

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: April 14, 2016 6:30 PM</p>
<p>In Re The Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #98</p> <p>Petitioners: JEAN MARTELLE DANIELS AND BRANDI RENEE MEEK</p> <p>v.</p> <p>Respondents: KELLY BROUGH and JOE BLAKE</p> <p>and</p> <p>Title Board: Suzanne Staiert, Sharon Eubanks, and Glenn Roper</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>RESPONDENTS' OPENING BRIEF</p>	

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 2,976 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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Respondents Kelly Brough and Joe Blake, registered electors of the State of Colorado, through their undersigned counsel, submit their Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2015-2016 #98 (unofficially captioned “Primary Elections”).

ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board correctly concluded that a proposed initiative that allows unaffiliated voters to participate in all primary elections, and also allows political parties to opt-out of that system, does not violate the constitutional single-subject requirement.
2. Whether the Title Board erred in excluding in the title details about minor parties and ballot formats.

STATEMENT OF THE CASE

This original proceeding is brought by Petitioners pursuant to section 1-40-107(2) as an appeal from a decision of the Ballot Title Setting Board to set the title, ballot title, and submission clause on

Proposed Initiative 2015-2016 #98 (“Proposed Initiative #98” or the “Initiative”).

Proposed Initiative #98 seeks to amend the Colorado election code governing the primary election process by allowing unaffiliated voters to vote in primary elections at the state and local levels. Initiative § 9. The Initiative further provides that if a political party does not wish to have unaffiliated voters participating in its primary elections, then it may opt out and instead nominate candidates to the general election ballot by convention or assembly. Initiative § 5.

Proposed Initiative #98 was filed on February 5, 2016. Following the required review and comment hearing pursuant to section 1-40-105(1), Proponents filed an amended version of the Initiative with the Title Board on February 19, 2016. The Title Board considered the Initiative and unanimously set a title on March 2, 2016.

Petitioners subsequently filed a Motion for Rehearing pursuant to section 1-40-107(1)(a), alleging that the Initiative violated the constitutional single-subject requirement and the clear title requirement. Respondents also filed a Motion for Rehearing, stating

that the Initiative's title did not accurately reflect the Initiative's subject matter, which rendered the title misleading. The Title Board considered both motions at its March 16, 2016 hearing. It unanimously granted the motions as to limited changes to the title and submission clause but denied the motions in all other respects, including Petitioners' alleged violations of the single-subject and clear title requirements. Petitioners subsequently filed a petition for review in this Court on March 23, 2016.

SUMMARY OF THE ARGUMENT

Proposed Initiative #98 contains only one subject: amending the primary election process to allow unaffiliated voters to participate in primary elections of one political party. The Initiative further provides that a political party may, if certain specific criteria are met, elect to opt out of using primary elections and instead nominate candidates to the general election ballot by convention or assembly. The Title Board correctly determined in a unanimous decision that the Initiative contained a single subject because the opt-out provision is properly

connected to creating a default system under which unaffiliated voters have the right to vote in primary elections.

In addition, while the title does not contain the exact language that Respondents thought best, the title ultimately set by the Title Board fairly and correctly expresses the central purpose of the Initiative in a clear manner.

STANDARD OF REVIEW

In reviewing a challenge to the Title Board’s decision, the reviewing court “employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board’s actions.” *In re Title, Ballot, Title and Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010).

The single-subject requirement of article V, § 1(5.5), should be construed liberally to avoid unduly restricting the initiative process. *In re Title, Ballot Title, and Submission Clause for 2007–2008 #61*, 184 P.3d 747, 750 (Colo. 2008). Thus, a reviewing court “only overturn[s] the Title Board’s finding that an initiative contains a single subject in a

clear case.” *In re Title, Ballot Title, and Submission Clause for 2011–2012 #3*, 274 P.3d 562, 565 (Colo. 2012).

In setting a title for a ballot initiative, the Title Board “has considerable direction,” and a court “will only reverse the Title Board’s designation if the title is ‘insufficient, unfair, or misleading.’” *Id.*

(quoting *In re Proposed Initiative 2009-2010 No. 45*, 234 P.3d at 648).

In particular, the Title Board “is given discretion” regarding the “length, complexity, and clarity in setting a title.” *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014).

ARGUMENT

I. The opt-out provision is properly connected to allowing unaffiliated voters to participate in primary elections.

Article V, § 1(5.5), of the Colorado Constitution requires that “[n]o measure shall be proposed by petition containing more than one subject.” *See also* § 1-40-106.5 (statutory single-subject requirement).

