

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board

In 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

▲ COURT USE ONLY ▲

Attorneys for Petitioners
Martha M. Tierney, No. 27521
Tierney Lawrence LLC
2675 Bellaire Street
Denver, CO 80207
Phone: (303) 356-4870
E-mail: mtierney@tierneylawrence.com

Case No.: 2016SA108

**ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF
PROPOSED INITIATIVE 2015-2016 #98**

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,372 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

By: s/Martha M. Tierney

TABLE OF CONTENTS

Page(s)

SUMMARY OF THE ARGUMENT1

ARGUMENT2

 I. Initiative 2015-2016 #98 Violates the Single Subject Requirement2

 A. The Political Party Opt-Out Provisions Create Separate Subjects2

 B. Initiative #98 Triggers Both of the "Dangers" Attendant to Omnibus Measures.....4

 II. The Ballot Title for Initiative 2015-2016 #98 Is Misleading.....7

 A. Initiative #98’s Title Is Misleading Because It Fails to Inform Readers of the Minor Political Party Opt-Out Provision7

 B. Initiative #98’s Title Is Misleading Because It Fails to Notify Readers that the Measure Materially Alters Current Election Laws.....9

CONCLUSION11

TABLE OF AUTHORITIES

Page(s)

Cases

<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000).....	3
<i>In re Ballot Title 1999-2000 #104</i> , 987 P.2d 249 (Colo. 1999).....	8
<i>In re Initiative 2001-2002 #43</i> , 46 P.3d 438 (Colo. 2002).....	5, 6
<i>In re Initiative for 1999-2000 #258(A)</i> , 4 P.3d 1094 (Colo. 2000).....	7, 8
<i>In re Initiative for 2007-2008 #62</i> , 184 P.3d 52 (Colo. 2008).....	8
<i>In re Initiative for 2015-2016 #73</i> , Case No. 16SA48 (Colorado Supreme Court, April 25, 2016).....	10
<i>In re Petition Procedures</i> , 900 P.2d 104 (Colo. 1995).....	6, 11
<i>In re Proposed Initiative “Public Rights in Waters II,”</i> 898 P.2d 1076 (Colo. 1995).....	3, 4

Statutes

§1-2-218.5(2), C.R.S. (2015).....	9
§1-40-106.5(1)(a), C.R.S. (2015).....	7
§1-40-106.5(1)(e)(II), C.R.S. (2015).....	5
§1-7-201(2), C.R.S. (2015).....	9

Other Authorities

<http://cologop.org/wp-content/uploads/2016/01/ElectionSummaryReport-Party-Resolutions-1.pdf>.....5

<http://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2014AbstractBook.pdf>.....5

<http://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2016/March/VotersByPartyStatus.pdf>.....10

Constitutional Provisions

Colo. Const. article V, Section 1(5.5).....6, 7

Jean Martelle Daniels and Brandi Renee Meek, (“Petitioners”), registered electors of the state of Colorado, through undersigned counsel, respectfully submit this Answer Brief in support of their petition for review of the title, ballot title and submission clause (jointly, the “Title”) that the Title Board set for Proposed Initiative 2015-2016 #98 (“Initiative #98”), and in response to the Opening Briefs filed by Proponents, Kellie Brough and Joe Blake, and the Title Board.

SUMMARY OF THE ARGUMENT

Initiative #98 violates the single subject requirement for initiatives, and the title set by the Title Board is unfair, misleading, and does not fairly and correctly express the true meaning of the measure. The central purpose of Initiative #98 is to allow unaffiliated voters to vote in the primary elections of political parties. In addition to this subject, however, the Proponents of Initiative #98 combined it with two antithetical unconnected provisions: (1) a new statutory provision allowing major political parties to cancel their primary elections and nominate all candidates by assembly or convention, and (2) another new provision giving minor political parties alone the option to expressly prohibit unaffiliated voters from voting in their primary elections. Proponents cannot avoid a single subject violation simply by claiming that these additional provisions are necessary to ensure that Initiative #98 survives post adoption constitutional review.

