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1:30 P.M.

COLORADO TITLE SETTING BOARD

Colorado Secretary of State

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR
INITIATIVE 2017-2018 #48

PROPONENTS' RESPONSE IN OPPOSITION TO MOTION FOR REHEARING

Kathleen Curry and Toni Larson, registered electors of the State of Colorado and the proponents of Initiative 2017-2018 #48 ("Initiative #48"), through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby respond in opposition to the Motion for Rehearing filed by Robert DuRay and Katina Banks ("Movants"), stating as follows:

I. Initiative #48 Has a Single Subject.

A proposed initiative comports with the single subject requirement of Article V, section 1(5.5) of the Colorado Constitution "if the initiative tends to effect or to carry out one general object or purpose." *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014). "An initiative meets this requirement as long as the subject matter of the initiative is necessarily or properly connected. Stated differently, so long as an initiative encompasses related matters it does not violate the single subject requirement." *Id.* (internal citations and quotations omitted) (emphasis in original). In addressing the single subject issue, it is improper for the Title Board to consider the merits of the proposed initiative or to review its "efficacy, construction, or future application." *In* at 176.

Here, as reflected in its title, ballot title, and submission clause (collectively, the "Title"), the single subject of Initiative #48 is state legislative redistricting in Colorado. More specifically, Initiative #48 restructures and renames the current Reapportionment Commission that is responsible for state legislative redistricting and, directly related thereto, sets forth eligibility requirements, appointment processes, redistricting criteria, and processes for adopting redistricting maps. This subject is not an overly broad or overreaching category, and all of the subsections of Initiative #48 are connected to its single subject of state legislative redistricting in Colorado. *See In re #89*, 328 P.3d at 177. Consequently, Colorado voters will not be surprised by any of the provisions of Initiative #48. *See id.*

Movants incorrectly contend that Initiative #48 contains multiple subjects. Movants first argue that Initiative #48's provisions addressing how state legislative redistricting plans are approved by the Colorado Supreme Court constitute a separate subject. The premise of Movants' argument is that Initiative #48 changes the Colorado Supreme Court from a court of appellate review to a trial court in approving redistricting plans. This argument is false because the language Movants rely upon to make this argument is unchanged from the existing constitutional language for the approval of plans drawn by the Reapportionment Commission, which currently reads:

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.

Colo. Const. art. V, § 48 (emphasizing the identical language as emphasized by Movants). In short, Movants' argument is based on a misinterpretation of the language emphasized above because Initiative #48 does nothing to change the language from its current form.

Movants next argue that the use of senior judges to nominate the independent commissioners constitutes a second subject. However, outlining the appointment process for state legislative redistricting commissioners is directly related to the single subject of state legislative redistricting. Movants nevertheless assert that utilizing senior judges to select a pool of 20 candidates to serve as independent commissioners is a second subject because the Colorado Constitution prevents judges from holding public office other than judicial. Mot. for Rehearing at 3 (citing Colo. Const. art. VI, § 18). This argument is flawed for several reasons.

First, the underlying premise of a constitutional conflict is unfounded. Movants cite no relevant authority for the proposition that the appointment role of senior judges constitutes "public office other than judiciary" under Colorado law. The only authority cited is an inapposite case in which the Arizona Supreme Court concluded that serving as a redistricting commissioner constituted public office. Mot. for Rehearing at 3-4 (citing *Adams v. Comm'n on Appellate Court Appointments*, P.3d 367, 370-71 (2011)). The court's analysis was based on the plain language of the constitutional provision in question, which clearly indicated that serving on the Arizona redistricting commission constituted holding "public office."

