

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	<p style="text-align: right;">DATE FILED: April 7, 2016 6:29 PM</p>
<p>IN RE THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR 2015-2016 #99 (“PRIMARY ELECTIONS”)</p> <p><b>Petitioners:</b> Kelly Brough and Joe Blake,</p> <p>v.</p> <p><b>Title Board:</b> Suzanne Staiert, Sharon Eubanks, and Glenn Roper</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioner:</p> <p>Jason R. Dunn BROWNSTEIN HYATT FARBER SCHRECK LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100 Fax: 303.223.1111 <a href="mailto:jdunn@bhfs.com">jdunn@bhfs.com</a></p>	<p>Case Number: 16SA93</p>
<p style="text-align: center;"><b>PETITIONERS’ OPENING BRIEF</b></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 2,606 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

## TABLE OF CONTENTS

	<b>Page</b>
ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT .....	2
STANDARD OF REVIEW.....	3
ARGUMENT.....	3
I.    Allowing unaffiliated voters to participate in primary elections and restoring a presidential primary both relate to the single subject of conducting primary elections .....	3
A.    Proposed Initiative #99 contains only one subject .....	4
B.    Neither of the “dangers” that underlie the single-subject doctrine are present.....	8
CONCLUSION .....	10

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Proposed Initiative “Public Rights in Waters II”,</i> 898 P.2d 1076 (Colo. 1995).....	6
<i>In re Proposed Petition Adding Section 2 to Article VII,</i> 900 P.2d 104 (Colo.1995) (Scott, J., concurring).....	6
<i>In re Title, Ballot Title and Submission Clause, and</i> <i>Summary for 1999-2000 NO. 219,</i> 999 P.2d 819, 820-22 (Colo. 2000).....	4
<i>In re Title, Ballot Title, and Submission Clause for 2007–</i> <i>2008 # 61,</i> 184 P.3d 747 (Colo.2008).....	4
<i>In re Title, Ballot Title and Submission Clause for 2007-2008</i> <i>#17,</i> 172 P.3d 871, 878 (Colo. 2007).....	5, 8
<i>In re Title, Ballot Title and Submission Clause for 2009-2010</i> <i>#91,</i> 235 P.3d 1071 (Colo. 2010)(Coats, J. dissenting) .....	12
<i>In re Title, Ballot Title, Submission Clause, and Summary</i> <i>for 2006-2006 #73,</i> 135 P.3d 736 (Colo. 2006).....	5
<b>Constitutional Provisions</b>	
Colorado Constitution, article V, §1(5.5).....	1, 4, 5, 15
<b>Statutes</b>	
C.R.S. § 1–40–106.5(1)(e)(II) .....	11, 12

C.R.S. § 1-40-105(1) .....2

C.R.S. § 1-40-106.5 .....5

C.R.S. § 1-40-106.5(1)(e)(I) .....6

C.R.S. § 1-40-107(2) .....1

**Other Authorities**

Alex Burness & Sarah Kuta, *Voters Turned Away as Boulder County Democrats Overwhelm Caucuses*, Daily Camera (Boulder, CO), Mar. 1, 2016, [http://www.dailycamera.com/local-election-news/ci\\_29582657/huge-crowds-reported-at-%20boulder-countys-democratic-caucus](http://www.dailycamera.com/local-election-news/ci_29582657/huge-crowds-reported-at-%20boulder-countys-democratic-caucus). .....13

Colorado Secretary of State, *2015-2016 Initiative Filings, Agendas & Results*, <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html#i98> title setting]. (last visited Apr. 7, 2016). .....9

Petitioners Kelly Brough and Joe Blake, registered electors of the State of Colorado, through their undersigned counsel, submits their Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2015-2016 #99 (unofficially captioned “Primary Elections”).

### **ISSUES PRESENTED FOR REVIEW**

Did the Title Board wrongly conclude that a proposed initiative to allow unaffiliated voters to participate in primary elections, including a reinstated presidential primary election, violates the constitutional single-subject requirement of article V, §1(5.5)?

### **STATEMENT OF THE CASE**

This original proceeding is brought pursuant to section 1-40-107(2) as an appeal from a decision of the Ballot Title Setting Board refusing to set a title on Proposed Initiative 2015-2016 #99 (“Proposed Initiative #99” or the “Initiative”).

Proposed Initiative #99 seeks to amend provisions of the Colorado election code governing the primary election process. Foremost, the

measure will allow unaffiliated voters to vote in primary elections for partisan elections at the federal, state and local level. To ensure that unaffiliated voters are allowed to participate in all such elections, the measure restores the primary election for the office of President of the United States, which Colorado had until 2000, and allows unaffiliated voters to participate in that contest. Currently, voters can express their preference in a presidential primary only by participating in our state's caucus system. Lastly, the measure 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.

