BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Robert David DuRay and Katina Banks, Objectors

vs.

Kathleen Curry and Toni Larson, Proponents.

MOTION FOR REHEARING ON INITIATIVE 2017-2018 #50

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 #50 ("Colorado Redistricting Commission").

The Title Board set a title for #50 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 a change to the Colorado Revised Statutes concerning federal 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 two largest political parties; establishing criteria to be used in drawing districts, including political competitiveness; prohibiting drawing plans to purposefully advantage or disadvantage any political party or person; developing procedures to be followed by the commission, including requiring that the commission's work be done in public meetings and requiring nonpartisan staff of the commission to prepare and present plans; requiring the agreement of at least 8 of 12 commissioners to approve any action of the commission; and specifying procedures for the finalization and approval of a plan?*

I. Initiative #50 violates the Constitution's single subject requirement.

A. Initiative #50 converts the Supreme Court's appellate review to a de novo trial on the merits before the Court.

Initiative #50 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 #50 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 C.R.S. § 2-1-105(8)(a) (emphasis added). Thus, parties will now be able to produce and present "any" new evidence to sustain the map 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 congressional redistricting plan is firmly established. The Supreme Court will "apply an abuse of discretion standard" to determine if the lower court drew district lines that are "manifestly unreasonable, arbitrary, or unfair." *Hall v. Moreno*, 2012 CO 14 ¶54 (Colo. 2011). In its review, the Court assesses the proceedings below only to determine if the lower court's "findings are supported by the record." *Id.* at ¶100. The Court will not address an argument about a map's district lines if "the record is inadequate for any conclusion to be reached" concerning its merits. *Beauprez v. Avalos*, 42 P.3d 642, 650 (Colo. 2002).

That limit on judicial consideration of evidentiary matters will be obliterated. Instead, Initiative #50 expands the Court's role to provide for the "production and presentation" of "any" evidence to justify a map's district lines. Proposed C.R.S. § 2-1-105(8)(a).

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 #50 sets a new condition on eligibility to serve in federal office service – non-membership on the redistricting commission.

Initiative #50 prohibits "an incumbent member of congress or a candidate for congress" from also serving as a member of the redistricting commission. Proposed C.R.S. § 2-1-105(4). It thus seeks to change the qualifications for members of the U.S. House of Representatives and U.S. Senators, as both are members of "congress."[1]

The qualifications to serve in Congress are beyond the reach of the state's voters. It was "the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995). Those qualifications relate to age (at least 25 for a member of the House and at least 30 for a member of the Senate), citizenship (at least 7 years for a member of the House and at least 9 years for a member of the Senate), and residence in the state

[1] Article 1, § 1 of the United States Constitution provides that all legislative power is vested in "a congress of the United States, which shall consist of a Senate and a House of Representatives."

to be represented. U.S. Const., art. I, § 2, cl. 2; § 3, cl. 3. The attempt to add to any other qualification, including non-service on a state's redistricting commission, is a separate subject that violates Colo. Const., Article V, § 1(5.5).

Adding changes to the qualifications of a governmental official to hold office is clearly its own subject. *In re Title for 1999-2000 #104*, 987 P.2d 249, 257 (Colo. 1999) (qualifications of appointed judges was a subject separate from qualification of executive branch officials who perform a function related to the judiciary, the judicial performance commission). Here, changing the eligibility criteria for a person to be a candidate or member of Congress does not run clearly and necessarily from a measure about the procedures by which congressional district lines are drawn.

Moreover, because a state has no power to limit the qualifications to be satisfied in order to serve in federal elective office or to run for federal elective office, this provision has no actual function except to serve as an artificial lure to voters. A proposed initiative does not pass the single subject test where it includes provisions that promote "uninformed voting" on a lengthy or complex initiative. *In re Title for "Public Rights in Waters II,"* 898 P.2d 1076, 1079 (Colo. 1995). Bait-and-switch provisions that obfuscate other elements of an initiative were one of the drafting techniques that the single subject requirement was intended to avoid. *Id.* Thus, this provision represents a prohibited second subject.

