COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT AND SUBMISSION CLAUSE FOR INITAITVE 2015-2016 #107

MOTION FOR REHEARING

Jason Legg and Luis A. Corchado, registered electors of the state of Colorado, object to the Title Board's ballot title and submission clause for Initiative 2015-2016 #107, and request a rehearing pursuant to C.R.S. 1-40-107.

1. The Title Board Set a title for Initiative 2015-2016 #107 on March 16, 2016.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following title:

> An amendment to the Colorado constitution concerning redistricting in Colorado, and, in connection therewith, renaming the Colorado reapportionment commission as the Colorado redistricting commission; directing that the commission redistrict congressional districts as well as legislative districts; requiring appointment of members with equal representation from each major political party and those not affiliated with any major party; prohibiting commission members from being lobbyists or incumbent members or candidates for either the state legislature or congress; adopting existing criteria for congressional districts and adding competitiveness to the criteria for state legislative and congressional districts; requiring that only the nonpartisan staff of the commission may submit plans to the commission; and requiring that the commission's work be done in public meetings.

2. The Title Board's title setting violates the single subject requirement of Colorado Const. Article V, Section 1(5.5).

A. The Title Board's title setting violates the single subject requirement of Colorado Const. Article V, Section 1(5.5) because it includes the subjects of fundamentally revamping the existing Reapportionment Commission and establishing a congressional redistricting commission.

Colorado citizens amended the Colorado Constitution to ensure that citizens' initiatives contain only one subject when presented to the citizens for a vote. Specifically, Colorado Const. Article V, Section 1(5.5) provides, in relevant part that:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the

polls. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

The implementing statutes require that the "single subject" requirement be "liberally construed, so as to avert the practices against which they are aimed" balanced against the goal of "preserving and protecting the right of initiative and referendum." C.R.S. 1-40-106.5(2). The "practices" that the single subject requirement protects against include (1) combining independent or "incongruous" purposes, and (2) surprising, defrauding, or misleading the voter into saying "yes" to an appealing purpose while tricking them into saying "yes" to a purpose that would not have passed on its own merits. C.R.S. 1-40-106.5(1)(e)(2015). *In re Proposed Initiative 1996-4*, 916 P.2d 528 (Colo. 1996).

The Colorado Supreme Court has provided additional criteria too for deciphering whether an initiative has a single subject. It has held that provisions include two different subjects when they are not dependent upon or necessarily and properly connected with each other. *In the Matter of the Title, Ballot Title, and Submission Clause for 2013–2014 #76*,. 333 P. 3d 76 (Colo. 2014). A general or broad "label" describing the subjects will not save independent subjects. See, e.g., *In re Amend TABOR 25, 900 P.2d 121, 125-126* (Colo. 1995)(the broad theme of "revenue changes" failed to convert disparate subjects into a single subject).

The Colorado Supreme Court's decision regarding 2014 Initiative #76 establishes that Initiative #107 has at least two independent subjects and thereby violates the single subject requirement. *In the Matter of the Title, Ballot Title, and Submission Clause For 2013-2014 #76*, 333 P.3d 76, 78 (2014). The Court held that Initiative #76 was unconstitutional as it addressed at least two different subjects: (1) revamping an existing recall process for elected officials and (2) establishing a new recall process for non-elected state and local officers. It began its analysis by first noting the important point that Article XXI, the targeted provision of Initiative #76, only applied to elected officials. *Id.* at 79-81. Consequently, the "process changes" in Initiative #76 for recall elections necessarily affected the existing recall process for elected officials. The Court recognized that some voters might favor altering the recall process but not favor establishing a new constitutional right to recall non-elected officers, or vice-versa. It held that this effort to "roll" two subjects into one Initiative "to attract the votes of various factions" constituted the type of surreptitious practice that the single subject requirement seeks to proscribe. *Id.* at 84. See also *In Re Proposed Initiative for 2005-2006 #55*, 138 P. 3d 273, 282 (Colo. 2006). The "process changes" to the recall of elected officials was "not dependent" or "necessarily" connected to the "substantive" changes of adding non-elected officials to the recall process. *Id.* at 86. Nor could the proponents of Initiative #76 merge these two subjects "with a single all-encompassing umbrella phrase ('concerning the recall of government officers')..." *Id.* at 86.

