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STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="2">DATE FILED: May 4, 2016 4:57 PM

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<tr><td>In Re The Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #98

Petitioners:
Jean Martelle Daniels and Brandi Renee Meek,

v.

Respondents: Kelly Brough and Joe Blake,

and

Title Board:
Suzanne Staiert, Sharon Eubanks, and Glenn Roper</td></tr>
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<tr><td colspan="2">RESPONDENTS' ANSWER BRIEF</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,261 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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ARGUMENT

I. Petitioners fail to explain how the Initiative violates the single-subject requirement.

In their Opening Brief, Petitioners argue that Proposed Initiative 2015-2016 #98 (the "Initiative") violates the single-subject requirement because it impermissibly contains two additional separate subjects: (1) allowing major political parties, under specific circumstances, to opt-out of the new system and select all of its candidates by assembly or convention; and (2) providing minor political parties the option to prohibit unaffiliated voters from voting in those parties' primary elections. As demonstrated in Respondents' Opening Brief, both of these provisions are properly connected to the Initiative's central tenant and effectuate its purpose—allowing unaffiliated voters to participate in state and local primary elections. In addition, despite Petitioner's claim to the contrary, neither provision triggers the "dangers" the single-subject rule was designed to prevent.

A. The opt-out clause is properly connected to the Initiative's single subject.

The thrust of Petitioners' Opening Brief is that the Initiative's opt-out provision, which permits major political parties in specific circumstances to opt-out of allowing unaffiliated voter participation and instead choose its candidates by assembly or convention, is an impermissible separate subject. Yet, Petitioners provide no compelling substantive reason why the opt-out clause is a separate subject. Instead, their Opening Brief simply cites basic reasons when this Court has found single-subject violations in other measures, and, without comparing those measures to this one, says that those reasons apply here. As demonstrated in both the Title Board's and Respondents' opening briefs, the opt-out provision is operationally connected to the primary purpose of the measure, and is a constitutional safety valve that is properly connected to creating a default system under which unaffiliated voters would have the opportunity to vote in primary elections.

Nonetheless, Petitioners contend that there is "no necessary connection" between the opt-out clause and providing unaffiliated

voters the opportunity to participate in primary elections. Petitioners' Op. Brief at 13. In particular, they argue that the opt-out provision is both an "unrelated subject" that is "not directly connected to the central focus of the measure" and "an attempt to survive a post-adoption First Amendment right of association challenge." Petitioners' Op. Brief at 9.

While the opt-out clause may not be "necessary" or even "essential" to the Initiative in the sense that the measure would be inoperable without it, inoperability has never been the test under this Court's single-subject jurisprudence. Rather, a measure has a single subject when its component parts are related matters such that there is a "necessary or proper" connection. *See, e.g.*, *In re Title, Ballot Title and Submission Clause for 2007-2008, #17,* 172 P.3d 871, 878 (Colo. 2007). The opt-out clause is properly connected to the measure as a means of both ensuring that any legal uncertainty, whether justified or not, is avoided, and giving unaffiliated voters the best chance at voting

in primary elections.[1] Its inclusion in the measure therefore, was directly connected to the measure's goal. *See In re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 No. 73,* 135 P.3d 736, 738 (Colo. 2006) (holding that the single-subject requirement is not violated unless an initiative has "at least two distinct and separate purposes which are not dependent upon or connected with each other").

In addition, common sense dictates that a provision meant to protect the constitutionality of a measure or guard against a legal challenge is a related subject. As mentioned on page 10 of Respondents' Opening Brief, the opt-out provision cannot stand alone because unaffiliated voters currently are not allowed to vote in primaries; it is impossible to opt-out of something that has yet to occur. In other words, while the opt-out may not be "necessary" to the subject of allowing unaffiliated voter participation, the latter is in fact necessary to the former; the opt-out from allowing unaffiliated voter participation

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[1] Petitioners contend that Respondents' statement at the Title Board hearing that political parties are unlikely to use the opt-out was intended to be an argument that such unlikeliness makes the opt-out provisions more compliant with the single-subject law. Petitioners' Op. Brief at 14. Such contention is incorrect. The provision stands on its own, regardless of effect, as part of the measure's single subject.

cannot operate absent the allowance of unaffiliated voter participation in the first instance. Thus, the opt-out provision's existence is directly tied to permitting unaffiliated voters to participate in primary elections. *See In re Proposed Initiative "Public Rights inWaters II"*, 898 P.2d 1076, 1079 (Colo. 1995) ("If the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.").[2]

B. Allowing minor political parties to prohibit unaffiliated voters from voting in their elections is not a separate subject.