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 political parties serving as the 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 C.R.S. § 2-1-103(3)(a), (b) (appointing authority is either party chairperson or party leadership, whatever is authorized by parties' own 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]
- "It's time that Colorado communities, not politicians, draw their districts."[4]
- "[P]oliticians and political appointees must be removed from the redistricting process...."[5]
- "Political parties or incumbents sometimes draw district lines for their own benefit at the expense of proportionality and fair representation."[6]
- "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."[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 #50 – 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 about 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 #50 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 #50 has a provision that "includes" competitiveness in the criteria to be used. In truth, competitiveness is applied only "after" all other criteria are either met or considered. Proposed C.R.S. § 2-1-102(1)(c). In other words, competitiveness within districts may never actually be utilized by the commission under #50.

---

[3] http://fairdistrictscolorado.org/the-problem/ (last viewed October 10, 2017) (attached).
[4] *See* footnote 3.
[5] http://fairdistrictscolorado.org/the-solution/ (last viewed October 10, 2017) (attached).
[6] http://fairdistrictscolorado.org/faq/ (last viewed October 10, 2017) (attached).
[7] *See* footnote 3.
[8] *See* footnote 3.
[9] *See* footnote 2.

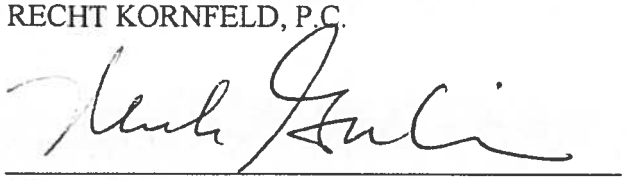
The ballot title, however, suggests competitiveness is a given in establishing lines for all districts. That is flatly incorrect. Because of the way in which Proponents drafted #50, competitiveness is no more likely to be used for district line drawing than it is under current Supreme Court doctrine which embraces competitiveness as a redistricting criterion. *Moreno, supra*, 2012 CO 14 at ¶52 ("consideration of competitiveness is consistent with the ultimate goal of maximizing fair and effective representation").

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 #50.

RESPECTFULLY SUBMITTED this 11th day of October, 2017.

RECHT KORNFELD, P.C.



Mark Grueskin
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Email: mark@rklawpc.com

Objectors' Addresses:

Robert David DuRay
1505 E. 13th Avenue #12
Denver CO 80218

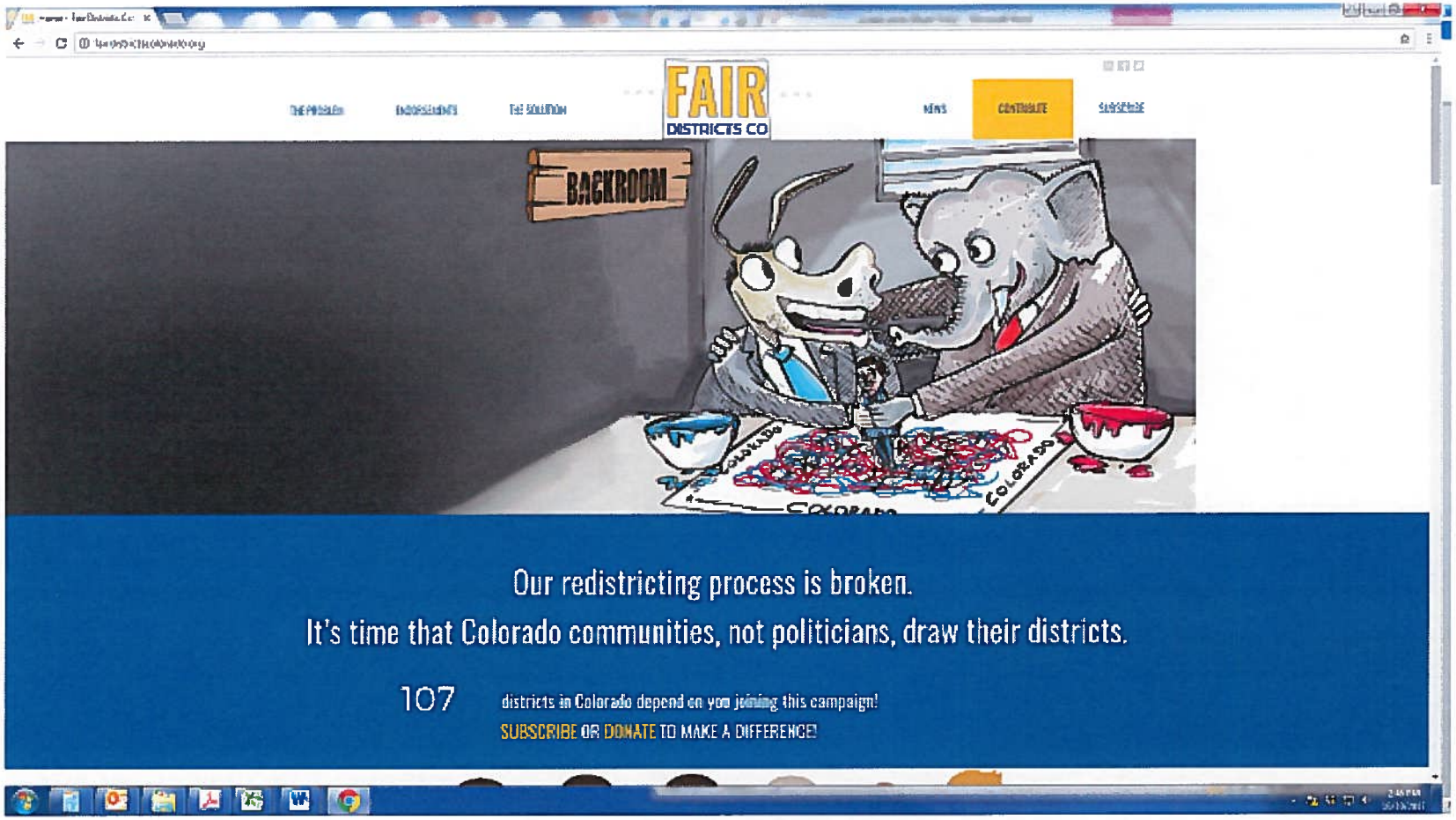
Katina Banks
3010 Jasmine Street
Denver, CO 80207