Proposed Initiative #99 was filed on February 5, 2016. Following the required review and comment hearing pursuant to section 1-40-105(1), the Proponents filed an amended version of the measure with the Title Board on February 19, 2016. The Title Board first considered the measure on March 2, 2016, during which the Board, by a 2-1 vote, found that the measure violated the single-subject requirement, and thus declined to set a title.

Petitioners subsequently filed a timely Motion for Rehearing. That motion was heard at the Board's March 16, 2016 hearing, during which the Board members debated the single subject question at length. The Board ultimately voted that the measure contained two subjects. The vote was again 2-1, with one of the two majority members calling the single-subject question "a close call."<sup>1</sup>

Petitioners subsequently filed a timely petition for review in this court on March 18, 2016.

### **SUMMARY OF THE ARGUMENT**

Proposed Initiative #99 contains only one subject: the process of conducting primary elections in Colorado.

The measure amends the primary election process by simply allowing unaffiliated voters to participate in the primary elections of one political party. To ensure that this right covers *all* primary elections, the measure reinstates the presidential primary in Colorado.

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<sup>1</sup> Audio recording Title Board - March 16, 2016, Part 1, Glen Roper at 1:21:45 can be found at [http://www.sos.state.co.us/pubs/info\\_center/audioArchives.html](http://www.sos.state.co.us/pubs/info_center/audioArchives.html).



A two-member majority of the Title Board erroneously deemed the restoration of the presidential primary a subject that is distinct and separate from allowing unaffiliated voters to participate in primary elections. Because those two provisions are properly connected and relate to the same single-subject, the majority's decision was in error and should be reversed.

### **STANDARD OF REVIEW**

Whether the Title Board properly refused to exercise its jurisdiction to set a title is a question of law subject to *de novo* review by this Court. See *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 NO. 219*, 999 P.2d 819, 820-22 (Colo. 2000). In doing so, 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).

## ARGUMENT

### **I. Allowing unaffiliated voters to participate in primary elections and restoring a presidential primary both relate to the single subject of conducting primary elections.**

Article V, § 1(5.5), of the Colorado Constitution requires that no measure “shall be proposed by petition containing more than one subject”. *See also* C.R.S. § 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). Under the “necessary or proper” rubric, 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 re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736, 738 (Colo. 2006).

That is not to say, however, that each and every component of a measure must be indispensable to fulfilling the central purpose of the measure. Nor does it mean that any component capable of standing on

its own as an independent measure is necessarily a separate subject. Rather, it means only that incongruous subjects that seek to accomplish multiple, discrete, and unconnected purposes shall not be combined. See C.R.S. § 1-40-106.5(1)(e)(I); see generally *In re Proposed Initiative “Public Rights in Waters 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.” *Id.* “So long as an initiative encompasses *related* matters it does not violate the single subject requirement.” *In re Proposed Petition Adding Section 2 to Article VII*, 900 P.2d 104, 113 (Colo.1995) (Scott, J., concurring).

**A. Proposed Initiative #99 contains only one subject.**

Proposed Initiative #99 seeks only to alter the primary election process in Colorado. It is axiomatic that how elections are conducted necessarily involves a variety of connected topics, such as who can vote in the election, which offices are covered by the election, when the election will occur, and how a person becomes a candidate for a particular office. Proposed Initiative #99 simply seeks to amend some

of those provisions by allowing unaffiliated voters to participate in primary elections and by ensuring that such elections include the presidential primary. Relatedly, the measure provides that a party may opt-out of a primary election if it does not want unaffiliated voters participating in its primary, and also that minor parties can refuse to allow unaffiliated voters to participate in any primary election it might hold (which is extremely rare in the first instance). Initiative §§ 5, 7.

While none of these provisions are “necessary” to the measure in the sense that the measure would be inoperative or nonsensical without any one of them, and each could surely stand alone as an independent measure, inoperability has never been the definition of “necessary or proper” under this Court’s single-subject jurisprudence. Rather, as noted above, the test is only whether the component parts of a measure are “*related matters*” that are “properly” connected within the context of the measure’s underlying purpose – here, changing the primary election process in Colorado. There can be little doubt that the topics of who can vote in a primary and which races are subject to a primary election are

related, not only to each other but also to the underlying purpose of amending the primary election process.

