

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: April 24, 2024 4:45 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #197</p>	
<p>Petitioners: Linda Good f/k/a Linda Bissett</p> <p>v.</p>	
<p>Respondents: Jason Bertolacci and Owen Alexander Clough,</p> <p>and</p> <p>Title Board: Theresa Conley, Christy Chase, and Jennifer Sullivan.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>THE TITLE BOARD'S ANSWER BRIEF</p>	

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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,059 words.

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/ Sam Wolter

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REPLY ARGUMENT

I. Petitioner Good waived any clear title objections.

In addition to her single subject objections, which were raised in her petition for review, Petitioner Good argues in her briefs that #197 also violates clear title requirements.¹ Specifically, Petitioner Good claims that “the Title set for the Initiative has mischaracterized a central element of the measure” by including language about the political party of a candidate running for a vacancy election, and thus violates the clear title requirement. Petr’s Opening Br., 25.

But as the Title Board noted in its opening brief, Petitioner Good has already waived any clear title objections. *See* Title Bd. Opening Br., 5. In her Motion for Rehearing, Petitioner Good objected to #197 solely “on the grounds that it is multiple subject[s].” Record, 7.² Petitioner Good’s statement to the Board during the March 20, 2024, rehearing

¹ Petitioner Good filed her Opening Brief on April 10, 2024, then filed her Answer Brief on April 17, 2024. The Title Board’s Answer Brief thus addresses arguments raised in both briefs.

² The Certified Record includes multiple sets of page numbers. For the sake of clarity, the Title Board’s page numbers refer to the Record’s PDF pagination.

addressed only her single subject objection. *Hearing Before Title Board on Proposed Initiative 2023-2024 #197* (Mar. 20, 2024), (<https://tinyurl.com/8b6mvdc5>) (“Hearing”) at 19:15. And Petitioner Good’s Petition for Review only argued that #197 violated the single subject requirement and § 1-40-106.5(e)(II), C.R.S. Petition for Review, 3-4. By failing to preserve, or even initially raise, any clear title arguments, Petitioner Good has waived any arguments that #197 violates the clear title requirement. *See, e.g., In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) (refusing to address issue not raised before Title Board).

In any event, the title set by the Board is not misleading. Petitioner Good argues that the title’s reference to political parties is misleading. Petr’s Opening Br., 25. But in considering a challenge to a title, the court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Here, the title is not misleading and is within the Board’s broad discretion to resolve “interrelated problems of length, complexity, and clarity in setting a title and ballot title and

submission clause.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24.

II. Petitioner Good’s single subject arguments fail.

A. The caselaw cited by Petitioner Good contradicts her argument that ranked voting is always a single subject.

Petitioner Good’s first argument appears to be that #197 contains multiple subjects because the Supreme Court of Alaska “clearly determined” that ranked voting “is a substantive subject.” Petr’s Opening Br., 23. Petitioner Good acknowledges that this case is not binding authority in Colorado. *Id.* Even as merely persuasive authority, however, the cited caselaw cuts *against* Petitioner Good. In the case, *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 498 (Alaska 2020), the Alaska Supreme Court upheld a voter initiative that introduced several electoral reforms, including conducting non-partisan primaries, requiring new political donation disclosures, and establishing ranked voting. Opponents argued that the initiative would have violated Alaska’s single subject requirement. *Id.* The Court rejected arguments that these provisions amounted to standalone subjects, instead holding

that they constituted one subject because “the initiative’s provisions are logically related.” *Id.* at 499. Petitioner Good cites this case for the proposition that ranked voting inherently constitutes a single subject, when the Court actually reached an opposite outcome. Accordingly, this argument fails to establish that #197 violates Colorado’s single subject requirement.

B. Ranked voting is an implementation detail directly tied to #197’s single subject.

Petitioner Good argues that the Title Board errs in characterizing the ranked voting provision as an implementation detail of #197. First, she appears to argue that the ranked voting provision cannot be an implementation detail because in the past, members of the Colorado legislature have introduced bills calling for ranked voting. Petr’s Ans. Br., 8-9. The past introduction of these bills “illustrates that Ranked Choice is a material change to the conduct of elections and requires a single subject.” *Id.* at 9. However, Petitioner Good cites no authority for the proposition that if a provision has previously been the subject of an unpassed bill, it must constitute a single subject. Whether members of

the legislature have separately sought to enact ranked voting in Colorado is irrelevant to the single subject analysis.

Next, Petitioner Good argues that ranked voting cannot be an implementation detail because “only a tiny fraction of Coloradans have ever experienced Ranked Choice Voting.” Petr’s Answer Br., 9. Even if Petitioner Good’s speculation regarding Colorado voters’ experience is correct, it is irrelevant to the single subject determination. What matters is that the ranked voting provision is an implementation detail that “[is] directly tied to the initiative’s focus” on replacing the appointment method of filling vacancies in the Colorado legislature with vacancy elections. *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 29.

C. Petitioner Good waived any argument about the scheduling provision of #197, and this provision is part of #197’s single subject.