CERTIFICATE OF SERVICE

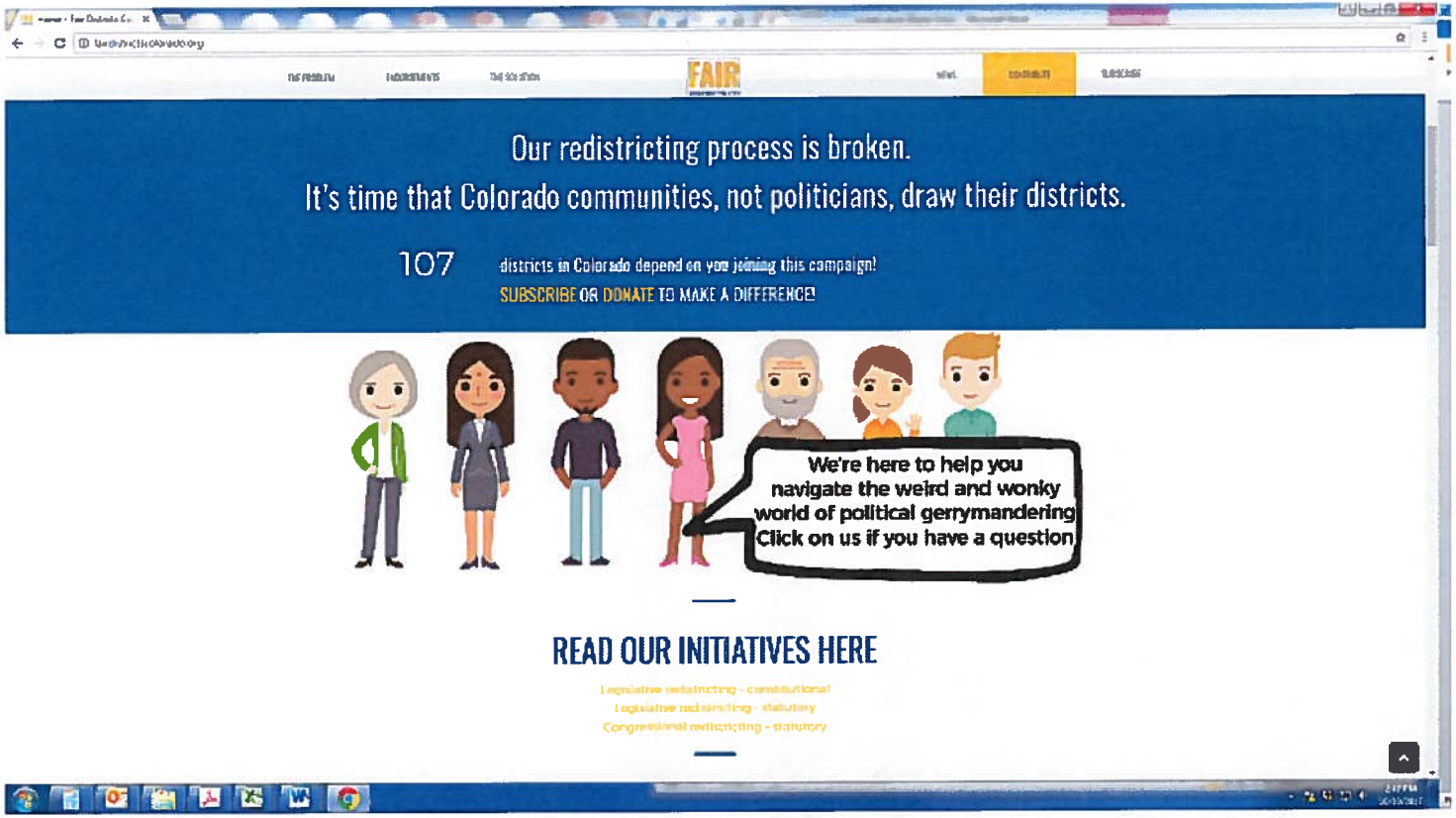
I hereby affirm that a true and accurate copy of the MOTION FOR REHEARING ON INITIATIVE 2017-2018 #50 was sent this day, October 11, 2017 via first class U.S. mail, postage pre-paid to the proponents' counsel at:

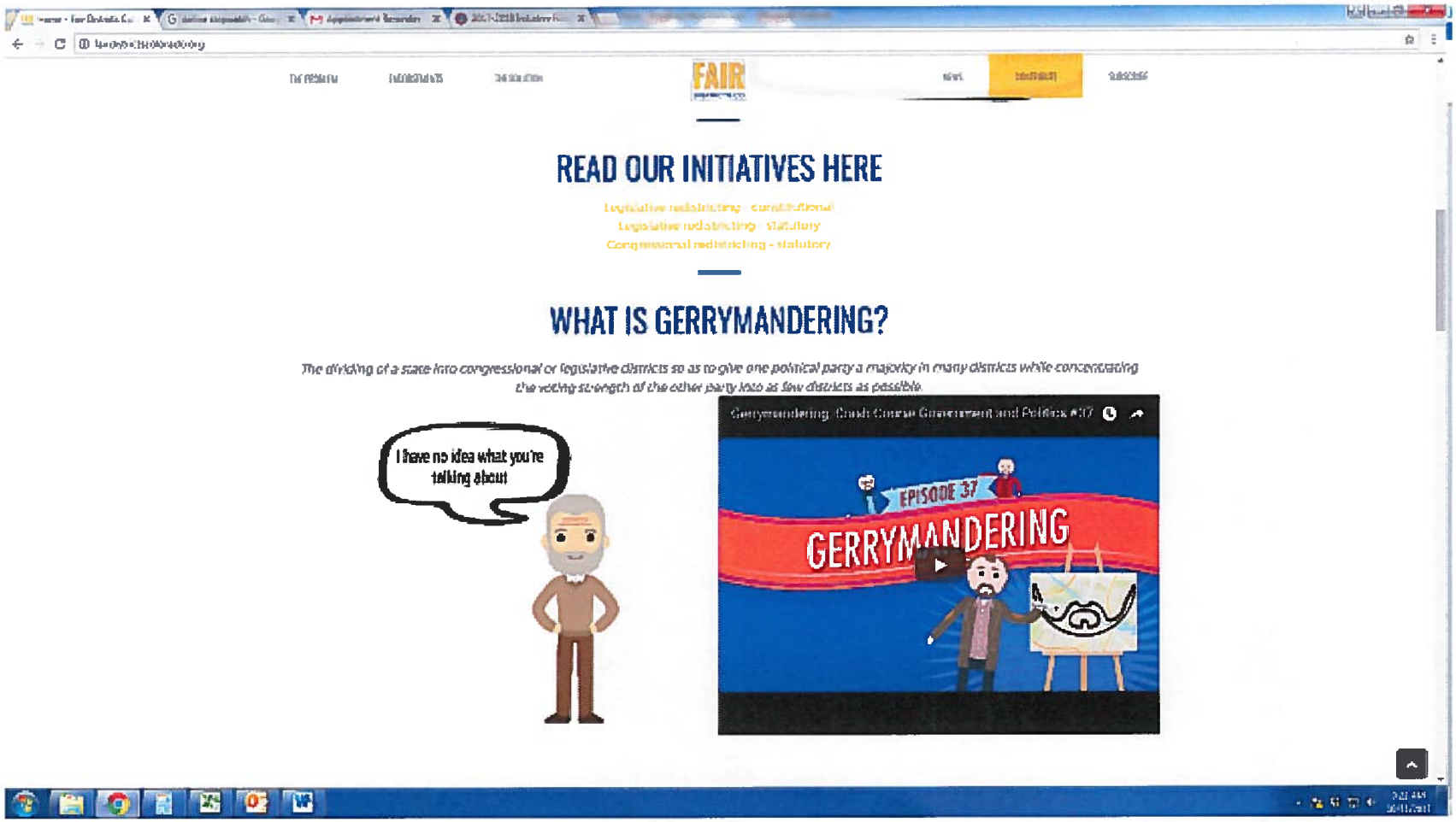
Benjamin Larson
Ireland Stapleton Pryor & Pascoe, PC
717 17th Street, Suite 2800
Denver, Colorado 80202