The Title Board's logic in finding two subjects boils down to this: the measure can either (a) restore the presidential primary, but cannot alter who may vote in that election (or any other), or (b) change who can vote in primary elections, but can't alter which primary contests are included. The Board's logic is not only legally flawed, *see In re Title, Ballot Title And Submission Clause For 2007-2008 #17*, 172 P.3d 871, 879 (Colo. 2007)(Eid, J. dissenting), it belies the Board's own actions.

First, there can be no dispute that a measure satisfies the single-subject rule by allowing unaffiliated voters to vote in *all* existing primary contests, including low level races such as county commissioner to federal races like the U.S. Senate. Proposed Initiative #99 proposes to do just that without objection from the Title Board. Similarly, so does a similar initiative that was recently filed: Proposed Initiative 2015-2016 #98, which is virtually identical to #99 in allowing unaffiliated voters to participate in primary elections but does not reinstate the presidential primary. At the same hearing it considered

Proposed Initiative #99, the Title Board considered and correctly found that #98 had a single subject and set a title.<sup>2</sup> The fact that #98 implicated a multitude of different primary contests at various levels of government was of no concern to the Board, nor should it have been.

And yet in Proposed Initiative #99, the Board deemed the measure's applicability to one additional election – the presidential primary – a second subject. But in the context of this measure, there is simply no distinction between that election and any other of the various partisan elections covered by the measure. The goal of the measure is simply to affect how voters participate in *all* primary elections in Colorado.

Moreover, it appears that at least one of the two Board members who deemed the inclusion of the presidential primary a second subject did so not simply because the measure was adding an election that currently does not exist in Colorado, but rather because (a) a presidential primary is typically held on a different day than other

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<sup>2</sup> Colorado Secretary of State, *2015-2016 Initiative Filings, Agendas & Results*, <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>

primary races, and (b) that a presidential primary is, in reality, an election of *delegates* (to a political party's national convention) rather than a direct election of presidential *candidates* (whose names are actually on the ballot).<sup>3</sup>

Neither rationale creates a second subject. First, the date on which a particular election is held is simply a technical aspect of the measure that does not change the underlying single purpose of the measure. Moreover, there is nothing in the measure that prevents all primary elections from being held on the same day. Second, in the context of a single-subject analysis, the fact that delegates rather than the actual candidates are being selected by voters is again a distinction without substance. The presidential primary ballot lists the names of the presidential candidates, not the delegates. The vast majority of voters are simply unaware that they are voting for delegates, nor do they likely know the names of those delegates. The critical point is that primary elections are the process by which voters express their

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<sup>3</sup> Audio recording Title Board - March 2, 2016, Part 3, Sharron Eubanks at 31:00 – 34:00 can be found at [http://www.sos.state.co.us/pubs/info\\_center/audioArchives.html](http://www.sos.state.co.us/pubs/info_center/audioArchives.html)

preference as to who should appear on the general election ballot, and this measure seeks only to allow unaffiliated voters to participate in that process for all partisan elections, including the presidential primary. The fact that the presidential primary is an election of delegates rather than actual candidates is therefore not a valid basis to deem the addition of the presidential primary a second subject.

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

The ultimate purpose of the single-subject rule is to prevent two specific dangers that are associated with omnibus initiatives. *See In Re Title, Ballot Title, and Submission Clause For 2011-2012 #3, 274 P.3d 562 (Colo. 2012); see also C.R.S. § 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.* (emphasis added). Neither concern is present here.

First, there is no indication that combining provisions to allow unaffiliated voters to participate in primary elections with the reinstatement of the presidential primary was done “for the purpose of” passing one or both of those provision that might otherwise fail if presented to voters alone. *See In re Title, Ballot Title and Submission Clause For 2009-2010 #91*, 235 P.3d 1071, 1088-87 (Colo. 2010)(Coats, J. dissenting)(describing fundamental purpose of single-subject rule as preventing “deliberate intent to deceive the voting public by secreting unrelated provisions or to combine, for voting strength purposes, disparate provisions that have already failed or are likely to fail on their own”). Indeed, not only do those two provisions have an obvious, logical and reasonable connection of ensuring that unaffiliated voters can participate in every type of partisan election, but common-sense dictates that any voter who supports the idea of allowing unaffiliated voters to participate in primary elections in Colorado would likely want that to include the presidential primary. And no indication to the

contrary was presented to the Title Board. Moreover, the fact that each provision could stand alone as an independent measure is simply irrelevant to the single-subject analysis and not the appropriate test of whether the provisions meet the test as “necessary and proper”. Thus, the first “danger” is not a concern here.