Proponents combined unconnected subjects into one measure for the purpose of garnering support from groups with different, or even conflicting interests. In addition, voters will be surprised by, or fraudulently led to vote for, these surreptitious provisions coiled up in the folds of a complex initiative.

The title for Initiative #98 is confusing and misleading because it contains no reference to the provision allowing a minor political party to prohibit unaffiliated electors from voting in the minor political party's primary election. The title is also misleading because it does not inform petition signers or voters that the measure creates an entirely new procedural "super ballot" mechanism for unaffiliated voters to participate in a primary election that will impact not only unaffiliated voters but all primary election participants. The Title for Initiative #98 should be returned to the Proponents or to the Title Board for the appropriate corrective action.

ARGUMENT

I. Initiative 2015-2016 #98 Violates the Single Subject Requirement.

A. The Political Party Opt-Out Provisions Create Separate Subjects.

Proponents maintain in their Opening Brief that the single subject of Initiative #98 is to "allow unaffiliated voters to participate in primary elections of one political party." *Respondents' Op. Br.*, at 7. Yet, the measure contains two

antithetical provisions: (1) creating a new process whereby a political party may choose to opt out of a primary election altogether and change from the nomination of candidates by primary election to the nomination of candidates by assembly or convention for all offices; and (2) allowing minor political parties to prohibit unaffiliated electors from voting in the minor political party's primary election. It is the addition of these two provisions within Initiative #98 that violate the single subject requirement. Only when an initiative "tends to effect or to carry out one general object or purpose," is it a single subject under the law." *In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1079 (Colo. 1995). Here, the Proponents of Initiative #98 have cobbled together disparate provisions not because they carry out one purpose – in fact, they carry out opposing purposes - but rather because they are hoping to avoid a post-adoption First Amendment Right of Association challenge. *See California Democratic Party v. Jones*, 530 U.S. 567, 577-78 (2000).

Proponents first contend that Petitioners "overstate the weight of the opt-out provision" because it is "simply a relatively minor provision put in place to (a) give any party that does not want unaffiliated voters participating ... an alternative, and (b) preempt any future claims that the Initiative infringes on the constitutional rights of political parties." *Respondents' Op. Br.*, at 7. Proponents make the novel

argument that because their measure would be found to constitute an unconstitutional violation of a political party's First Amendment Right of Association if they do not include the opt-out clause for major political parties or the optional prohibition for minor political parties, those provisions are necessarily connected to the single subject of allowing unaffiliated voters to participate in primary elections of one political party. Proponents, however, cite no authority for that proposition, and Petitioners find no authority to support it.

Instead, this Court has repeatedly made clear that an initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes. *In re Waters II*, 898 P.2d at 1078. Here, Initiative #98 relates to three subjects and has three distinct purposes: (1) it allows unaffiliated voters to participate in primary elections of a political party; (2) it creates a new process allowing a political party vote to opt out of nominating candidates by primary election and instead nominate all candidates by closed assembly or convention; and (3) it allows minor political parties to prohibit unaffiliated electors from voting in the minor political party's primary elections.

B. Initiative #98 Triggers Both of the "Dangers" Attendant to Omnibus Measures.

Proponents dismiss the first danger of combining unconnected subjects into one measure for the purpose of garnering support from groups with different or

conflicting interests, by asserting: “a provision granting the right to opt-out from a system allowing unaffiliated voter participation would be a non- sequitur if proposed as a stand-alone measure because unaffiliated voters obviously are not allowed to vote in primaries under current law.” *Respondents’ Op. Br.*, p. 10. Yet, that is not what Initiative #98 does. The provision allowing a political party to opt-out of a primary election and instead elect all candidates by assembly or convention would impact not just unaffiliated voters but also all affiliated voters who could not physically attend an assembly or convention. In 2014 for example, approximately 338,224 people voted in the Colorado Republican Party primary election.¹ Compare that number to the 2016 Colorado Republican Party state assembly, when approximately 3,750 registered Colorado republicans turned up.² Some voters might favor allowing unaffiliated voters to vote in primary elections, but not favor a process whereby a small number of party regulars would have the power to nominate all candidates by assembly or convention, or visa-versa. *See In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002); §1-40-106.5(1)(e)(II), C.R.S. (2015).

