BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Robert David DuRay and Katina Banks, Objectors

vs.

Bill Hobbs and Kathleen Curry, Proponents.

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MOTION FOR REHEARING ON INITIATIVE 2017-2018 #69

Robert DuRay and Katina Banks, registered electors of the State of Colorado, through legal counsel, Recht Kornfeld P.C., object to the Title Board's title and ballot title and submission clause set for Initiative 2017-18 #69 relating to congressional redistricting.

The Title Board set a title for #69 on November 15, 2017. At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

> *Shall there be a change to the Colorado Revised Statutes concerning congressional redistricting, and, in connection therewith, establishing a congressional redistricting commission to perform the responsibility of the state legislature to redraw congressional boundaries following each federal census; specifying 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; establishing factors for the commission to use in drawing districts; requiring the commission to consider political competitiveness after all other factors; 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 be done in public meetings and requiring the commission's nonpartisan staff to prepare and present plans; 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?*

INITIATIVE #69 VIOLATES THE SINGLE SUBJECT REQUIREMENT

A. Initiative #69 converts appellate review to a de novo trial on the merits before the Supreme Court.

Initiative #69 mandates that the Supreme Court abandon its historic role as an appellate court, authorizing the parties' "production and presentation of supportive evidence" for the plan presented. In describing the Supreme Court's consideration of the Commission's plan, Initiative #69 states:

> THE SUPREME COURT SHALL REVIEW THE SUBMITTED PLAN AND DETERMINE WHETHER THE PLAN COMPLIES WITH SECTION 2-1-102. THE COURT'S REVIEW AND DETERMINATION SHALL TAKE PRECEDENCE OVER OTHER MATTERS BEFORE THE COURT. **THE SUPREME COURT SHALL ADOPT RULES** FOR SUCH PROCEEDINGS AND **FOR THE PRODUCTION AND PRESENTATION OF SUPPORTIVE EVIDENCE FOR SUCH PLAN. ANY** LEGAL ARGUMENTS OR **EVIDENCE CONCERNING SUCH PLAN SHALL BE SUBMITTED TO THE SUPREME COURT** PURSUANT TO THE SCHEDULE ESTABLISHED BY THE COURT. THE SUPREME COURT SHALL EITHER APPROVE THE PLAN OR RETURN THE PLAN TO THE COMMISSION WITH THE COURT'S REASONS FOR DISAPPROVAL UNDER SECTION 2-1-102.

Proposed Art. § 2-1-105(9)(a) (emphasis added). Thus, parties will now be able to produce and present "any" new evidence to sustain the maps presented.

This change in the Supreme Court's role – to base its decision on non-record evidence – runs contrary to the very essence of an appellate court. "Evidence which was not presented to the trial court will not be considered on review." *In re Petition of Edison*, 637 P.2d 362, 363 (Colo. 1981). Providing evidence to the Supreme Court for it to weigh, evaluate, and use for the first time in the proceeding is a radical departure from the fundamental task of an appeal.

Introducing new evidence is not even permitted in original proceedings before the Supreme Court pursuant to Colorado Appellate Rule 21. Where a party invokes the Court's jurisdiction and then supplements its trial court record with new documents for the Court's review, the Supreme Court will reject those additional materials and resort only to the record developed below.

> We find this procedure unacceptable. This is another case where a party fails to comply with well established procedures in the trial court and requests, if not expects, this court to act as the fact finder to whom relevant and important evidence is presented for the first time. We decline to consider the additional evidence.... Simply stated, we will not consider issues and evidence presented for the first time in original proceedings.

Panos Inv. Co. v. District Court of Cty. of Larimer, 662 P.2d 180, 182 (Colo. 1983).

