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COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2017-2018 #95

MOTION FOR REHEARING ON INITIATIVE 2017-2018 #95

Randolph E. Pye and Max S. Gad (the "Objectors"), through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby object to the title, ballot title and submission clause ("Title(s)"), set for 2017-2018 #95 ("Initiative #95").

On January 17, 2018, the Title Board set the Title for Initiative #95 as follows:

> An amendment to the Colorado constitution concerning congressional redistricting, and, in connection therewith, establishing a citizens' 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 competitiveness, as defined in this amendment, to mean that districts are not 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 unaffiliated commissioners the power to reject any map; mandating disclosure, within 72 hours, of paid lobbying of the commission; and providing for judicial review of redistricting maps.

I. Initiative #95 Violates the Single Subject Requirement.

Initiative #95 has at least three separate subjects apart from the stated subject of congressional redistricting, each of which is addressed in turn.

A. Initiative #95 Fundamentally Alters the Supreme Court's Authority by Requiring It to Approve Unconstitutional Redistricting Maps.

If there is no supermajority consensus, Initiative #95 allows the commissioners to submit competing maps and forces the Colorado Supreme Court to choose the map that most closely complies with state and federal law, even if it is otherwise unconstitutional. Proposed article 5, § 44(8)(b) (in the absence of supermajority agreement on approving any 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")[1] (emphasis added); *id.* at § 44(8)(a)(III) (absent supermajority agreement on the changes to be made to approved maps in order to comply with the court's directions, providing that the "supreme court **must** adopt the proposed changes that are most responsive to the direction it provided to the citizens' commission") (emphasis added).

The fact that the Supreme Court must adopt an unconstitutional map without revision is established by the plain language of the measure. The meaning of Initiative #95's judicial review provisions is also evident when comparing them to their sister provisions in Initiative #96, which expressly permit the Colorado Supreme Court to reject and return maps that do not comply with constitutional criteria. Initiative #96, proposed article V, § 48(3)(c).

Forcing the Court to adopt unconstitutional maps dramatically alters the Court's existing and inherent authority to determine issues of constitutionality. *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"). This fundamental change to the judicial branch's authority, which is buried in lengthy provisions concerning the review process, directly contradicts the Proponents' purported purpose of increasing accountability in the redistricting process and would therefore surprise voters. Consequently, this change is the epitome of a surreptitious provision and constitutes a second subject.

Moreover, this aspect of the measure is critical because the chances of the triggering circumstances occurring, i.e., the failure of a supermajority vote, are high. In contrast to Initiative #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, the measure disincentives the commissioners—particularly the partisan, major-party commissioners—from reaching supermajority because the commissioners then get to submit competing maps from which the Supreme Court must choose one. *See* Initiative #95, proposed article V, § 48(3)(b).

In this way, the commission is set up to fail in order to purposefully maintain the status quo. The two well-organized major parties represented on the commission will submit competing maps and battle before the courts, leaving unaffiliated voters, who lack the same political organization and funding, with no say in the redistricting process. The only difference under Initiative #95 is that no one outside of the commission can submit maps for the Court's consideration, and the Supreme Court is forced to adopt a partisan-drawn map even if it is unconstitutional.

In short, Initiative #95 should be returned to the Proponents because requiring the Colorado Supreme Court to approve unconstitutional plans drawn by partisan commissioners constitutes a second subject.

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[1] 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.

B. Initiative #95 Requires the Chief Judge of the Court of Appeals to Select 6 out of the 12 Commissioners.

Proposed article 5, § 44(4)(d) requires the Chief Judge of the Colorado Court of Appeals to select half of the commission's members, including 4 of the 6 partisan commissioners. The Colorado Constitution prohibits judges from holding other public office, and serving as the appointing authority for half of the commission constitutes other public office. Colo. Const., art. VI, §18. In contrast, 2017-18 #48 and #67 utilize senior judges merely to select the pool of unaffiliated candidates from which commissioners are then randomly selected by the secretary of state. Further, 2017-18 #50, #68, and #69 use retired judges to select the pool of unaffiliated candidates.

Consequently, Initiative #95 has a much greater impact on the judiciary's nonpartisan existence than the competing measures. Voters will be surprised to learn the degree to which #95 politicizes the judiciary—an apolitical branch of government. Pursuant to *In re Title, Ballot Title, & Submission Clause for Initiative 2015-16 #132 and #133*, this level of intrusion constitutes a second subject. 2016 CO 55, ¶ 25.

C. Initiative #95 Prohibits Professional Lobbyists from Sitting on the Commission.

In *In re 2015-16 #132 and #133*, the opponents of those measures argued strenuously that the prohibition against lobbyists from sitting on the commission constituted a second subject based on Supreme Court precedent in *In re Title, Ballot Title and Submission Clause for 2003-04 #32 and #33*, 76 p.3d 460, 462 (Colo. 2003). In *In re 2003-04 #32 and #33*, the measures altered the petitioning process and also separately excluded all lawyers from participating in the title setting process. The Supreme Court ruled that the wholesale prohibition against an entire profession from participating in the title setting process constituted a second subject. Likewise, Initiative #95's prohibition against all professional lobbyists from serving on the commission may constitute a second subject here.[2] Proposed art. V, § 44(4)(h)(I).

II. The Titles Are Unfair, Inaccurate, and Incomplete.

In addition to containing multiple subjects, Initiative #95's Titles are also deficient. In assessing the Titles, the Title Board should view the issue through the lens provided by Proponents at the title setting hearing, i.e., that the Titles should highlight the differences between the pending redistricting measures.

