

SUPREME COURT, STATE OF  
COLORADO

2 East 14<sup>th</sup> 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 #99 (“Primary Elections”)

**Petitioners:** Kelly Brough and Joe Blake,

v.

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

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Case No.: 2016SA93

**TITLE BOARD’S OPENING 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 1,217 words.

B. The brief complies with C.A.R. 28(k) because 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, and not to an entire document, where the issue was raised and ruled on.

*/s/Christopher M. Jackson*  
Christopher M. Jackson, 49202  
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## TABLE OF CONTENTS

	<b>PAGE</b>
Statement of the Issue Presented for Review.....	1
Statement of the Case .....	1
Summary of the Argument .....	2
Argument.....	2
I. Standard of review. ....	2
II. Number 99 violates the single-subject rule. ....	3
Conclusion .....	7

## TABLE OF AUTHORITIES

	PAGE
<b>CASES</b>	
<i>In re Ballot Title 1999-2000 #25</i> , 974 P.2d 458 (Colo. 1999).....	4
<i>In re Title, Ballot Title, &amp; Submission Clause 2007-2008</i> , #17, 172 P.3d 871 (Colo. 2007).....	5
<i>In re Title, Ballot Title, &amp; Submission Clause 2007-2008</i> , #62, 184 P.3d 52 (Colo. 2008).....	3
<i>In re Title, Ballot Title, &amp; Submission Clause for 2011-2012 #3</i> , 274 P.3d 562 (Colo. 2012).....	2
<i>In re Title, Ballot Title, &amp; Submission Clause for Proposed Initiative 2001-2002 #43</i> , 46 P.3d 438 (Colo. 2002).....	4, 6
<i>In re Title, Ballot Title, Submission Clause, &amp; Summary Adopted April 5, 1995</i> , 898 P.2d 1076 (Colo. 1995).....	6
<b>CONSTITUTIONS</b>	
Colo. Const. art. V, § 1(5.5) .....	1, 3
<b>STATUTES</b>	
§ 1-40-106.5(1)(e), C.R.S. (2013).....	5

## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Whether the Title Board (“Board”) erred in ruling that Proposed Initiative #99 (“#99”) contains multiple subjects and thereby violates Article V, § 1(5.5) of the Colorado Constitution.

## **STATEMENT OF THE CASE**

Petitioners Kelly Brough and Joe Blake seek to circulate #99 to obtain the required number of signatures to place the measure on the ballot. Number 99 would make two substantive changes to Colorado law: (1) permit unaffiliated voters to participate in primary elections and (2) reinstate a presidential primary system in the state. *See* Mar. 18, 2016 Certified copy of the final action by the Title Board and the Motion for Rehearing-Part 1, at 2 (“Attachment 1”) (“Because primary elections are paid for by taxpayers, all eligible voters who want their voices to be heard should be able to vote in those elections.”); *id.* at 8 (“A presidential primary election must be held on a Tuesday on a date designated by the Governor.”).

The Board conducted a public hearing on March 2, 2016 and declined to set a title after finding that #99 violated Colorado’s single-subject rule. Mar. 18, 2016 Certified copy of the final action by the Title Board and the Motion for Rehearing- Part 2, at 17 (“Attachment 2”). The Petitioners filed a motion for rehearing March 9, *id.* at 18, and the Board denied that motion, *id.* at 21. The Petitioners then filed a timely petition of review with this Court on March 18.

## **SUMMARY OF THE ARGUMENT**

The Board correctly determined that Initiative #99 violates the single-subject rule by including provisions that (1) permit unaffiliated voters to participate in primary elections and (2) reinstate a presidential primary. As a result, the Board’s decision should be affirmed.

## **ARGUMENT**

### **I. Standard of review.**

When a Board decision relating to the single-subject rule is challenged, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *In re Title, Ballot Title, &*

*Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) (quotation omitted). “[W]hen determining whether a proposed initiative comports with the single-subject/clear title requirement, we may not address the merits of a proposed initiative, nor [may] we interpret its language or predict its application if adopted by the electorate.” *In re Title, Ballot Title, & Submission Clause 2007-2008, #62*, 184 P.3d 52, 58 (Colo. 2008) (quotations omitted).

