

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Robert David DuRay and Katina Banks, Objectors

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S. WARD

OCT 11 2017

2:15 P.M.

vs.

Kathleen Curry and Toni Larson, Proponents.

Colorado Secretary of State

MOTION FOR REHEARING ON INITIATIVE 2017-2018 #48

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 #48 relating to state legislative reapportionment.

The Title Board set a title for #48 on October 4, 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 an amendment to the Colorado constitution concerning state legislative redistricting, and, in connection therewith, renaming the commission that redraws state legislative boundaries; changing 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 two largest political parties; adding political competitiveness to the criteria used by the commission; prohibiting drawing plans to purposefully advantage or disadvantage any political party or person; specifying procedures that the commission must follow, including requiring that the commission's work be done in public meetings and requiring the nonpartisan staff of the commission to prepare and present plans; and requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission?

I. Initiative #48 violates the Constitution's single subject requirement.

A. Initiative #48 converts appellate review to a de novo trial on the merits before the Supreme Court.

Initiative #48 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 #48 states:

The Supreme Court shall review the submitted plan and determine whether the plan complies with sections 46(2) and 47 of this article V. 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 sections 46(2) and 47 of this article V.

Proposed Art. V, § 48.5(7)(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*, 682 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 #48 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. #48 violates Article VI concerning the prohibition on other public offices to be held by judges.

Initiative #48 sets up a panel of senior judges who screen the non-major political party commissioners. This panel is so central to the measure, as Proponents admit on their website. "To minimize the 'stuff the ballot box dynamic', by which both parties attempt to get their 'independents' on the commission, **our initiatives use senior/recently retired judges to identify truly independent finalists.**"¹

Under Initiative #48, the secretary of state appoints the panel of senior judges. Proposed Art. V, § 48(6)(d). They are compensated based on a formula that reflects their regular compensation level as well as coverage of their travel and expenses. *Id.*, § 48(6)(e). As a matter of law, senior judges are categorized and treated as "judges." C.R.S. § 13-5.5-102(13).

The Colorado Constitution provides, "No justice or judge of a court of record shall accept designation or nomination for any public office other than judicial without first resigning from his judicial office." Colo. Const., art. VI, § 18. "Any other public office" includes an appointment to a redistricting panel such as this one. *Adams v. Comm'n on Appellate Court*

¹ <http://fairdistrictscolorado.org/faq/> (last viewed October 10, 2017) (attached) (emphasis added).

Appointments v. State Compensation Ins. Fund, 254 P.3d 367, 371 (Az. 2011) (irrigation district directors could be appointed to Arizona redistricting commission as it was an “other public office”).

Where the nature of the public appointment of officials who screen potential members of the commission is at odds with voter expectations for such officials, the proposal violates the single subject requirement. That was the Supreme Court’s reasoning in #132, *supra*, striking a measure on single subject grounds that “add[ed] to the Nominating Commission’s otherwise apolitical role of recommending judicial appointments the new and inherently political task of recommending members for the reconfigured Reapportionment Commission.” 2016 CO 55 at ¶25.

Initiative #48 is a far greater incursion into neutral decision making, as it mandates the participation of certain persons who may be serving as judges in pending matters. Much like last year’s initiatives, this measure “run[s] the risk of surprising voters with a ‘surreptitious’ change not anticipated by the seemingly neutral requirement that the [specified officials] recommend candidates for appointment to the Redistricting Commission.” *Id.* at ¶26. As such, it violates the single subject requirement and should be returned to the Proponents.

II. The titles fail to inform voters of certain central elements of the measure and thus are deficient.

A. The titles are silent as to appointing authorities for two-thirds of the commission.

The ballot title fails to state that the representatives of the two largest political parties on the commission are appointed by the two parties themselves. Proposed Art. V, § 48(2)(a), (b) (appointees named by party chairpersons or party leadership, depending on the authority provided in political parties’ rules). In a measure that is billed as creating an “independent” commission, the fact that the Proponents have handed over a governmental function as important as redistricting to a private entity – a political club – is something voters would presumably be interested in knowing. Yet, the titles are silent on this key issue.