Petitioners' second argument is that the Initiative's provision, allowing minor political parties to prohibit unaffiliated voters from voting in their election, is a separate subject. Petitioners' Op. Brief at

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[2] Despite Petitioners' insinuation that the Initiative is unlikely to survive a post-enactment legal challenge without the opt-clause clause, it is far from clear whether a political party's right of association would render this measure unconstitutional if the opt-out provision was not included. For example, this measure is distinguishable from the unconstitutional primary system in *California Democratic Party v. Jones*, 530 U.S. 567, 570, 577 (2000), because California had a blanket primary where each voter's ballot listed every candidate regardless of party affiliation and allowed the voter to choose freely among those candidates. In contrast, this measure would permit unaffiliated voters to cast a ballot only in one political party's primary.

14–15; *see* Initiative § 7. This argument is untimely and is otherwise meritless.

First, Petitioners presented this issue for the first time in their Opening Brief. The argument was not made either in their Motion for Rehearing or in their Petition for Review. *See* Title Set by the Ballot Title Setting Board, Certified Copy of the Record, at 26–29; Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiative 2015–2016 #98. Therefore, this issue was not properly preserved. *See, e.g.*, *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1008 (Colo. 2008) ("[I]ssues not raised in or decided by a lower court will not be addressed for the first time on appeal.").

Second, the provision is simply not a separate subject. Rather, it is properly connected to the other parts of the measure for the same reasons stated above in the discussion on the opt-out provision for major parties. Somewhat like the opt-out provision, this clause was included to preempt any challenge based on a political party's First Amendment rights. Because minor political parties are relatively small, there is a higher risk that forcing them to associate with a relatively large

number of voters who are not affiliated with them could violate those parties' constitutional rights. *See, e.g.*, *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570, 577 (2000).

Thus, Petitioners' arguments regarding the single-subject requirement should be rejected.

C. The Initiative triggers none of the "dangers" the single-subject rule was designed to prevent.

Petitioners contend that the opt-out clause for major political parties and the clause allowing minor political parties to prohibit unaffiliated voters from their primaries trigger both specific dangers associated with omnibus initiatives. Petitioners' Op. Brief at 5–6, 11–12, 15. Specifically, the single-subject rule is designed: (1) to prevent proponents from strategically combining two separate proposals into a single measure out of concern that one might fail if presented to voters alone; and (2) to "avoid 'voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision "coiled up in the folds" of a complex initiative.'" *See In Re Title, Ballot Title, Submission*

Clause for 2011-2012 #3, 274 P.3d 562, 566 (Colo. 2012) (internal citations omitted).

Petitioners again state generic language from case law without substantive argument. For example, Petitioners fail to state why this measure would gain support from voters who might want to vote for the opt-out for major political parties but not from voters who prefer to allow unaffiliated voters to participate in primary elections, and vice versa. Instead, a voter who was in favor of nominating candidates only by convention or assembly would be less likely to vote for the measure because the default system is allowing unaffiliated voters to participate. Conversely, a voter who did not like the opt-out clause would be less likely, not more likely, to vote for the measure because, as a result of the opt-out provision, the Initiative does not guarantee that unaffiliated voters will participate in each election. The same is true as to the minor political party clause. Thus, if the measure passes, it will be because voters approved a change in the primary system that allows unaffiliated voters to participate, but also provides exceptions in specific circumstances.