This issue was properly preserved. The Board denied title setting on #99 at a hearing on March 2, 2016 “on the basis that the measure does not constitute a single subject.” Attachment 2, at 17. Petitioners moved for rehearing, and the Board denied that motion on March 16, again “on the basis that the measure does not constitute a single subject.” *Id.* at 21. Petitioners then timely filed their petition with this Court.

## **II. Number 99 violates the single-subject rule.**

The state constitution provides that an initiative may relate to only one subject:

No measure shall be proposed by petition containing more than one subject .... If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

COLO. CONST., art. V, § 1(5.5). A proposed measure that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). In contrast, “to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 441 (Colo. 2002) (quotations omitted).

The Board correctly determined that #99 violates the Colorado Constitution because the measure has, on its face, two separate subjects. The first portion of the initiative would ensure that voters who choose not to affiliate with a political party are nevertheless entitled to participate in the primary elections of major political parties.



Number 99 declares, “An eligible unaffiliated elector is entitled to vote in the primary election of a major political party without affiliating with that political party.” Attachment 1, at 6. At the same time, the initiative also includes provisions relating to the selection of delegates to the presidential nominating conventions of major political parties: it reinstates a primary system in Colorado. *Id.* at 8 (“A presidential primary election must be held on a Tuesday on a date designated by the governor.”). In short, one portion of #99 imposes changes on *who may participate in* Colorado’s primary elections; another portion establishes *a new primary election* altogether.

Moreover, the combination of these two disparate subjects into one initiative poses precisely the twin evils Article V was adopted to eliminate. Article V was enacted to forbid the practice 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,” § 1-40-106.5(1)(e), C.R.S., and to prevent “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” *In re Title, Ballot Title, &*

*Submission Clause 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007). In this case, a voter considering the merits of #99 might have very different opinions about the two components of that initiative. He or she might firmly believe that unaffiliated voters' voices should be heard in primary elections, but strongly support the deliberative, "town-hall" decision-making process of a presidential caucus. Conversely, a different voter may be strongly in favor of abolishing the caucus as an outdated relic, but believe that only the members of a political party should have a say in who that party nominates for office. Number 99, in other words, may be one of those measures that, "incapable of being enacted on [its] own merits" nonetheless passes because it "join[s] multiple subjects ... [that] will secure the support of various factions that may have different or even conflicting interests." *In re Title #43*, 46 P.3d at 442 (citation omitted). This is precisely the kind of "log rolling" or "Christmas tree tactics" the single-subject rule was designed to prevent. *In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995*, 898 P.2d 1076, 1079 (Colo. 1995).

The Petitioners may characterize #99 as an initiative whose only subject is “primary elections,” or perhaps “the selection of candidates for the general election ballot.” But any argument that describes the initiative at such a high level of generality is unavailing. This Court has consistently held that “a proponent's attempt to characterize his initiative under some overarching theme will not save an initiative containing separate and unconnected purposes.” *In re Title #43*, 46 P.3d at 442 (citation omitted); *see also id.* at 441-42 (Colo. 2002) (“The common characteristic that the paragraphs all involve ‘water’ is too general and too broad to constitute a single subject.”). The Title Board reached the right conclusion: #99 violates the single-subject rule.

### **CONCLUSION**

For the reasons given above, the Court should affirm the Title Board’s order denying a title setting.

Respectfully submitted on this 7<sup>th</sup> day of April, 2016.

ATTORNEY GENERAL  
CYNTHIA H. COFFMAN

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## CERTIFICATE OF SERVICE

This is to certify that I electronically served the foregoing **TITLE BOARD OPENING BRIEF** and related documents upon the following party through ICCES this 7<sup>th</sup> day of April, 2016:

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