

SUPREME COURT, STATE OF
COLORADO
2 East 14th Avenue
Denver, CO 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 (“Primary Elections”)

Petitioners: Jean Martelle Daniels and
Brandi Renee Meek,

v.

Respondents: Kelly Brough and Joe Blake,

and

Title Board: Suzanne Staiert, Sharron
Eubanks, and Glenn Roper.

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Case No.: 2016SA108

TITLE BOARD’S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I 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, I certify that:

A. The brief complies with C.A.R. 28(g) because it contains 1,789 words.

B. The brief complies with C.A.R. 28(b) because it contains, under a separate heading placed before the discussion of the issue, a statement whether the Title Board agrees with the Petitioners' statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not.

/s/ Christopher M. Jackson
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board (“Board”) erred in finding that Proposed Initiative #98 (“#98”) contains a single subject under Article V, § 1(5.5) of the Colorado Constitution.
2. Whether the title the Board set for #98 complies with Colorado law.

STATEMENT OF THE CASE

The Board adopts the statement of the case presented in its April 14, 2016 Opening Brief, with one correction: it is Respondents, rather than Petitioners, who seek to circulate #98 to obtain the requisite number of signatures to place the measure on the ballot.

SUMMARY OF THE ARGUMENT

The Board correctly determined that Initiative #98 complies with Article V’s single-subject rule. Petitioners’ arguments to the contrary—one of which was waived below—should be rejected. In addition, the Board’s title for #98 correctly and fairly expresses the true intent and meaning of the measure. This Court should affirm the Board’s decision.

ARGUMENT

I. The Board correctly found that #98 contains a single subject.

A. Standard of review.

The Board agrees with Petitioners that this Court reviews the Title Board's decision by "employing all legitimate presumptions in favor of the propriety of the Title Board's action." Pet'rs Opening Br. at 7 (quoting *In re Title, Ballot Title, & Submission Clause for 2013-2014*, #89, 328 P.3d 172, 176 (Colo. 2014)).

Petitioners did properly preserve their argument that #98's "opt-out provision" is an impermissible second subject. But they raise a new argument for the first time in their Opening Brief, suggesting that #98 contains a *third* subject by "allow[ing] minor political parties to prohibit unaffiliated electors from voting in the minor political party's primary election." *Id.* at 14. This claim was not raised in Petitioners' motion for rehearing before the Board. See Mar. 24, 2016 Part 2 Exhibits to Petition for Review of Final Action of Title Setting Board for Proposed Initiative 2015-2016 #98, at 11-12 (arguing that #98's "*two* discrete subjects violate the single subject requirement when *paired* together")

(emphasis added). Because this issue was not properly preserved, it has been waived. *See, e.g., Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte, LLC*, 97 P.3d 252, 257 (Colo. App. 2004) (“Arguments not presented to or ruled upon by the district court cannot be raised for the first time on appeal. Accordingly, we decline to consider this issue.”) (citing *Estate of Stevenson v. Hollywood Bar & Café, Inc.*, 832 P.3d 718 (Colo. 1992)).

B. Number 98’s “opt-out” provision does not violate the single-subject rule.

Petitioners argue that the inclusion of #98’s opt-out violates the single-subject rule. Pet’rs Opening Br. at 10-11. But the opt-out provision comfortably fits into #98’s subject: expanding the right of unaffiliated voters to participate in primary elections. As Petitioners themselves recognize, the opt-out provision was included to ensure #98 does not run afoul of the federal Constitution. *Id.* at 10-11. It is, in other words, a provision that “relate[s] directly to [the measure’s] single subject” and is therefore part of a “comprehensive framework” that seeks to achieve a single goal. *In re Title, Ballot Title, & Submission*

Clause for 2009-2010, #91, 235 P.3d 1071, 1076 (Colo. 2010) (citation omitted).

Petitioners suggest that #98 runs the risk of both logrolling and voter confusion. Pet’rs Opening Br. at 12 (“[S]ome voters might favor allowing unaffiliated voters to vote in primary elections, but not favor creating a new process allowing a political party the right ... [to nominate] candidates by assembly or convention, or vice versa.”); *id.* at 12-13 (voters might 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 ... nominate candidates [via] nomination or convention”). But raising the potential existence of such voters as a theoretical possibility isn’t enough to overturn the Board’s decision; otherwise, only one-provision measures could ever be approved. Petitioners have not offered any reason to conclude that there is any real-world risk that a substantial number of voters would be coerced into voting for #98 or surprised by its opt-out provision. Moreover, the theoretical voters posited by Petitioners—people in favor of allowing unaffiliated electors to participate but against permitting

parties to nominate via convention or assembly—would support a law that violates the First Amendment’s right to free association. *See Calif. Dem. Party v. Jones*, 530 U.S. 577-78 (2000).