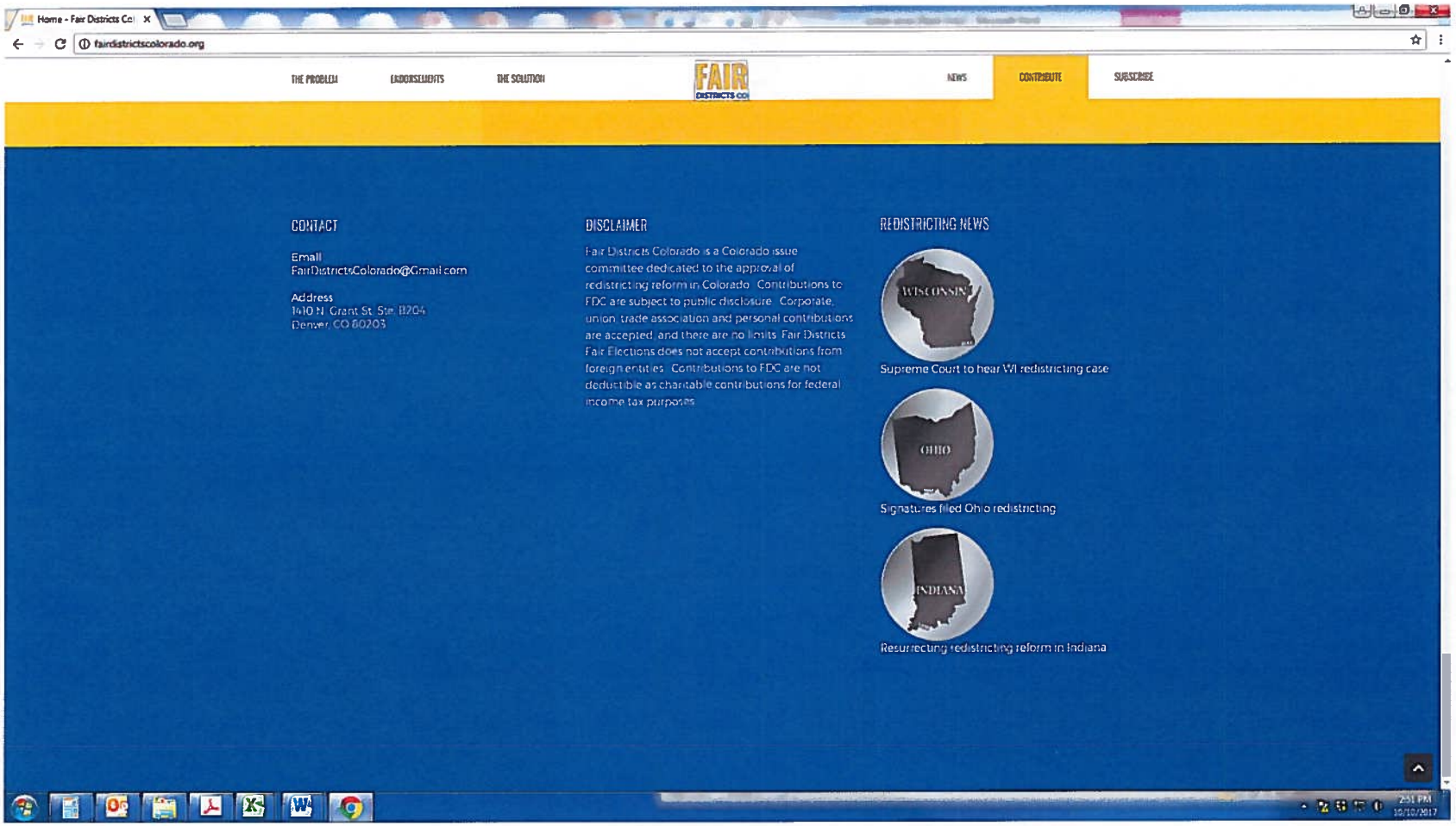
Erin Holweger