Likewise, Proposed Initiative #99 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 presidential primary is an obvious feature of the measure, particularly in light of the current presidential election and media coverage of problems with the recent presidential caucuses in Colorado.<sup>4</sup> The two provisions have an obvious, logical and reasonable connection: ensuring that unaffiliated voters can participate in every type of partisan primary election in Colorado. And any concern about whether the Proponents are attempting to hide the provision in the folds of a complex measure can be dismissed simply by

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<sup>4</sup> Alex Burness & Sarah Kuta, *Voters Turned Away as Boulder County Democrats Overwhelm Caucuses*, Daily Camera (Boulder, CO), Mar. 1, 2016, [http://www.dailycamera.com/local-election-news/ci\\_29582657/huge-crowds-reported-at-%20boulder-countys-democratic-caucus](http://www.dailycamera.com/local-election-news/ci_29582657/huge-crowds-reported-at-%20boulder-countys-democratic-caucus)

looking at the proposed title submitted to the Title Board by the Proponents prior to the initial hearing on March 2, 2016:

*Shall there be a change to the Colorado Revised Statutes concerning primary elections, and, in connection therewith, giving unaffiliated voters the option to vote in the primary election of one major political party without having to register as a member of that party; **and restoring a presidential primary contest to be held no later than the third week of March in a presidential election year?**<sup>5</sup>*

That language clearly advises voters that the measure will reinstate the presidential primary. Surely the Title Board would have adopted similar language had it found a single-subject. Moreover, the measure itself is not so complex that one reading it might fail to notice the

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<sup>5</sup> The Proponents' draft title was submitted via email on February 23, 2016, but was not included in the certified copy of the proceedings provided by the Secretary of State and attached to the Petition in this matter. A certified copy of the Proponents' draft title is attached hereto as Exhibit 1.

presidential primary provision. *See* Initiative § 13. As such, there is no danger that the presidential primary provision might be adopted unbeknownst to the electorate voting to allow unaffiliated voter participation.

Accordingly, Proposed Initiative #99 presents neither of the “dangers” that the single-subject rule was designed to guard against.

## **CONCLUSION**

Proposed Initiative #99 seeks only to give unaffiliated voters the opportunity to participate in all partisan primary elections in Colorado. Such a purpose constitutes a single subject under article V, § 1(5.5), and this Court’s jurisprudence. Petitioners therefore respectfully ask this Court to reverse the Title Board’s finding that the measure violates the single-subject requirement, and remand the case to the Title Board with instruction to set a title for the measure.

Respectfully submitted this 7th day of April, 2016.

BROWNSTEIN HYATT FARBER SCHRECK LLP

/s/ Jason R. Dunn

Jason R. Dunn

Attorney for Petitioners

**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2016, I electronically filed a true and correct copy of the foregoing PETITIONERS' OPENING BRIEF via the Colorado ICCES system which will send notification of such filing and service upon the following:

Cynthia H. Coffman, Attorney General  
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*/s/ Paulette M. Chesson*  
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DATE FILED: April 7, 2016 6:29 PM

# STATE OF COLORADO

DEPARTMENT OF  
STATE

## CERTIFICATE

I, **WAYNE W. WILLIAMS**, Secretary of State of the State of Colorado, do hereby certify that:

the attached is a true and exact copy of an email received from Jason Dunn with proponents' suggested language for the ballot title for Title Board for Proposed Initiative "2015-2016 #99 'Primary Elections'".....

.....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....  
and affixed the Great Seal of the State of Colorado, at the  
City of Denver this 4<sup>th</sup> day of April, 2016.



EXHIBIT 1

*Wayne W. Williams*  
SECRETARY OF STATE

## Steven Ward

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**From:** Dunn, Jason R. <JDunn@BHFS.com>  
**Sent:** Tuesday, March 01, 2016 3:48 PM  
**To:** Steven Ward  
**Subject:** FW: #99

**Follow Up Flag:** Follow up  
**Due By:** Wednesday, March 02, 2016 8:00 AM  
**Flag Status:** Completed

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**From:** Dunn, Jason R.  
**Sent:** Tuesday, February 23, 2016 8:20 AM  
**To:** steve.ward@sos.state.co.us  
**Subject:** #99

Steve,

Please accept the following language as a suggested staff draft of the title for proposed initiative #99.

*Shall there be a change to the Colorado Revised Statutes concerning primary elections, and, in connection therewith, giving unaffiliated voters the option to vote in the primary election of one major political party without having to register as a member of that party; and restoring a presidential primary contest to be held no later than the third week of March in a presidential election year?*

*Jason*

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