Petitioners also contend that the opt-out provision has “no necessary connection” to #98’s purpose. Pet’rs Opening Br. at 13. But in fact, there is a substantial connection: the opt-out provision is, as noted above, part of #98’s “comprehensive framework” to expand the right of unaffiliated voters to participate in primary elections. Number 98 is perhaps best analogized by the initiative at issue in *In re Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014). There, this Court took up a challenge to an initiative relating to the recall provisions for state and local officials. *Id.* at 78. The Court noted that the initiative’s “first subject” would make “substantial changes to the manner in which state and local recall elections are triggered and conducted under constitutional and statutory law.” *Id.* at 81. These changes included “new enforcement provisions,” a new “threshold requirement for the number of valid petition signatures,” different rules regarding the “content of recall ballots,” a different

“manner of filling vacancies caused by recall elections,” the “elimination of the application of existing campaign finance laws to recall petitions and elections,” and different “[r]equirements applicable to petition circulation.” *Id.* at 81-83. Despite the large number of procedural and substantive amendments the initiative would make, the Court nevertheless held that “[c]ollectively, these changes to the manner in which recall elections are triggered and conducted *constitute a single subject.*” *Id.* at 83 (emphasis added).

Much like *In re #76*, #98 contains a number of different provisions, but all of them relate to one overarching goal. Given that the standard of review for violation of the single-subject rule is to employ “all legitimate presumptions” in the Board’s favor, this Court should affirm the Board’s decision.

C. Number 98’s “minor-party exemption” does not violate the single-subject rule.

Petitioners contend that #98’s minor-party exemption “is a violation of the single subject requirement.” Pet’rs Opening Br. at 14. The Court should reject this argument. It was raised for the first time

on appeal to this Court and has therefore been waived. *See supra*

Section I.A.

On the merits, the inclusion of the minor-party exemption does not violate the single-subject rule. Petitioners contend that “[t]he plain language of the measure is concentrated on opening the political party primary process to unaffiliated voters.” Pet’rs Opening Br. at 15. That is precisely what #98—including its minor-party exemption—does.

Under current law, unaffiliated voters have no right at all to participate in a party’s primary election. §§ 1-7-201(1), (2), C.R.S. But if #98 passes, unaffiliated voters will be allowed to participate in any minor party’s primary unless that party takes affirmative steps to prohibit it.

Mar. 24, 2016 Part 1 Exhibits to Petition for Review of Final Action of Title Setting Board for Proposed Initiative 2015-2016 #98, at 5. In other words, # 98 *expands* the right of unaffiliated voters to participate in primary elections. The fact that the measure does not make this right *indefeasible* does not mean that it violates the single-subject rule.

II. The title the Board set for #98 was proper.

A. Standard of review.

In their opening brief, Petitioners do not articulate the standard this Court employs in reviewing a title the Board sets, and instead describe the legal standard for ballot titles themselves. Pet'rs Opening Br. at 16. In any event, the case law is clear that this Court “give[s] great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles are insufficient, unfair, or misleading.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 645, 648 (Colo. 2010) (citation omitted).

The Board agrees with Petitioners that this issue was properly preserved.

B. The title’s omission of an exemption for minor political parties is not misleading.

Petitioners contend that #98’s title is misleading because it does not describe the measure’s minor-party exemption. But as noted in the Board’s Opening Brief, the Board need only distill the measure down into a “reasonable ascertainable expression of [its] purpose.” *In re Title*,

Ballot Title, & Submission Clause for 2009-2010, #45, 234 P.3d 642, 648 (Colo. 2010) (citation omitted). While the minor-party exemption certainly is a feature of #98, it is not its *central* feature, and as such, the Board “is not required to explain” it in the title. *In re Title, Ballot Title, & Submission Clause for 2013-2014, #90, 328 P.3d 155, 165* (Colo. 2014) (citation omitted). Even if Petitioners are right that the inclusion of the minor-party exemption would improve #98’s title, the “Board need not set out the ‘best possible’ title.” *In re Title, Ballot Title, & Submission Clause for 2011-2012, No. 45, 274 P.3d 576, 582* (Colo. 2012). Particularly because this Court grants “great deference” to the Board in setting a title, it should not reverse this decision. *In re #45, 234 P.3d at 648* (citation omitted).

C. The title’s omission of #98’s use of combined or separate ballots is not misleading.

Finally, Petitioners argue that #98’s title is confusing because it “will treat unaffiliated voters differently and, arguably preferentially, by providing” those voters with either a “super ballot” or “a separate primary ballot for each of the major political party primary contests.”

Pet'rs Opening Br. at 19, 20. They contend that “[t]his is a substantial procedural change and should be referenced in the title.” *Id.* at 19. But that is simply not the case; these are minor procedural modifications that are intended to effectuate #98’s primary purpose, and Petitioners offer no explanation as to why they are “substantial.” Petitioners do say that #98 treats unaffiliated voters “differently and, arguably preferentially,” *id.* at 19, but they do not explain how this procedural mechanism constitutes preferential treatment. As Respondents discuss in their Opening Brief, Colorado law requires a ballot title to be “brief” and to “unambiguously state the *principle* of the provision to be added, amended, or repealed.” § 1-40-106(3)(b), C.R.S. (emphasis added). “[T]he Board is not required to and, in this case, clearly cannot describe every feature of a proposed measure in the titles.” *In re Title, Ballot Title, & Submission Clause of Feb. 3, 1993*, 852 P.2d 28, 33 (Colo. 1993) (citation omitted). Because there is no risk of voter confusion or surprise, the Board’s decision should be affirmed.

CONCLUSION

For the reasons given above, the Court should affirm the Board's March 16, 2016 decision regarding #98.

Respectfully submitted on this 4th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I electronically served the **TITLE BOARD'S ANSWER BRIEF** and related documents upon the following parties through ICCES this 4th day of May, 2016:

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