A. The Phrase, "Citizens' Commission" Is an Impermissible Catch Phrase.

The inclusion of the word "citizens'" makes this a catch phrase that appeals to voters' emotions. Its inclusion is particularly inappropriate considering that applicants for the commission must be experienced in political advocacy, i.e., political insiders. Proposed art. 5, § 44(4)(b)(I). The title for 2017-18 #96 does not include this catch phrase even though the

[2] When this issue was re-raised in the lobbyist context *In re 2015-16 #132 and #133*, the Court declined to rule one way or the other on the issue. 2016 CO 55, ¶ 26, n.2.

commissioner criteria are the same. *See* #96, proposed art. § 48(1). The word "citizens'" in this phrase is also unnecessary because it does not inform voters of anything they do not already know. Who else would be sitting on the commission—non-citizens? The word "citizens'" should be removed from the Titles.

B. The Competitiveness Clause Is Misleading and Unfair.

While Proponents tout their definition of competitiveness, Initiative #95 utterly fails to promote competitiveness in the drawing of district lines. By defining competitiveness as they have, Proponents propose to make competitiveness only a diluted "consideration" of purposeful intent to politically gerrymander district lines. Proposed art. V, § 44(2)(c), (7)(b)(III) (providing only for the consideration of competitiveness as a final "factor" among redistricting criteria). The codification of this "definition" eliminates the plain-meaning, common-law definition of competitiveness, i.e., that political races be close, regardless of intent to politically gerrymander. *Hall v. Moreno*, 2012 CO 14, ¶ 52 (describing consideration of competitiveness as ensuring that elected officials cannot ignore the needs of any block of constituents); *id.* n.7 (citing to debate in the General Assembly, including statement that competitive districts are districts "with even numbers of Republican, Democratic, and Unaffiliated voters", which establishes "**accountability**") (emphasis added).

In other words, under Initiative #95, the commission can draw districts that are not competitive at all, so long as the commission can demonstrate that it gave some consideration to whether the lack of competitiveness was the result of purposeful political gerrymandering. The resulting detriment to truly competitive districts is exacerbated by the fact that the definition of political gerrymandering (i.e., the definition of competitiveness) in Initiative #95 will be nearly impossible to establish. *See* Proposed art. V, § 44(2)(c) (defining as, for example, drawing a district "for the purpose of **guaranteeing** a political party control of a district **for the following decade**") (emphasis added). Initiative #95's gutting of competitiveness considerations is particularly troubling because the legislative declaration appeals to voters' desire for competitive districts. Proposed art. V, § 44(d).

In contrast, the competing measures all bar political gerrymandering outright, rather than merely require consideration of whether it is the cause of uncompetitive districts. *See, e.g.*, 2017-18 #69, proposed C.R.S. § 2-1-102(1)(a)(III) (stating that the commission "shall . . . not prepare any congressional redistricting plan to purposefully advantage or disadvantage any political party or person"). In addition to this bar against political gerrymandering, the competing measures separately require the commission to maximize competitiveness in the traditional, common-law sense, i.e., that elections be close, hard-fought races. *See, e.g.*, 2017-18 #69, proposed C.R.S. § 2-1-102(1)(c).

Given these stark contrasts between the two measures, it would be unfair to include the competitiveness clause, which should be stricken altogether. Alternatively, the word "competitiveness" should be stricken from the clause. This word is unnecessary because the following description of the definition correctly informs voters of what the measure does. In this case, the clause should be revised to read, "consideration of whether districts are drawn for the purpose of protecting an incumbent legislator or for the purpose of guaranteeing a political party control of a district for the following decade."

C. The Clause, "Giving the 4 unaffiliated commissioners the power to reject any map," Is Misleading.

As an initial matter, the use of the word "unaffiliated" should be changed to "commissioners who are not registered with any political party" for consistency within the Titles and because the Title Board did not permit the use of the word "unaffiliated" in the competing measures.

Moreover, this clause does not make clear that these 4 commissioners must unanimously take the affirmative step of vetoing a partisan-drawn map. As drafted, it sounds like any 1 of the 4 could reject a map drawn by the 8 partisan commissioners. This issue is important because Initiative #69 requires the affirmative vote of two independent commissioners in order to approve a map. Whereas, under Initiative #95, the partisan Republican and Democratic commissioners can approve a map so long as one independent commissioner elects not to, or is otherwise unavailable to, veto. The clause at issue should be changed to, "allowing a map to be vetoed by the vote of all 4 commissioners who are not registered with any political party."

D. The Titles Should Reflect that, If No Supermajority Is Reached, Then Only the Commissioners Get to Submit Competing Maps from Which the Court Must Choose One.

As discussed above in Section I.A, this surreptitious concept, which effectively maintains the status quo in the redistricting process, is the heart of the measure and demonstrates a vast departure from the competing measures. Proposed art. V, § 44(8)(b). Unlike in the competing measures, Initiative #95 provides no incentive for and, in fact, disincentives supermajority approval of redistricting maps. Consequently, the likely outcome of any redistricting process is that the respective political factions on the commission will submit competing maps and then battle before the courts, just as they do now. Unaffiliated voters, without the collective resources and political organization of the major parties, will be left in the cold.

To be fair and not misleading, the Titles must alert voters to this issue. Accordingly, after the clause concerning the veto rights of the 4 commissioners, the following clause should be added: "allowing only commissioners to submit maps for judicial approval in the event 8 of the 12 commissioners cannot reach consensus and requiring the Supreme Court to choose one such map without revision".

WHEREFORE, the Objectors respectfully request that the Title Board reverse their title setting for Initiative #95 because of the single subject violations and because of the deficiencies with the description of the measure in the Titles.

Dated: January 24, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **MOTION FOR REHEARING ON INITIATIVE 2017-2018 #95** was sent this 24th day of January, 2018, via first class U.S. mail, postage pre-paid or email to Movants at:

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