At least under current law, the appointments are made by constitutional officers – members of the general assembly, the governor, and the chief justice. All of these officers take oaths to uphold the Constitution of the United States and the Constitution of the State of Colorado. Further, all must act in a manner that is consistent with statutes that provide for public official accountability.

But political parties are answerable only to the political insiders that the Proponents rail against in their measure. Ironically, the Proponents’ website shows the mascots of the two major political parties dividing up Colorado.² They are counting on the Title Board’s silence on this issue, as exemplified by their tactical use of anti-political party rhetoric:

² <http://fairdistrictscolorado.org/> (last viewed October 10, 2017) (attached).

- “Our citizen initiatives take map drawing out of the hands of political insiders...”³
- “Our initiatives aim to end the practice of backroom dealing and shady politics where political operatives, in smoke-filled rooms, decide the outcome of elections before you even cast your ballot.”⁴
- “It’s time that Colorado communities, not politicians, draw their districts.”⁵
- “[P]oliticians and political appointees must be removed from the redistricting process....”⁶
- “Political parties or incumbents sometimes draw district lines for their own benefit at the expense of proportionality and fair representation.”⁷

How important is this information? Proponents’ website depicts a character who literally says about the potential for gerrymandering of districts, “I have no idea what you’re talking about.”⁸ If that’s not a sign that voters and petition signers need more information about #48 – and specifically, who will be making the appointments to the commission, nothing could be. After all, those voters and petition signers aren’t likely to have the benefit of the evidently necessary “crash course” YouTube video the Proponents’ cartoon spokesman is about to watch concerning redistricting.

Further, Proponents even state that the entire issue of redistricting is “weird and wonky.”⁹ An under-descriptive ballot title does not address what Proponents admit is the very real possibility of voter misunderstanding of this initiative.

At bare minimum, voters should know #48 allocates important authority to partisan insiders who, according to Proponents, are motivated to use their power (and presumably their roles as governmental appointing authorities) for political advantage. A ballot title is invalid where it is “so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶34 (Colo. 2016). This title suffers from that very malady.

B. The title inaccurately indicates the commission will consider competitiveness on par with other redistricting criteria.

The title indicates that #48 has a provision that “adds” competitiveness to the criteria to be used. In truth, competitiveness is applied only “to the extent possible” and only “after meeting the other requirements of this section.” Proposed Art. V, § 47(4)(b). In other words, competitiveness within districts may never actually be utilized by the commission under #48.

³ <http://fairdistrictscolorado.org/the-problem/> (last viewed October 10, 2017) (attached).

⁴ See footnote 3.

⁵ See footnote 2.

⁶ <http://fairdistrictscolorado.org/the-solution/> (last viewed October 10, 2017) (attached).

⁷ See footnote 1.

⁸ See footnote 2.

⁹ See footnote 2.

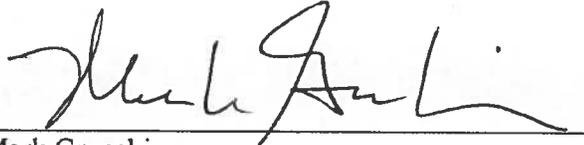
The ballot title, however, suggests competitiveness is a given in establishing lines for all districts. That is flatly incorrect. Because of the way in which Proponents drafted #48, competitiveness is no more likely to be used for district line drawing than it is under current Supreme Court doctrine wherein competitiveness is an acceptable non-constitutional factor that may be used in redistricting if all constitutional criteria are satisfied. *In re Reapportionment, supra*, 332 P.3d at 111.