Initiative #107 in this case suffers from essentially the same infirmity found in the 2014 Initiative #76 that the Court struck down as an unconstitutional initiative. Just like the 2014 Initiative #76, the 2015 Initiative #107 advances the two purposes of "revamping" an existing process and establishing a new process. Also like the 2014 Initiative #76, Initiative #107 combines "process changes" to an existing

process for state legislative districts with the "substantive" change of creating an entirely new redistricting responsibility. More specifically, Initiative #107 seeks to 1) fundamentally revamp the forty-year old Colorado Reapportionment Commission and 2) establish a new process for the independent federal redistricting process. Looking at the initiative's details on each of these subjects drives home the analogy to *In the Matter of the Title, Ballot Title, and Submission Clause For 2013-2014 #76.*

First, Initiative #107 fundamentally revamps (and necessarily renames) the existing Reapportionment Commission that currently redistricts only state legislative districts. The Colorado Supreme Court has previously recognized the creation of the Reapportionment Commission as a "major change" the voters approved in 1974 with a deliberate design. The 1974 amendment to state legislative redistricting sought "to reduce the impact that partisan politics can have on the drawing of legislative district boundaries, through the placement of the commission outside the legislative branch and through the requirements for appointment of commission members *by all three branches of state government*." *In re Colorado General Assembly*, 828 P.2d 185, 211 (Colo. 1992)(emphasis added). The "major motivation" to the 1974 Amendment was "the General Assembly's reapportionment track record, which was prone 'to endless battles over redistricting and to enmity among state lawmakers.'" *Id.* Since its inception in 1974, the Reapportionment Commission has consistently succeeded in adopting a reapportionment plan after the 1980, 1990, 2000 and 2010 censuses. In contrast, the General Assembly has failed after those four censuses to redistrict the federal congressional districts before one or more parties filed a lawsuit seeking court intervention to create a new federal congressional redistricting plan.

The process changes in Initiative #107 seek to undo the Reapportionment Commission's 40-year successful track record. One process change is to remove the appointment powers from the executive branch and the apolitical judicial branch of Colorado government (Section 48(1)(a) and (b)) and give all that appointment power to the General Assembly, undoing the deliberate goal of the 1974 Amendment of involving all three branches of government in the appointment process. Under the existing Reapportionment Commission process, all three branches of government were free to choose a commission member belonging to any party or no party within the overall limitations on the ultimate makeup of the Reapportionment Commission. In fact, in 2001, a Democratic Governor appointed a Republican commissioner as one of his three appointments.

Under Initiative #107, the leadership of the General Assembly (i.e., the two major parties) will appoint the first eight commission members from their "own party so that no more than four members may be registered with the same party." See Section 48(1)(b). Initiative #107 also seeks to change the Commission membership from an odd number to an even number (Section 48(1)(a)), allowing for the possibility of a tied vote that cannot occur under the current process. In another process change, the last four commission seats will be chosen equally by the highest ranking members of the state's two largest political parties, resulting in an even and exclusive distribution of the appointment power between the two major parties. See Section 48(1)(c)(I). The change in commission membership to an even number coupled with the even distribution of appointment power between the two major parties effectively returns the reapportionment commission to the General Assembly and unwinds the fundamental goal of the 1974 Amendment to take the reapportionment process out of the General Assembly's hands. Unaffiliated voters no longer will have the ability to appeal to an apolitical government body to be appointed to the Reapportionment Commission but will have to seek permission from the two major parties. In effect, truly unaffiliated voters will never be appointed because neither party can count on his or her vote during the redistricting process.

The point here is not to focus on policy arguments but to demonstrate that Initiative #107's changes to the appointment process for the reapportionment commission are fundamental and clearly constitute one distinct purpose of Initiative #107. More specifically, that subject is to convert a functional Reapportionment Commission into a General Assembly stand-in that will break down just as it has broken down in the federal redistricting process for many consecutive decades. It is easy to see that many, if not most, voters might oppose this part of the Initiative if it was properly presented as a single subject in its own Initiative.