There is a strong and well-understood reason for restricting the role of an appellate court to its historic role: the "orderly administration of justice." *Id.* Even the parties' use of additional affidavits before the Supreme Court does not meet this fundamental element of acceptable appellate practice that is necessary to foster an orderly justice system. *Bond v. District Court*, 692 P.2d 33, 39 n.2 (Colo. 1984). There are important reasons for prohibiting new evidence on appeal, including the fact that such new evidence is "not subject to cross-examination." *Cf. City & County of Broomfield v. Farmers Reservoir & Irrigation Co.*, 235 P.3d 296, 297 (Colo. 2010) ("tables and calculations [that] were not introduced at trial" constituted "new evidence" and were properly excluded from appellate review).

Any change to the long-standing, well-accepted role of the Supreme Court as an appellate body is a change that would surely surprise voters. The Court's historic role in assessing a commission's legislative reapportionment plan is firmly established. "**Our role in this proceeding is a narrow one**: we measure the Adopted Plan against the constitutional standards, according to the hierarchy of federal and state criteria we have previously identified.... **Our review must be** swift and **limited in scope** so that elections may proceed on schedule." *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 110 (Colo. 2011) (emphasis added) (citations omitted).

Even more to the point, Initiative #69 gives the Court a new, substantive role in evaluating evidence and applying it for the purpose of justifying the House and Senate maps' district lines. The proponents ignore the fact this role has always been one for the Commission and the Commission alone. "We do not redraw the apportionment map for the Commission." *Id.* Neither has the Court, based on evidence the Commission never saw, been asked to conjure up reasons, based on that new evidence, to justify the districts drawn.

When an initiative's proponents change an operating and fundamental tenet underlying a second governmental body in order to advance a redistricting measure, their proposal violates the single subject requirement in the Colorado Constitution. *In re Title, Ballot Title & Submission Clause for Initiative 2015-2016 #132*, 2016 CO 55 ¶¶24-25 (Colo. 2016) citing *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #64*, 960 P.2d 1192, 1196 (Colo. 1998) (altering the powers of a separate commission furthered a distinct purpose). Therefore, this measure should be returned to its proponents to comply with the single subject requirement.

B. Initiative #69 violates the single subject requirement because it seeks to make race (as well as language group identification) key bases both for setting district lines and, by extension, for the representation of constituents.

In addition to establishing a redistricting commission, this initiative radically alters the basis for legislative representation and provides that districts may be drawn based on "racial" or "language group" communities of interest. The measure authorizes the commission to consider factors including:

> The preservation of communities of interest, including RACIAL, ethnic, LANGUAGE GROUP, cultural, economic, trade area, geographic, and demographic factors.

Proposed Art. V, § 2-1-105(1)(b)(II).

This change is a dramatic departure from existing Colorado law. In 2011, when presented with a map that aligned Hispanics in southern (Pueblo and San Luis Valley) and north-central Colorado (Morgan and Weld Counties), the district court refused to link towns and counties based on the race of many of their inhabitants. "[T]he court found that race was the predominant consideration in the drawing of the... maps, creating a significant concern as to the constitutionality of the maps." *Hall v. Moreno.* 2012 CO 14 ¶25, citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) ("[A]ll laws that classify citizens on the basis of race, including racially gerrymandered districting schemes, are constitutionally suspect and must be strictly scrutinized").

Thus, to create a construct whereby districts could be drawn as a matter of racial communities of interest represents a substantive departure from what voters have experienced – the drawing of districts to reflect "the foundational goal of congressional redistricting under the United States Constitution: 'fair and effective representation for all citizens.'" *Hall, supra,* at ¶43, citing *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). All non-constitutional criteria for redistricting, including the preservation of communities of interest, "must be interpreted in light of this overarching goal." *Hall, supra.*

A focus on race (or "language group") communities of interest is contrary to the underpinnings of fair and effective representation. "The recognition of nonracial communities of interest reflects the principle that a State may not 'assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls.'" *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 433 (2006) (citations omitted). Thus, racial communities of interest are not used precisely because such communities of interest would assume that race is a way of grouping citizens with common policy concerns. That presumption is so overbroad as to be useless if not counterproductive.