In contrast, here the issue is not whether serving as a redistricting commissioner constitutes public office because the senior judges are not the redistricting commissioners and they do not sit on the Independent Legislative Redistricting Commission ("Commission")—the senior judges merely recommend candidates for the Commission.¹ Additionally, Movants ignore that the judiciary already plays a more direct role in nominating commissioners to the Reapportionment Commission, given that Colo. Const. art. V, Sec. 48(1)(b) requires the Chief Justice of the Colorado Supreme Court to nominate four of the eleven members of the Reapportionment Commission. Because the nominating role of the judiciary contemplated by

¹ Even if senior judges were being asked to sit on the Commission, Proponents doubt whether, under Colorado law, such role would be considered holding "public office other than judiciary," because it is common for judges in Colorado to sit on outside commissions. For example, judges sit on the Colorado Commission on Criminal & Juvenile Justice (the "CCCJJ"), a commission established by the General Assembly pursuant to H.B. 07-1358. See CCCJJ 2016 Annual Report at pp. viii, 3, *available at* https://cdpsdocs.state.co.us/ccjj/Resources/Report/2016-12_CCJJAnnRpt.pdf; *see also* C.R.S. § 16-11.3-101. Other than judges, the CCCJJ is filled with commissioners from the other branches of state government and from outside of state government. *Id.* at vii-viii.

Initiative #48 already exists in the Colorado Constitution, Movants' argument of a constitutional conflict is meritless.

Aside from the incorrect assumption of a constitutional conflict, Movants argument is not compelling because, like the 1974 Amendment No. 9 that required the Chief Justice to nominate four members of the Reapportionment Commission, Initiative #48 proposes to change the Colorado Constitution and therefore the question of a constitutional conflict is moot. *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 315-16 (1975) (rejecting argument that Chief Justice's nomination role was unconstitutional). Regardless, the question of a constitutional conflict is a legal question that goes to the merits of Initiative #48 and is not a single subject issue.

Finally, Movants' reliance on *In re Title, Ballot Title, & Submission Clause for 2015-2016 #132*, 2016 CO 55 is misplaced. In #132, the court took issue with changing the distinct and narrow role of the existing Colorado Supreme Court Nominating Commission. *Id.* at ¶¶ 19, 24-25. Nowhere in #132 did the court make a wholesale prohibition against using an entire branch of government to nominate officials on a public commission, which is the interpretation Movants give of #132.

Accordingly, the Title Board should affirm the Title setting for Initiative #48 because it has a single subject.

II. The Title Is Not Misleading.

Ballot titles must be brief, while at the same time being fair and not misleading. C.R.S. § 1-40-106(3)(b); *In re Second Initiated Constitutional Amendment*, 613 P.2d 867 (Colo. 1980). The Title Board has considerable discretion in resolving "the interrelated problems of length, complexity, and clarity" in setting titles. *In re Proposed Initiative Concerning State Personnel Sys.*, 691 P.2d 1121, 1125 (Colo. 1984).

Movants first contend that the title is misleading because it does not state who the appointing authorities are for the eight non-independent commissioners. Mot. for Rehearing at 4. This argument lacks merit because, for the sake of brevity, the title does not describe the appointing authorities of any of the commissioners, whether independent or not. The title does, however, clearly describe the commissioners' respective association or non-association with Colorado's two largest political parties and therefore fairly addresses the political composition of the Commission.

Movants next contend that the title is misleading because it purportedly mischaracterizes how political competitiveness is considered in drawing plans. Mot. for Rehearing at 5. Movants argue that the title suggests that competitiveness is a requirement and always applied by the Commission. *Id.* The title does not suggest as much. Rather, the title states that political competitiveness is added to the "criteria" used by the Commission. "Criteria" and its singular "criterion" are defined as "standard(s) on which a judgment or decision may be based." *Merriam-Webster.com*, 2017, available at <https://www.merriam-webster.com> (last visited Oct. 14, 2017) (emphasis added). By definition, "criteria" to be considered are not requirements.

If anything, the use of the word "criteria" in the title undersells the role that competitiveness plays in the Commission's considerations. Initiative #48 plainly states that, to the extent possible, the commission shall maximize the number of competitive districts. Proposed Art. V, § 47(4)(b). Accordingly, Movants' concerns are unfounded because the title properly balances brevity with clarity.

WHEREFORE, Kathleen Curry and Toni Larson respectfully request that the Title Board deny the Motion for Rehearing and affirm the title setting for Initiative #48.

Dated: October 17, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **PROPONENTS' RESPONSE IN OPPOSITION TO MOTION FOR REHEARING** was sent this 17th day of October, 2017, via first class U.S. mail, postage pre-paid or email to Movants at:

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