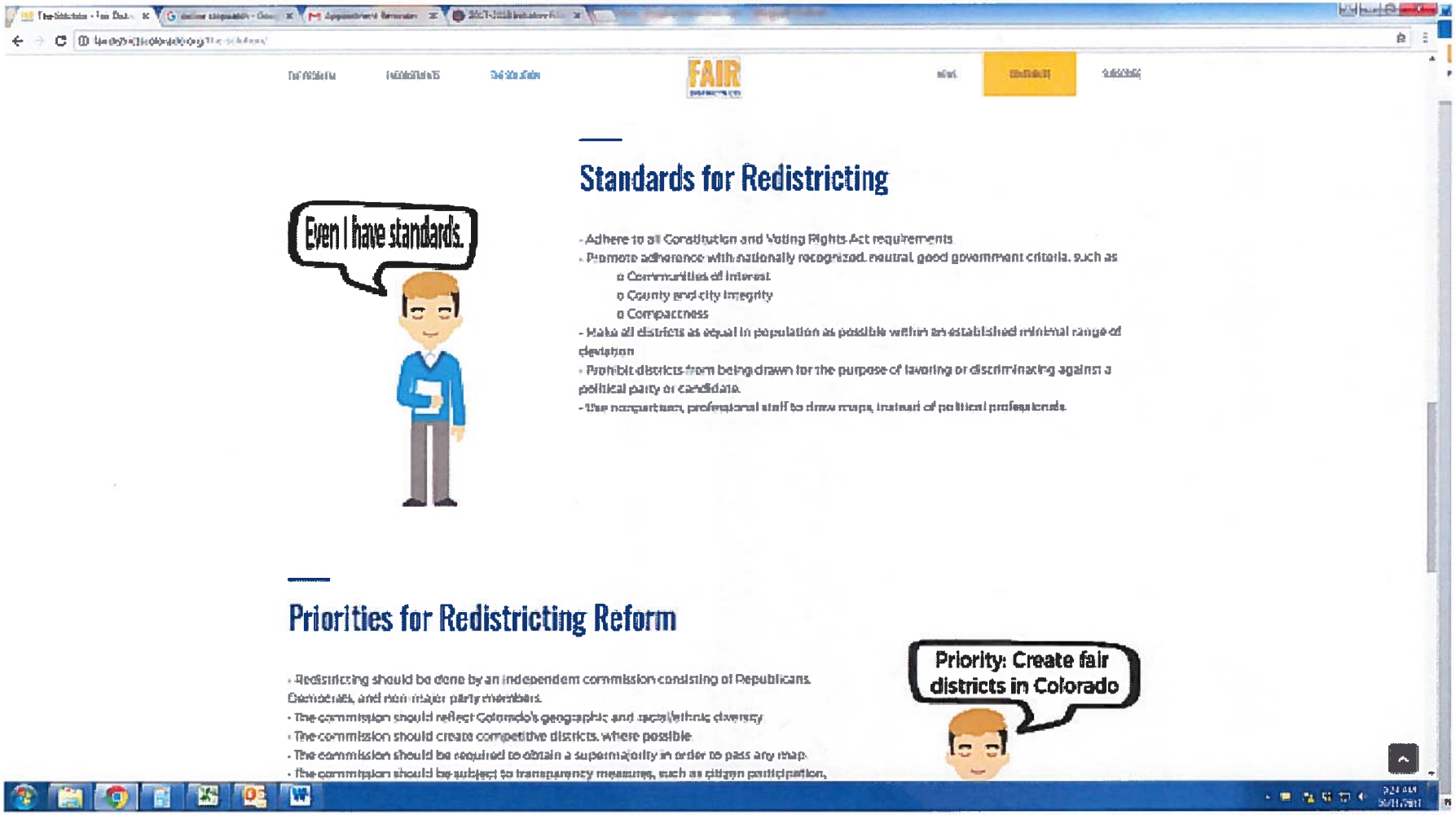
S. WARD
2:15 P.m.