The threats posed by Proponents' approach include not just the undermining of fair and effective representation. Race-based districting, if successful, is the ultimate "us vs. them" construct for legislative representation, fixing white districts and Hispanic districts and African-American districts and so on. "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

As a result, it cannot be said that adding "race" and "language group" communities of interest is simply another redistricting procedure. It is a substantive and even fundamental change in the law. And when a measure, such as this one, masks such substantive change as a procedural one, it violates the single subject requirement. In *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438 (Colo. 2002), a proposed ballot measure that changed certain initiative-related procedures also expressly changed two state constitutional rights: protection against multi-subject ballot measures and excluding zoning matters that affect private property rights from the right of referendum. *Id.* at 445-46, 448.

In finding a single subject violation, the Court noted the voter surprise that would result from voters who considered a reform measure who only later found that they had also sacrificed fundamental constitutional protections. "It is ironic that in approving a seemingly innocuous

initiative proposing to relax the procedural requirements for placing a measure on the ballot, voters may inadvertently nullify their only protection against the dangers of including incongruous measures in a single initiative." *Id.* at 446. In so concluding, the Court relied on the Board's observations below:

> The general assembly gave us a list, "To avoid surprise and fraud, avoid surreptitious measures being buried within broader measures." This just strikes me as something that is buried .... I just don't think that normally that a measure that deals with petitioners' rights, one would normally think that that would include reversing the single-subject rule.

Id. (citing comments of chairman of the Title Board, William Hobbs).

Both concerns apply here. First, the consideration of a measure establishing a new redistricting commission, with elaborate selection processes, procedures for map-drawing and approval, and public input requirements, masks the fact that a new form of race-based districting would be authorized in Colorado. These concerns have no necessary connection with one another and could easily be advanced by separate ballot measures. *See* C.R.S. 1-40-106.5(1)(e)(I). Second, the fact that they are combined would be a surprise to voters. *See* C.R.S. 1-40-106.5(1)(e)(II). Voters would focus, at Proponents' urging, about the supposedly independent commission rather than the fact that their districts could now be drawn in a way that would undermine the understood goal of fair and effective representation for all Coloradans. This provision thus violates both of the single subject concerns at the heart of the 1994 amendment imposing that requirement.

Further, this aspect is buried in a 15-page measure that is full of complex procedural provisions. It is easily overlooked as a matter of the sheer volume and political noise over a new mechanism for drawing districts. Proponents tout their inclusion of an already-accepted redistricting consideration – political competitiveness – as the major change to be enacted. In comparison, it is a minor one given that the Colorado courts have already sanctioned its use in both the congressional and legislative redistricting processes. *Hall, supra*, at ¶52; *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 111 (Colo. 2011). As race-based communities of interest have never been the basis for district lines, voters would have no reason to think that this provision was included in this measure.

The Proponents endorse the Board's summary of the single subject description as "congressional redistricting." However, the fact that provisions in a measure share a "common characteristic" is not enough to convert untethered amendments to a single subject. *In re Title, Ballot Title & Submission Clause and Summary for Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 2002).

If Proponents want to make racial (or language group) interests a keystone of both the districting line-drawing process *and* the way in which legislative concerns are represented in the legislative branch through establishing new communities of interest that focus on such matters, they certainly may do so. But they must amend this aspect of our election and governing processes through an independent ballot measure rather than hide these changes in this initiative that purports, as its primary purpose, to change the procedural aspects of redistricting.

The Board should set no title for this measure and should instead return it to the Proponents so that they may cure this constitutional matter of the first order.

WHEREFORE, the titles set November 15, 2017 should be reversed, due to the single subject violations addressed herein.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2017-2018 #69 was sent this day, November 22, 2017 via email and first class U.S. mail, postage pre-paid to the proponents' counsel at:

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