Where the title misstates the substance of the proposed initiative by omitting a central element of the provision being described, the Board errs. #73, *supra*, 2015 CO 24 at ¶35. This title should state that competitiveness is the final factor the commission can consider and that it *can do so only if every other factor is satisfied*.

WHEREFORE, the titles set October 4, 2017 should be reversed, due to the single subject violations addressed herein and corrected to address a lack of needed information and material misrepresentations about #48.

RESPECTFULLY SUBMITTED this 11th day of October, 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 #48 was sent this day, October 11, 2017 via first class U.S. mail, postage pre-paid to the proponents' counsel at:

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Erin Holweger

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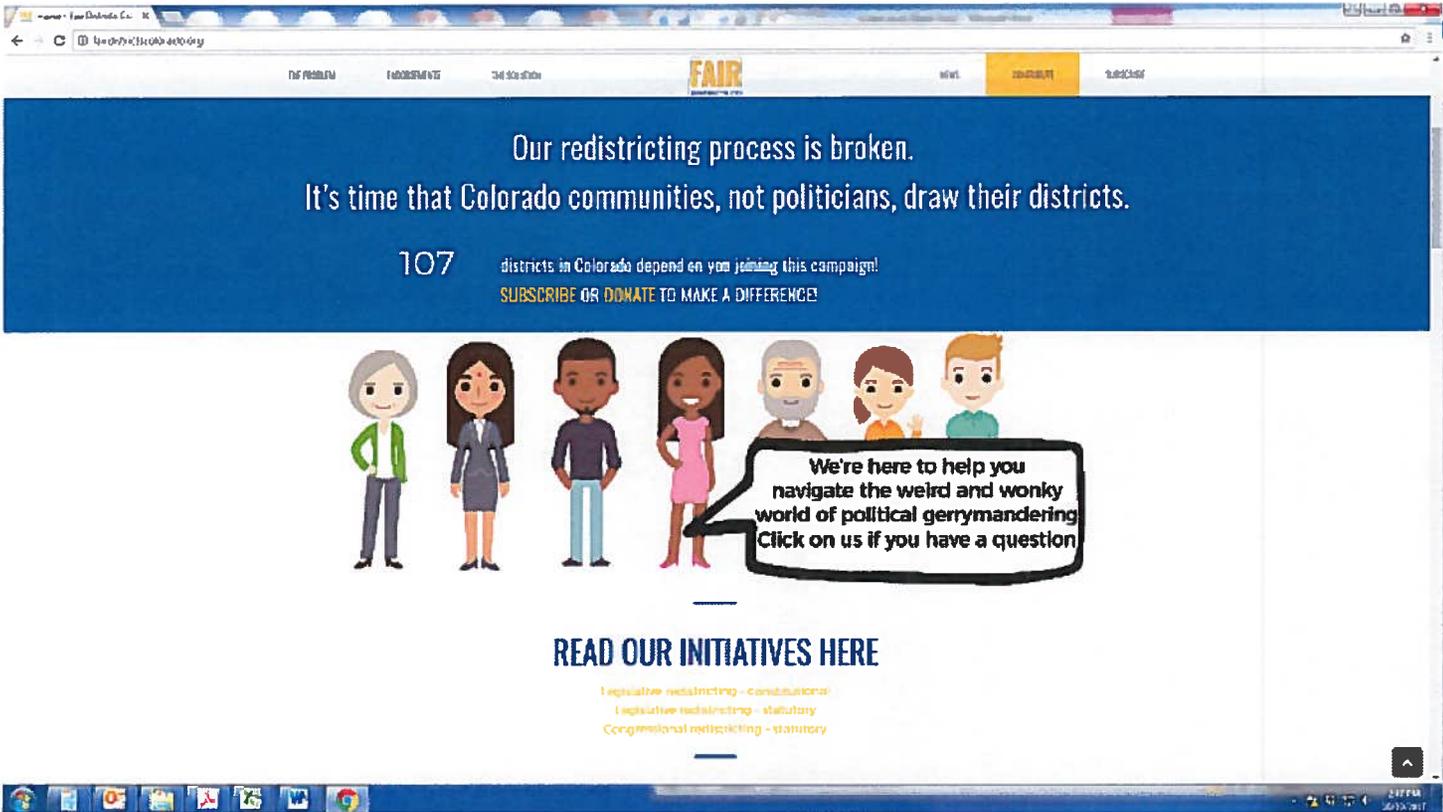
FAIR DISTRICTS CO.

