “that the Supreme Court must adopt an unconstitutional map.” Motion for Rehearing at 4.

Objectors assumed that the only maps before the Court will be unconstitutional for one or more reasons. This assumption is unwarranted given the exhaustive hearing and mapmaking processes that involve nonpartisan staff, twelve redistricting commissioners, and any interested members of the public who choose to participate in this process. This assumption is also unwarranted given the legal presumption that public officials will perform their duties in constitutional manner. For more than a century, the courts have embraced the contrary proposition: “it will be presumed that state officials perform their duties according to law, and this presumption obtains until the contrary is shown.” *Mulnix v.*

Denver, 175 P. 475 (Colo. 1918), citing *Nance v. People*, 54 P. 631, 634 (Colo. 1898).

In any event, the entire argument advanced is premised on how the initiative will be applied. Matters of implementation are divorced from the single subject inquiry, as neither this Board nor the Supreme Court in reviewing this Board's decision may address the measure's "future application." #76, *supra*, 2014 CO 52 at ¶8.

2. *The role of the chief judge of the Court of Appeals in identifying members of the commission is not a separate subject.*

Objectors argued below that the role of the chief judge of the Court of Appeals violates the single subject requirement because this role would allegedly violate Colo. Const., art. VI, sec. 18 and would have a conjectural "greater impact on the judiciary's nonpartisan existence than the competing measures." Motion for Rehearing at 4.

First, Colo. Const., art. VI, sec. 18 addresses a prohibition on judges holding other public offices. Objectors presumed, without citing authority, that the role specified in Initiative #96, limited in time and in substantive authority, is its own "public office." This is untrue because the limited role of the chief judge of the Court of Appeals is not holding a second "office." "An office has been defined as

‘an employment, on behalf of the government, in any station or public trust, not merely transient, occasional or incidental.’” *People ex rel. Denver & R. G. R. Co. v. Garfield County Court*, 147 P. 329 (Colo. 1915) (citation omitted). The task of choosing among already vetted applications is certainly a “transient” undertaking, just as it is “occasional.” *Id.* (“The positions held by these commissioners were transient in their nature, and ceased to exist upon the full performance of the few duties attached to them”). The chief judge would not be holding an office because it is a singular undertaking, occurring only once a decade. His role as a result of this initiative is not a public office.

More important, the chief judge’s role under Initiative #96 lacks “the essential elements of public offices which embrace the ideas of tenure, duration, emolument and duties.” *Id.* Focusing here only on the question of “emolument,” Initiative #95 provides no compensation whatsoever for the chief judge. Thus, it is quite unlike Initiatives 2017-2018 #67, #68, and #69, which expressly provide:

THE SECRETARY OF STATE SHALL REIMBURSE MEMBERS OF THE PANEL FOR NECESSARY TRAVEL AND OTHER REASONABLE EXPENSES INCURRED IN THE PERFORMANCE OF THEIR DUTIES AND SHALL COMPENSATE MEMBERS OF THE PANEL FOR EACH DAY THAT THE PANEL MEETS IN AN AMOUNT EQUAL TO ONE-TWENTIETH OF THE MONTHLY SALARY THEN CURRENTLY APPLICABLE TO ASSOCIATE JUSTICES OF THE COLORADO SUPREME COURT.

(Emphasis added.) Objectors’ argument on this count is without merit.

In addition, any reliance on #132, *supra*, is unwarranted. Below, Objectors neglected to note that the Court relied on *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #64*, 960 P.2d 1192, 1199 (Colo. 1998). As the Court noted in #132, “We observed (in #64) that the Commission on Judicial Discipline is an independent constitutional body with power derived from ‘a separate and independent constitutional basis’ than the judicial branch. We reasoned that altering the powers of this separate commission furthered a distinct purpose, and therefore violated the single subject requirement.” #132, *supra*, 2016 CO 55, ¶24. Initiative #132 violated the single subject rule for this reason, not because there was a judicially related actor involved. Initiative #132 violated the single subject requirement because the measure both “restructure[d] the Reapportionment Commission” and “fundamentally change the role and mission of the independent Supreme Court Nominating Commission.” *Id.* at ¶25.

Finally, the Supreme Court Nominating Commission was a second subject in #132 because the Commission is a constitutional entity, adopted by the voters for a specific reason – to remove political influence from the naming of appellate judges and justices. In contrast, the Court of Appeals is a statutory rather than a constitutional entity. C.R.S. § 13-4-101. The voters never considered whether it should be established or what purposes its establishment should serve. In the same

vein, the chief judge of the Court of Appeals is not a constitutionally designated officer. The chief judge's role is established by statute. C.R.S. § 13-4-105. Thus, the concerns that were at the heart of the opinion in #132 are not present here.

As such, Petitioners' contention is without merit.

CONCLUSION

The Title Board correctly found this measure comprised a single subject, and that decision should be upheld.

Respectfully submitted this 6th day of March, 2018.

/s Mark Grueskin

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

ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent this day, March 6, 2018, via Colorado Courts Electronic Filing to Counsel for the Title Board and to Counsel for the Proponents at:

Matthew Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Benjamin Larson
Ireland Stapleton Pryor & Pascoe, PC
717 17th Street, Suite 2800
Denver, CO 80202

/s Erin Holweger _____