¹ Colorado Secretary of State 2014 Abstract of Votes Cast, *available at* <http://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2014AbstractBook.pdf>

² Colorado Republican Party Summary Report *available at* <http://cologop.org/wp-content/uploads/2016/01/ElectionSummaryReport-Party-Resolutions-1.pdf>

Initiative #98 unconstitutionally combines the two subjects in an attempt to attract voters who might oppose one of these two subjects if it were standing alone. “To avert such mischief, the single subject requirement limits the voters to answering ‘yes’ or ‘no’ to a straightforward, single subject proposal.” *See In re Petition Procedures*, 900 P.2d 104, 108 (Colo. 1995).

Proponents also dismiss the second danger of omnibus measures, asserting that voters will not be surprised by, or fraudulently led to vote for, a "surreptitious provision ‘coiled up in the folds’ of a complex initiative." *In re Initiative 2001-2002 #43*, 46 P.3d at 442-43. Yet, Proponents insist that the central focus of the measure is to allow unaffiliated voters to vote in primary elections. It is certainly conceivable that voters would be surprised to learn that by voting to allow unaffiliated voters to vote in primary elections, they also had given political parties the authority to cancel primary elections altogether and nominate candidates in a process closed to all who do not attend a particular assembly or convention. That type of hidden subject is not permitted under article V, section 1(5.5) of the Colorado Constitution. *See id.*

The Title Board similarly dismisses the single subject concerns by contending that the provisions allowing a political party to cancel its primary election and nominate all candidates by assembly or convention, or to prohibit

unaffiliated voters from voting in a political party's primary election, are "part of #98's broader subject: expanding the right of unaffiliated voters to participate in primary elections." *Title Board Op. Br.*, p. 6. Yet, nowhere does the Title Board explain how these two provisions expand the rights of unaffiliated voters. Rather, these three disparate subjects are not directly tied to one another, but instead violate the single subject requirement. *See In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000); Colo Const., art. V, §1(5.5); §1-40-106.5(1)(a), C.R.S. (2015).

The Court should reverse the decision of the Title Board that Initiative #98 contains a single subject.

II. The Ballot Title for Initiative 2015-2016 #98 Is Misleading.

A. Initiative #98's Title Is Misleading Because It Fails to Inform Readers of the Minor Political Party Opt-Out Provision.

The title for Initiative #98 contains no mention of the provision that allows a minor political party to prohibit unaffiliated electors from voting in the minor political party's primary election. This omission is both material and misleading. Proponents counter this argument by suggesting that because only a "small number of people" participate in minor party elections, there is no need to include this provision in the title. *Prop. Op. Br.* at 14. Yet, the number of people affected by a particular section of a ballot measure is not the test of whether the title should

reference that section. Although a title “need not state every detail of an initiative or restate the obvious,” it “must not mislead the voters or promote voter confusion.” *In re Initiative for 1999-2000 #258(A)*, 4 P.3d at 1099. Titles that contain a material and significant omission, misstatement, or misrepresentation cannot stand. *See In re Ballot Title 1999-2000 #104*, 987 P.2d 249, 260 (Colo. 1999).

Initiative #98 contains a four paragraph Declaration of the People of the State of Colorado that details the reasons why unaffiliated voters should be allowed to participate in primary elections without affiliating with a political party. Petition signers and voters who read the declaration and the title would have no way of knowing that unaffiliated voters may not be permitted to participate in minor political party primaries should the minor political party vote to bar them. Indeed, voters might deem it material that only unaffiliated voters seeking to vote in major political party primaries would have that right guaranteed under Initiative #98. The Title Board’s duty is to ensure that the title “fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board.” *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). The Title of Initiative #98 fails this test.