Secondly, Initiative #107 establishes a new process for the redistricting of congressional districts. Currently, the federal redistricting process is completely independent of the state legislative reapportionment process and has been for decades. It is carried out by the general assembly and governor through the legislative process, not the existing reapportionment commission. Moreover, its genesis flows directly from the federal constitution (U.S. Const., Art I, section 4) and, secondarily, the state constitution. Initiative #107 would reassign this responsibility to the revamped Colorado Reapportionment Commission and change the criteria guiding congressional redistricting. The federal redistricting process has been an ad hoc process governed by the whim of the two major parties in the General Assembly. It need not consider the interests of unaffiliated voters and communities of interest (e.g., Latino communities), and it continues the "endless battles" that sparked the 1974 Amendments. This is exactly the same type of expansion of authority that was found to constitute a second subject in *In the Matter of the Title, Ballot Title, and Submission Clause For 2013-2014 #76*. Stated more poignantly, fixing the broken ad hoc federal redistricting process is a completely separate subject from breaking the existing and functional Reapportionment Commission. And again, many voters might vote for this proposal related to federal redistricting but might not approve of fundamentally changing the existing Reapportionment Commission.

Further, these two subjects are not necessarily dependent upon one another. There is no reason the first subject of altering the existing Reapportionment Commission cannot be addressed separately from establishing a new process for congressional redistricting. The single subject requirement of article V, section 1(5.5), of the Colorado Constitution prohibits such attempts to roll together these multiple subjects in order to attract the votes of various factions that might favor one of the subjects and otherwise oppose the other. See *In re Proposed Initiative for 2005–2006 # 74*, 136 P.3d 237, 242 (Colo.2006). For this reason, Initiative #107 fails to satisfy the single -subject requirement delineated in Section 1 (5.5) of Article V of the Colorado Constitution.

B. The Title Board's title setting violates the single subject requirement of Colorado Const. Article V, Section 1(5.5) because it includes the subject of directing that redistricting be carried out in a manner devoid of partisan considerations while deceptively mandating exactly that.

C.R.S. Section 1-40-106.5(3) reads:

> It is further the intent of the general assembly that, in setting titles pursuant to section 1 (5.5) of article V, the initiative title setting review board created in section 1-40-106 should apply judicial decisions construing the constitutional single-subject requirement for bills and should follow the same rules employed by the general assembly in considering titles for bills.

This instructs the title review board to consider both judicial decisions construing the constitutional single-subject requirement for bills and the same rules employed by the general assembly in considering titles for bills. The general assembly expands on their intent in C.R.S. Section 1-40-106.5(1)(e). That subsection provides:

> The practices intended by the general assembly to be inhibited by section 1 (5.5) of article V and section 2 (3) of article XIX are as follows:
>
> > (I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;
> >
> > (II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

The court has read these subsections to demonstrate that the General Assembly intended "[t]o forbid the treatment of incongruous subjects in the same measure" and *prevent voter fraud and surprise*. *In re Proposed Initiative 1996-4*, 916 P.2d 528 (Colo. 1996) (emphasis added). This was illustrated in *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #61*, 184 P.3d 747 (2008). In that case, the Court began its single-subject analysis by noting:

> The single subject requirement is intended to prevent two practices by initiative proponents. First, it serves to ensure that each initiative depends upon its own merits for passage. Second, the single subject requirement is intended to "prevent surreptitious measures . . . [so as] to prevent surprise and fraud from being practiced upon voters. (internal citations and quotations omitted)

It then proceeded to evaluate an initiative on the first criteria. It ruled that "...the Initiative "effects one general purpose" and thus contains a single subject". Next, the Court evaluated whether or not the initiative constituted a deceptive or surreptitious measure. That question centered around the Board's ruling that "Initiative # 61 violates the single subject requirement because the first sentence of the Initiative prohibits discrimination and preferential treatment while the second sentence allows such action to the extent permitted by the United States Constitution." The Board was troubled by the internal contradictions within the initiative, and ruled that they would operate to mislead voters. *Id.* at 750.