THE PROBLEM THE SOLUTION NEWS CONTRIBUTE SUBSCRIBE

BACKROOM

Our redistricting process is broken.
It's time that Colorado communities, not politicians, draw their districts.

107 districts in Colorado depend on you joining this campaign!
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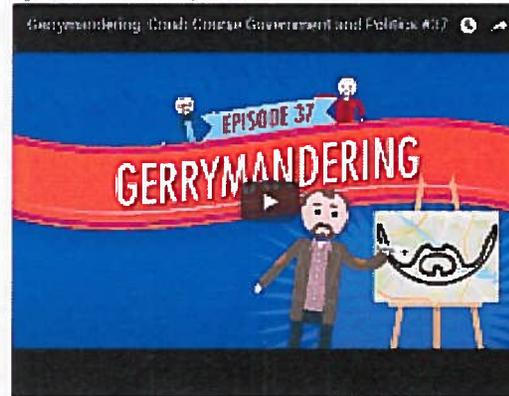
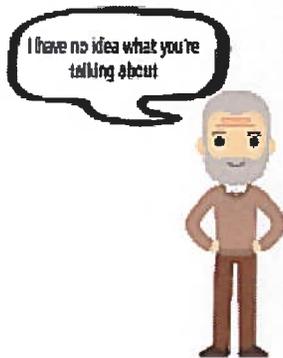


READ OUR INITIATIVES HERE

- Legislative redistricting - constitutional
- Legislative redistricting - statutory
- Congressional redistricting - statutory

WHAT IS GERRYMANDERING?

The dividing of a state into congressional or legislative districts so as to give one political party a majority in many districts while concentrating the voting strength of the other party into as few districts as possible