B. Initiative #98's Title Is Misleading Because It Fails to Notify Readers that the Measure Materially Alters Current Election Laws.

The title for Initiative #98 is misleading because it fails to inform petition signers and voters that the measure materially alters current election law in ways that might well be of significance to them. Initiative #98 substantially changes existing election law by requiring county clerks to send all unaffiliated voters before each primary election either a “super ballot” containing all primary election candidates for all political parties, or each of the primary election ballots for all major political parties. This is in contrast to current law, which allows unaffiliated voters, up to and including on election day, “to declare a political party affiliation when the elector desires to vote at a primary election,” §1-2-218.5(2), C.R.S. (2015), whereupon “the election judges shall deliver the appropriate party ballot to the eligible elector.” §1-7-201(2), C.R.S. (2015) As a result, all voters voting in the Democratic Party primary receive the same ballot, all voters voting in the Republican Party primary receive the same ballot, and so on. Initiative #98's proposed changes to Colorado's election laws will significantly change primary elections in Colorado by providing unaffiliated voters with either a special “super ballot,” or each of the primary election ballots for all major political parties, giving them more choices and more access than those voters who are affiliated with a political party. Initiative #98 will modify the way that more than 34% of

Colorado's voters participate in primary elections in Colorado,³ and in so doing will materially change primary elections for all Colorado voters.

The Proponents and the Title Board dismiss this argument as one involving “technical minutia” that does not pertain to a material element of the measure. *Respondents' Op. Br.*, p. 16; *Title Bd. Op. Br.*, p. 11. Yet, this Court recently reversed the Title Board's title setting in *In re Initiative for 2015-2016 #73*, Case No. 16SA48 (Colorado Supreme Court, April 25, 2016), holding that the title was misleading because it did not advise voters what changes the measure made to recall and successor election procedures, and it did not alert voters to the fact that some of the proposed changes would significantly alter how recall elections are conducted. *See id.* at p. 8.

Similarly, the Title for Initiative #98 contains only the general statement that the measure allows “unaffiliated electors to vote in the primary election of a political party without declaring an affiliation.” The Title makes no mention of the substantial changes the measure makes to primary election procedures and does not alert voters as to how the measure materially alters the way primary elections are conducted in Colorado. So general a title does not allow a voter to understand the

³ As of April 1, 2016, 34.4% of Colorado's registered voters were unaffiliated with a political party. Office of the Secretary of State of Colorado, *available at* <http://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2016/March/VotersByPartyStatus.pdf>.

effect of a “yes/for” or “no/against” vote and thus does not satisfy the clear title requirement. *See In re Petition Procedures*, 900 P.2d at 108.

CONCLUSION

WHEREFORE, Petitioners respectfully request that, after consideration of the parties' briefs, this Court determine that Initiative #98 violates the single subject requirement and that the Title Board be instructed to return the measure to the proponents, or, in the alternative, the title set for Initiative #98 is neither fair nor accurate and remand Initiative #98 to the Title Board with instructions to redraft the title to accurately and fairly represent the text of the proposed initiative.

Respectfully submitted this 4th day of May 2016.

TIERNEY LAWRENCE LLC

By: s/Martha M. Tierney
Martha M. Tierney, No. 27521
2675 Bellaire Street
Denver, Colorado 80207
Phone Number: (303) 356-4870
E-mail: mtierney@tierneylawrence.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 2016 a true and correct copy of the foregoing **ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-2016 #98** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

Jason Dunn, Esq.
Brownstein Hyatt Farber Schreck LLP
410 Seventeenth Street
Denver, Colorado 80202-4432
Email: jdunn@bhfs.com
Attorneys for Designated Representatives Kelly Brough and Joe Blake

LeeAnn Morrill, Esq.
Matthew Grove, Esq.
Christopher M. Jackson, Esq.
Office of the Colorado Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
Email: leeann.morrill@coag.gov, Matt.Grove@coag.gov,
Christopher.jackson@coag.gov
Attorneys for Title Board

s/Martha M. Tierney

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.