The court did not reject the Board's secondary single subject analysis regarding deception. It embraced it. Ultimately, it found that initiative was not misleading because the contradictory provision is inherently applicable to all state statutes regardless of whether or not it was included in the measure. The court wrote, "Therefore, we reject the argument that a measure is deceptive merely because its content depends on the United States Constitution, as interpreted by the United States Supreme Court." *Id.* at 751.

Conducting a single subject analysis in the same manner, the court struck down an initiative in *Matter of Ballot Title for 1997-98 #84*, 961 P.2d 456, 458 (Colo. 1998). There, the court was troubled by the proposition that an initiative purporting to cut taxes would simultaneously mandate the elimination of state programs. In finding that such an initiative violates the single subject requirement, the court wrote, "Voters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs." *Id.* at 460-61.

The same analysis in the instant case demonstrates that Initiative 2015-2016 #107 is a deceptive measure that will practice surprise and fraud upon voters by overtly pursuing one subject while impermissibly including a surreptitious provision "coiled in its folds" in violation of the single subject requirement. See *In re Proposed Initiative 2001-02 No. 43*,46 P.3d 438, 442 (Colo. 2002).

To begin, its provisions are deceptively contradictory. Section 43.5 of Initiative 2015-2016 #107 states in part:

> The People of the state of Colorado find and declare that fair representation requires that the practice of political gerrymandering, *whereby congressional, and senatorial districts and representative districts of the general assembly are purposefully drawn to favor one political party or incumbent over another or to accomplish political goals, must end.* (emphasis added)

Giving that declaration teeth, Section 48(2)(c) provides:

> Nonpartisan staff *shall not draw any plan for the purpose of favoring a political party, incumbent legislator, member of congress, or other person.* For the purpose of establishing fair and competitive districts, nonpartisan staff may use and consider election performance data. (emphasis mine)

This language clearly tells voters that the initiative intends to prevent the drawing of congressional, and senatorial and representative districts for the purpose of benefitting one political party, incumbent legislator, member of congress, or other person.

However, Section 47(4) of the Initiative provides:

> After following subsections 1, 2, and 3 of this section, and section 46 of this article, nonpartisan staff shall maximize the number of fair and *competitive* senatorial districts and representative districts. (emphasis mine)

Similarly, Section 47.5(1)(c) reads:

> Shall, after adhering to the provisions of this subsection (a) and considering the provisions of this subsection (b), maximize the number of fair and *competitive* congressional districts. (emphasis added)

The plain language of these subsections clearly directs the nonpartisan staff and commission to draw congressional, and senatorial and representative districts for the purpose of benefitting a political party, incumbent legislator, member of congress, or other person. While a laudable goal, making a district more competitive inherently requires improving the chances of victory of the less likely to prevail political party, incumbent legislator, member of congress, or other person.

The language of Section 43.5 and Section 48(2)(c) are thus inconsistent with the direction provided in Sections 47(4) and 47.5(1)(c). They work to mislead voters about the operation of the initiative. The former sections will lead a voter to believe that the initiative proscribes the drawing of districts to favor or disfavor a political party, incumbent legislator, member of congress, or other person. The latter provisions of the initiative, however, provide for exactly that. This is exactly the type of surprise subject the court disallowed in *Matter of Ballot Title for 1997-98 #84*. Accordingly, the provisions of the Initiative #107 that direct redistricting sans partisanship and the provisions of Initiative #107 that direct redistricting with specific partisan objectives constitute separate subjects.

Moreover, and unlike *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #61*, this internal deception is solely the product of the initiative itself. There is no existing, controlling law that governs partisan considerations in redistricting. The Initiative is not on the one hand proscribing partisan considerations and on the other hand acknowledging that senior law may mandate partisan considerations. Rather, it represents that it eliminates partisan redistricting and then, with its own breath, commands exactly that.

Accordingly, Initiative 2015-2015 #107 must be found to violate the single subject requirement.

3. The titles are misleading, confusing, and prejudicial.

The title and submission clause of a ballot measure should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. *In re Title, Ballot & Submission Clause for 2009-2010 No. 45*, 234 P. 3d 642, 648 (Colo. 2010). The subject title and submission clause fails to do so.

A. Describing the commission as "renamed" and simply "directing" the appointment method is misleading and fails to identify the independent purpose of fundamentally altering the Reapportionment Commission.