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REDISTRICTING NEWS



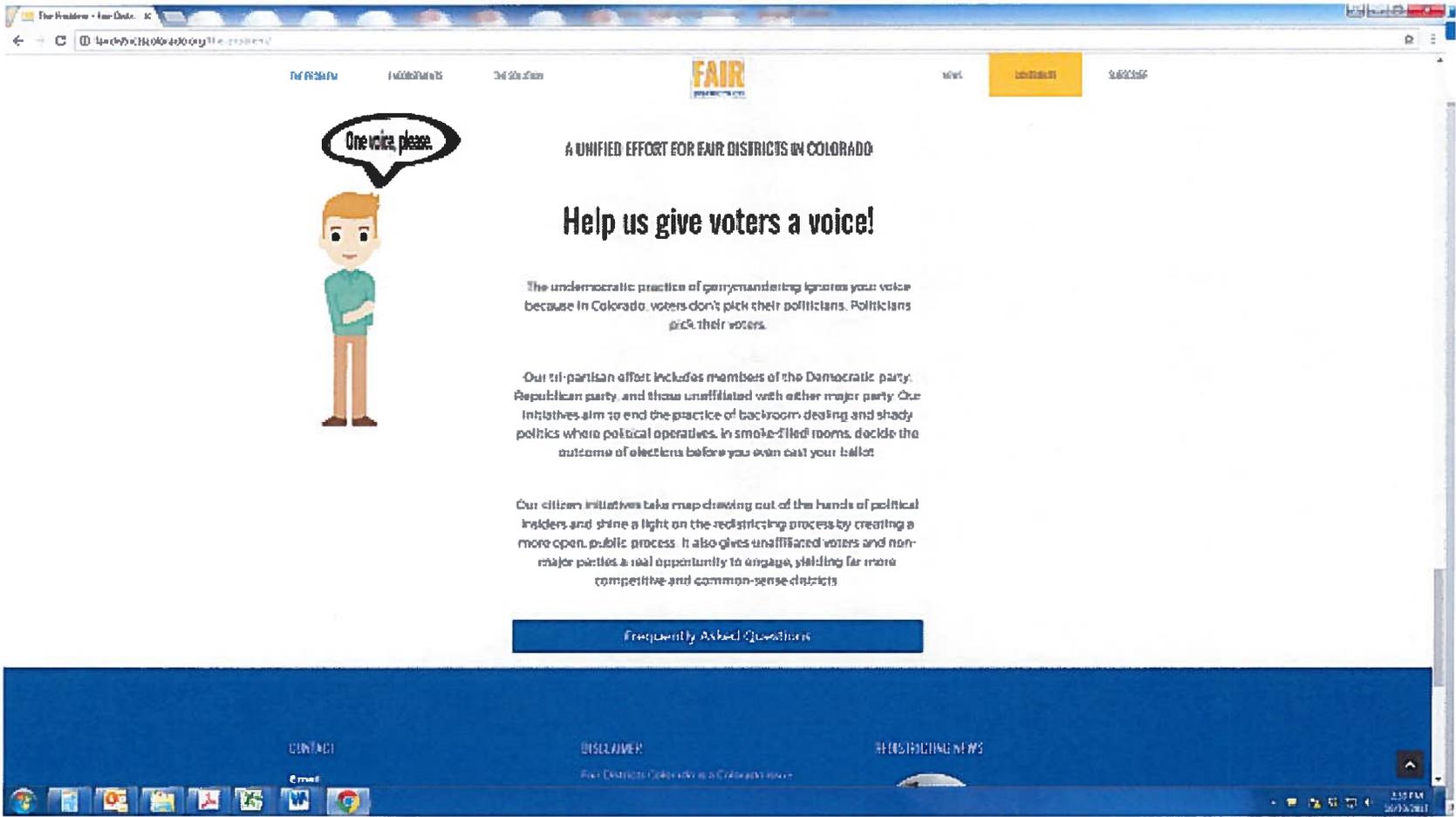
Supreme Court to hear WI redistricting case



Signatures filed Ohio redistricting



Resurrecting redistricting reform in Indiana



FAIR DISTRICTS COLORADO

What's wrong with the current system?

Redistricting is a fiercely contested issue, primarily due to gerrymandering. Political parties or incumbents sometimes draw district lines for their own benefit at the expense of proportionality and fair representation. Some argue that this practice contributes to the present lack of competitive elections. Uncompetitive elections can in turn discourage participation. Also, district lines sometimes minimize the influence of minority voters by disproportionately consolidating them within single districts or splitting them across several districts. In both the 2000 and 2010 redistricting cycles, divided state legislatures were unable to approve congressional redistricting plans, and as a result, final maps were drawn by state courts and not by a transparent process.

How will the Fair Districts Colorado initiatives fix the current system?

The Fair Districts Colorado initiatives will create new, independent commissions to redistrict both the state legislature and the U.S. Congress. Consisting of Republicans, Democrats and those unaffiliated with either major party, a supermajority vote will be required to prevent one party from hijacking the process. To minimize the "stuff the ballot box dynamic", by which both parties attempt to get their "independents" on the commission, our initiatives use senior / recently retired judges to identify truly independent finalists. Fair Districts Colorado takes the district map-drawing from partisan political operatives and puts it in the hands of non-partisan staff to draw district boundaries. The commission's and its staff's business must be conducted in open, public meetings to ensure transparency (no more back-room deals and less partisan gerrymandering). Colorado law already recognizes several nationally-recognized good government criteria. We want to add competitiveness, once those other criteria are ensured.