Under this requirement, there must be a “‘necessary or proper’ connection between the component parts of a proposed initiative.” *See*,

e.g., *In re Title, Ballot Title and Submission Clause for 2007-2008, #17*, 172 P.3d 871, 878 (Colo. 2007). The 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 re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 No. 73*, 135 P.3d 736, 738 (Colo. 2006) (quoting *In re Petition Procedures*, 900 P.2d 104, 109 (Colo.1995)).

The single-subject requirement is not intended to be an overly restrictive barrier to the initiative process. Rather, “[i]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *In re Proposed Initiative “Public Rights in Waters II”*, 898 P.2d 1076, 1079 (Colo. 1995). In fact, an initiative that contains several interrelated purposes does not violate the single-subject requirement. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1076 (Colo. 2010). For example, an initiative that proposes “a comprehensive framework” satisfies the single-subject requirement “if all of its provisions relate directly to its single subject.” *Id.* In determining whether an initiative contains a

single subject, a court “must review the initiative as a whole rather than piecemeal and examine individual statements in light of their context.” *Id.* at 1077.

A. Proposed Initiative #98 contains only one subject.

Proposed Initiative #98 has one subject: amending the primary election process to allow unaffiliated voters to participate in primary elections of one political party. Petitioners’ argument at the Motion for Rehearing—that the Initiative violates the single-subject requirement by allowing unaffiliated voters to participate in primaries while also providing an opt-out for any party that does not want to allow such unaffiliated voter participation—overstates the weight of the opt-out provision and is based on an overly broad description of the Initiative’s underlying theme.

First, the opt-out clause is simply a relatively minor provision put in place to (a) give any party that does not want unaffiliated voters participating in that party’s primary an alternative, and (b) preempt any future claims that the Initiative infringes on the constitutional

rights of political parties. Looking at the Initiative as a whole demonstrates that the opt-out clause is designed to work with the Initiative's central tenant and effectuate its purpose—allowing unaffiliated voters to participate in primary elections. The opt-out clause thus is properly connected to the single-subject clause and does not create two different subjects.

Second, the Initiative's single subject is not based an impermissible overarching theme or “umbrella,” as Petitioners argued at the hearing. The Initiative's single subject of allowing unaffiliated voters to participate in the primary process is narrower than themes such as “water” or “revenue changes” that have been found to circumvent the single-subject rule. *In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). In fact, the single subject is actually narrower than “primary elections” (the Initiative's unofficial heading), as it relates only to the subset of unaffiliated voter participation in primary elections.

B. Neither of the “dangers” that underlie the single-subject doctrine are present.

The single-subject rule is meant to prevent two specific dangers associated with omnibus initiatives. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012); *see also* § 1–40–106.5(1)(e)(II).

First, combining subjects with no necessary or proper connection *for the purpose of* garnering support for the initiative from various factions—that may have different or even conflicting interests—could lead to the enactment of measures that would fail on their own merits. Second, the single subject rule helps avoid ‘voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision “coiled up in the folds” of a complex initiative.’

Id. (internal citations omitted) (emphasis added). Neither concern is present here.

First, there is no indication that the Initiative strategically combined two separate proposals into a single measure out of concern that one might fail if presented to voters alone. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 261 (Colo. 1999) (noting that the single-subject requirement “prevents the practice of putting together in one measure multiple

subjects ‘*for the purpose of* enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits” (quoting § 1–40–106.5(1)(e)(I) (emphasis added)). Logically-speaking, 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. Moreover, a voter who supports the idea of allowing unaffiliated voter participation would likely also support the opt-out provision as a means of preempting any claim (whether legitimate or not) that the measure infringes on the constitutional rights of the parties. Indeed, the Initiative largely mirrors schemes used in other states. *See, e.g., Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655 (D.S.C. 2011) (holding that South Carolina’s open primary laws that provide an opt out from an open primary whereby political parties could choose a convention or a petition, *see* S.C. Code Ann. § 7-11-10, do not facially burden a political party’s right to freedom of association).

Similarly, it is unlikely that any voter favoring the selection of candidates exclusively by assembly or convention would support this measure that broadens the primary process to allow unaffiliated voter participation. The opt-out is not the default scenario and requires “at least three-fourths” “of the party’s state central committee votes” to trigger it. Initiative § 5. Therefore, the Initiative will pass or fail almost exclusively on the merits of allowing unaffiliated voters to participate in political party primaries, and is not an effort to pass one provision that could not otherwise pass on its own.