Describing the commission as simply "renamed" rather than with words like "replacing" and/or "changing" the existing Reapportionment Commission impermissibly misleads voters and hides the independent purpose of altering the Reapportionment Commission that has achieved its mission of creating a new state legislative redistricting plan after each census. On this point, the Title Board actually deleted the word "changing" that was included in the original proposed title and submission clause. The title and submission clause set by the Title Board gives the false impression that the Reapportionment Commission has not otherwise been changed and disguises the independent purpose of fundamentally changing the Reapportionment Commission thereby (1) preventing the voters from detecting the changes and (2) appealing to many voters' desire to fix the federal redistricting process (without breaking a functional system).

The single subject requirements in the Colorado Constitution and implementing statutes require that voters be informed in the title and submission question that Initiative #107 transfers the Governor's and Judiciary branches' appointment powers to the General Assembly (Section 48(1)(a). The voters must be informed that Initiative #107 changes the Commission membership from an odd number to an even number (Section 48(1)(a)) to allow for the possibility of a stalemate by an even vote. They must be informed that the leadership of the two major parties will appoint all the commissioners, the first eight commission members from their "own party" and the last four following an application process. See Section 48(1)(b-c). The voters must be informed that Initiative #107 unwinds the fundamental goal of the 1974 Amendment to take the reapportionment process out of the General Assembly's hands. The title and submission clause do not inform the voters that unaffiliated voters no longer will have the ability to appeal to an apolitical government body to be appointed to the Reapportionment Commission but will have to garner permission from the two major parties. It must be clear that one subject in Initiative #107 is to change a functional Reapportionment Commission to General Assembly stand-in that decades of history proves will most likely break down.

Given the scope of the fundamental alterations to the commission, the only accurate way to characterize the Initiative's treatment of the existing reapportionment commission is to describe it as being repealed and replaced by the redistricting commission that places all of the appointment power into one branch of government: the General Assembly that is "prone to endless battles" decade after decade.

B. The description "not affiliated" is misleading.

The title reads in part, "...requiring appointment of members with equal representation from each major political party and those not affiliated with any major party." While lawmakers may understand the term "affiliated" in a manner that is consistent with the actual provisions of Initiative #107, the electorate likely will not. Initiative #107 provides that four members of the commission may not have been affiliated with the same political party or member already on the commission. It later adds that these four members must be registered with minor parties or unaffiliated. Presumably, this is why the title characterizes them as "not affiliated".

However, it is unlikely that the electorate would characterize them as such. Merriam-Webster defines the term affiliated as "closely associated with another, typically in a dependent or subordinate position". http://www.merriam-webster.com/dictionary/affiliated. A person hired by another is dependent upon that person, and certainly closely associated therewith. The initiative provides that these four members are selected by the highest ranking members of the state's two largest political parties. See Section 48(1)(c)(I). These positions are paid and carry a great deal of power. It is extremely doubtful that the average voter would characterize a commission member as not affiliated with a political party when the political party in fact selects the commission member for this paid, powerful position.

C. The omission of the term "fair" is misleading.

The title reads in part, "adding competitiveness to the criteria for state legislative and congressional districts". Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. See *In re Ballot Title 1997-98 # 62*, 961 P.2d 1077, 1082 (Colo. 1988). Initiative #107 actually adds both fairness and competiveness to the criteria. The omission of fairness is misleading.

This may seem immaterial, but it is not. On its face, the requirement that districts be fair seems beyond reproach. This could lead to the conclusion that its omission is inconsequential. However, the term "fair" is highly subjective. It lends itself to being construed and applied as defined by the individual commission members as they define it. This could result in the commission members having substantial discretion in redistricting. Voters should be given the opportunity to reach that, and other conclusions, by being put on notice of its inclusion in the initiative.

WHEREFORE, the title set on March 16, 2016 should be stricken altogether.

RESPECTFULLY SUBMITTED this 23rd day of March, 2016.

Jason Legg

Jason M. Legg

Jason Legg

Luis A. Corchado, by JML

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2015-2016 #107 was sent on this day, March 23, 2016 via first class U.S. mail, postage pre-paid to the proponents at:

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