Likewise, Petitioners' argument that the Initiative lends itself to voter surprise because its Declaration does not mention either provision is unavailing and contrary to the measure's plain language. Petitioners' Op. Brief at 12–13, 15. As to the opt-out for major political parties, Section 5 of the Initiative contains three paragraphs explaining the details of the opt-out. In addition, the measure's title clearly states that the measure would create a change "permitting a political party in specific circumstances to select all of its candidates by assembly or convention instead of by primary election."[3]

As to the minor political party clause, section 7 of the Initiative explicitly states that "[a] minor political party may prohibit unaffiliated electors from voting in the party's primary election" as long as it is in accordance with party rules and proper notification is provided to the Secretary of State.

Thus, a voter would not find either provision "hidden" or "coiled up in the folds."

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[3] Title Set by the Ballot Title Setting Board, Certified Copy of the Record, at 30.

II. The title need not state that minor political parties may exclude unaffiliated voters from their primaries, or that the measure would create new ballot formats for unaffiliated voters.

Petitioners argue that the title set by the Title Board is misleading because it fails to mention that the Initiative (1) permits minor political parties to exclude unaffiliated voters from its primary, and (2) creates new ballot formats for unaffiliated voters. While Petitioners correctly stated in their Opening Brief that "a title 'need not state every detail of an initiative,'" Petitioners' Op. Brief at 17 (quoting *In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000)), Petitioners failed to justify their characterization of these provisions as "key" or "substantial." Petitioners' Op. Brief at 17, 19, 20. Rather, both the minor party provision and the ballot format provisions are secondary provisions. Their inclusion in the title would significantly lengthen the title, potentially confuse voters, and provide unnecessary details. *See In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010) (reasoning that a measure's title should be a "reasonably ascertainable expression of [its] purpose").

Unlike Petitioners' characterization, the minor political party clause is an ancillary provision that is not "key." Its insignificance is illustrated by the fact that only 3.23 percent of ballots were cast for the minor political party candidates in the last gubernatorial election.[4] Thus, this provision would have no effect on the vast majority of Colorado voters.

As to the provisions providing for new ballot formats, Petitioners argue that these provisions are substantial and should be included in the title because they "treat unaffiliated voters differently, and arguably preferentially." Petitioners' Op. Brief at 19, 20. The Initiative would create a new type of ballot for unaffiliated voters that would contain all primary candidates for all races on one ballot for the voter to choose one party's primary to participate in, or if not practicable, would require that unaffiliated voters be sent, and select one ballot from, each of the party's primary ballots. *See* Initiative § 3. Petitioners' concern appears to be that unaffiliated voters would have the option of choosing

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[4] Office of the Secretary of State of Colorado, Abstract of Votes Cast 106–07 (2014), available at http://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2014AbstractBook.pdf.

at the time of voting, as opposed to at some time prior, in which political party primary they wanted to vote. However, this is exactly what the measure provides for and what the title describes. The title unambiguously states that the Initiative "allow[s] an unaffiliated elector to vote in the primary election of a political party without declaring an affiliation with that party."[5]

In essence, the new ballot formats are nothing more than "implementing provisions" that this Court has held do not need to be in the title. *See In re Title, Ballot Title, & Submission Clause for 2007-2008, #17*, 172 P.3d 871, 874 (Colo. 2007) (citation omitted). The combined ballot, or a separate ballot for each political party's candidates, provides unaffiliated voters with a means for voting without having to choose a political party beforehand. Therefore, the title "correctly and fairly express the true intent and meaning" of the initiative. C.R.S. § 1-40-106(3)(b).

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[5] Title Set by the Ballot Title Setting Board, Certified Copy of the Record, at 30.

CONCLUSION

Proposed Initiative #98 expands the right of unaffiliated voters to participate in state and local primary elections in Colorado. This purpose is a single subject under the Colorado Constitution and this Court's jurisprudence. In addition, the title is not unfair, insufficient, or misleading, and need not include information about minor implementing provisions. The Respondents therefore respectfully ask this Court to affirm the Title Board's denial of the substantive parts of the Petitioner's Motion for Rehearing.

Respectfully submitted this 4th day of May 2016.

BROWNSTEIN HYATT FARBER SCHRECK LLP

/s/ Jason R. Dunn
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2016, I electronically filed a true and correct copy of the foregoing RESPONDENTS' ANSWER BRIEF via the Colorado ICCES system which will send notification of such filing and service upon the following:

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