Second, the Initiative does not raise concerns of “voter surprise” or that surreptitious provisions are being “coiled up in the folds” of the measure. Rather, the inclusion of the opt-out clause is an obvious feature of the Initiative, occupies its own section of the measure titled “Nomination of candidates for general election by convention” (Initiative § 5), and is included in the title set by the Title Board, which states:

Shall there be a change to the Colorado Revised Statutes concerning the process of selecting candidates representing political parties on a general election ballot, and, in connection therewith, allowing an unaffiliated elector to vote

*in the primary election of a political party without declaring an affiliation with that party **and permitting a political party in specific circumstances to select all of its candidates by assembly or convention instead of by primary election?***¹

That language clearly advises voters of the opt-out provision and is not so complex that a reader might not notice the provision.

Accordingly, Proposed Initiative #98 presents neither of the “dangers” the single-subject rule was designed to prevent.

II. The title set by the Title Board fairly and correctly expresses the true meaning of the measure, and does not violate the clear title requirement.

The Colorado Constitution states that an initiative's single subject shall be clearly expressed in its title. *See* Colo. Const. art. V, § 1(5.5).

A ballot initiative’s title “shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear.” § 1-40-106(3)(b). It “shall correctly and fairly express the true intent and meaning” of the initiative. *Id.* A title, however, “need not ‘spell out every detail of a proposal.’” *Matter*

¹ Title Set by the Ballot Title Setting Board, Certified Copy of the Record, at 30 (emphasis added).

of Title, Ballot Title & Submission Clause for 2013-2014 #129, 333 P.3d 101, 106 (Colo. 2014) (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #256*, 12 P.3d 246, 256 (Colo. 2000)). Furthermore, “[t]he Title Board need not set the ‘best possible’ title.” *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 582 (Colo. 2012).

A. The title need not inform voters that the Initiative would allow a minor political party to exclude unaffiliated voters from its primary.

The Petitioners argued at the Title board hearing that the title fails to inform voters that the Initiative would allow minor political parties to prohibit unaffiliated voters from participating in their primary elections. *See* Initiative § 7. Minor political parties are classified as such because their gubernatorial candidate did not receive at least ten percent of the total votes cast in the last election. *See* § 1-1-104(22). Allowing minor political parties to bar unaffiliated voters from their primaries is a constitutional safeguard: Because minor political

parties are relatively small,² 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) (noting that in California's blanket primary, where each voter's ballot lists every candidate regardless of party affiliation and allows the voter to choose freely among those candidates, "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival").

In writing the title, the Title Board's duty "is to summarize the central features of a proposed initiative." *Matter of Title , Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014).

Here, given the small number of people that participate in minor party elections, the provision allowing minor political parties to prohibit

² In the last Colorado gubernatorial election, only 66,981 of the total 2,075,837 ballots, or 3.23 percent, were cast for candidates affiliated with minor political parties. 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>.

unaffiliated voters from participating in their primary elections is far from “central.” *See id.* at 165 (Colo. 2014) (concluding that the central feature of the initiative was to expand local governments' authority to regulate “oil and gas development,” and the omission “hydraulic fracturing” in the title did not render it misleading because it was not a “material” omission). The omission of this detail does not mislead voters to support or oppose the Initiative, and including it in the title would be *more* likely to lead to voter confusion than help avoid it. As written, the title “fairly reflects the central purpose of the initiative.” *Id.*

B. The title need not include details about technical aspects of ballot formats.

The Petitioners also argue that the title must inform voters that the Initiative would create a new type of ballot for unaffiliated voters that would contain all primary candidates for all races on one ballot, or if not practicable, would require that unaffiliated voters be sent, and select from, each of the party’s primary ballots. *See* Initiative § 3. This detail is simply a procedural technicality that relates to the format of

the ballots that would be given to unaffiliated voters. It is not one of the Initiative's "material elements," or central to the purpose of the measure, and it is highly unlikely that voters would base their vote on whether they support or oppose this method of getting ballots to unaffiliated voters. *See generally Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). Adhering to the Petitioner's argument would require technical minutia to be included in the title and is contrary to underlying purpose of having ballot titles in the first instance. *See* § 1-40-106(3)(b) (noting that a title should be "brief," "express the true intent and meaning" of the initiative, and "unambiguously state the principle of the provision sought to be added, amended, or repealed"); *see also In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991) ("The [Title] [B]oard is not required to describe every nuance and feature of the proposed measure.").

CONCLUSION

Proposed Initiative #98 seeks to give unaffiliated voters the opportunity to participate in state and local primary elections in Colorado. Such a purpose constitutes a single subject under article V, § 1(5.5), and this Court's jurisprudence. In addition, the title is not unfair, insufficient, or misleading. 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 14 day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I electronically filed a true and correct copy of the foregoing RESPONDENTS' OPENING BRIEF via the Colorado ICCES system which will send notification of such filing and service upon the following:

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