FAIR
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!
SUBSCRIBE OR DONATE TO MAKE A DIFFERENCE!
We're here to help you navigate the weird and wonky world of political gerrymandering Click on us if you have a question
READ OUR INITIATIVES HERE


FAIR
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
I have no idea what you're talking about
EPISODE 37
GERRYMANDERING


Home - Fair Districts Col
fairdistrictscolorado.org
THE PROBLEM
ENDORSEMENTS
THE SOLUTION
FAIR DISTRICTS CO
NEWS
CONTRIBUTE
SUBSCRIBE
CONTACT
Email
FairDistrictsColorado@Gmail.com
Address
1410 N. Grant St. Ste. B204
Denver, CO 80203
DISCLAIMER
Fair Districts Colorado is a Colorado issue committee dedicated to the approval of redistricting reform in Colorado. Contributions to FDC are subject to public disclosure. Corporate, union, trade association and personal contributions are accepted, and there are no limits. Fair Districts Fair Elections does not accept contributions from foreign entities. Contributions to FDC are not deductible as charitable contributions for federal income tax purposes.
REDISTRICTING NEWS
WISCONSIN
Supreme Court to hear WI redistricting case
OHIO
Signatures filed Ohio redistricting
INDIANA
Resurrecting redistricting reform in Indiana
2:41 PM


FAIR
One voice, please.
A UNIFIED EFFORT FOR FAIR DISTRICTS IN COLORADO
Help us give voters a voice!
The undemocratic practice of gerrymandering ignores your voice because in Colorado, voters don't pick their politicians. Politicians pick their voters.
Our bi-partisan effort includes members of the Democratic party, Republican party, and those unaffiliated with either major party. 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.
Our citizen initiatives take map drawing out of the hands of political insiders and shine a light on the redistricting process by creating a more open, public process. It also gives unaffiliated voters and non-major parties a real opportunity to engage, yielding far more competitive and common-sense districts.
Frequently Asked Questions
CONTACT
DISCLAIMER


FAIR
Even I have standards.
Standards for Redistricting
- Adhere to all Constitution and Voting Rights Act requirements
- Promote adherence with nationally recognized, neutral, good government criteria, such as
o Communities of interest
o County and city integrity
o Compactness
- Make all districts as equal in population as possible within an established minimal range of deviation
- Prohibit districts from being drawn for the purpose of favoring or discriminating against a political party or candidate.
- Use nonpartisan, professional staff to draw maps, instead of political professionals.
Priorities for Redistricting Reform
- Redistricting should be done by an independent commission consisting of Republicans, Democrats, and non-major party members.
- The commission should reflect Colorado's geographic and racial/ethnic diversity
- The commission should create competitive districts, where possible
- The commission should be required to obtain a supermajority in order to pass any map
- The commission should be subject to transparency measures, such as citizen participation,
Priority: Create fair districts in 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 gamesmanship). Colorado law already recognizes several nationally-recognized good government criteria. We want to add competitiveness, once those other criteria are ensured.