Petitioner Good also attempts to supplement her argument that #197 violates the single subject requirement by incorporating in full arguments that a different Petitioner filed in a challenge to a separate

initiative.³ She includes four verbatim pages from the other Petitioner’s Petition for Review, which cover several clear title and single subject objections. Petitioner Good did not raise any of these arguments in her Motion for Rehearing, her statements to the Board during the Rehearing, or her Petition for Review. *See* Record, p 7; Hearing (<https://tinyurl.com/8b6mvdc5>), at 19:15; Petition for Review, pp 3-4. These arguments have been waived. *See, e.g., In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d at 1130 n.3 (refusing to address issue not raised before Title Board). Furthermore, the Initiative that the other Petitioner was challenging has been withdrawn and the Court dismissed the case, rendering the objections moot. *See* Order of Court, *In re Title, Ballot Title, and Submission Clause for the Proposed Initiative 2023-2024 #219*, 2024SA110 (Colo. 2024). The Title Board will nonetheless address these recycled arguments.

³ Petitioner Good “incorporated within [her] brief” the Motion for Rehearing filed by Mark Chilson through his attorney Scott Gessler in objection Initiative 2023-2024 #219, which was filed by the same proponents that filed #197. Mr. Chilson’s Motion for Rehearing was filed March 27, 2024.

Petitioner Good argues that the provisions about the scheduling of a vacancy election, which she has never previously addressed, violate the single subject requirement in three ways. First, she alleges that that voters will be surprised that the new vacancy election process “also brings with it the strong possibility that Coloradans will lose their representation in the General Assembly for months, and possibly years.” Petr’s Opening Br., p 29.

But what Petitioner Good calls a strong possibility is merely her own personal speculation, apparently based on the hypothetical risk of political mischief by a Governor who refuses to call a vacancy election. The Title Board “may not speculate on the potential effects of the initiative if enacted” and did not err in declining to speculate about the possibility alleged by Petitioner Good. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 24 (quoting *In re Proposed Initiated Const. Amend. Concerning the Fair Treatment of Injured Workers Amend.*, 873 P.2d 718, 720-21 (Colo. 1994)). Similarly, “[w]hether [an] Initiative will indeed have the effects the petitioners claim is beyond the scope of [this Court’s] review.” *In re Title, Ballot*

Title & Submission Clause, & Summary for 1999-00 #256, 12 P.3d 246, 257 (Colo. 2000) (citing *In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 No. 255*, 4 P.3d 485, 495 (Colo. 2000)).

Petitioner Good’s speculation about the potential effects of an initiative thus does not establish the risk of voter surprise that the single subject requirement seeks to prevent.

Next, Petitioner Good claims that the method for scheduling an election is not necessarily and properly connected to the ranked voting method, and therefore violates the single subject requirement. But the provision regarding how a vacancy election is called is an implementation detail, not a separate subject. Implementation details “that are directly tied to the initiative’s central focus do not constitute a separate subject.” *In re 2021-2022 #16*, 2021 CO 55, ¶ 29 (quotations omitted). The process of calling an election is a necessary component of holding any election. How a vacancy election is called and scheduled is thus “directly tied to the initiative’s central focus” of instituting such elections to fill vacancies in the Colorado legislature. *Id.*

Finally, Petitioner Good argues that #197 violates the anti-logrolling purpose of the single subject requirement, Petr’s Opening Br., p 30, which seeks to prevent measures that attempt to obtain support from various separate factions by combining unrelated subjects in a single matter. *See In re 2013-2014 #76*, 2014 CO 52, ¶ 32. She claims that it is “certainly likely” that voters in favor of the proposed vacancy elections would oppose “a mechanism that results in eliminating democratic representation in the General Assembly for tens of thousands of Coloradans, for months or years.” Petr’s Opening Br., p 30.

This logrolling argument fails for two reasons. First, #197 does not combine unrelated subjects into a single matter but concerns the single subject of replacing vacancy appointments with vacancy elections. It thus does not present the sort of logrolling the single subject requirement seeks to prevent. Second, like Petitioner Good’s argument regarding the risk of voter surprise, this argument is based entirely on her own speculation regarding the effect of #197. The “mechanism” Petitioner Good references is not an unrelated subject or a subject at all, but rather her prediction about an effect of the initiative. Because the

Title Board “may not speculate on the potential effects of the initiative if enacted,” it would have been inappropriate for the Board to treat this hypothetical risk raised by Petitioner Good as a subject of the Initiative.

In re 2013-2014 #89, 2014 CO 66, ¶ 24.

III. Petitioner Good fails to establish that #197 violates § 1-40-106.5(e)(II), C.R.S.

A. The Title Board stands on its prior arguments as to why #197 does not violate § 1-40-106.5(e)(II), C.R.S.

The Board rests on the arguments in its opening brief as to why the ranked voting provision of #197 does not violate § 1-40-106.5(e)(II), C.R.S. *See* Title Bd’s Op. Br. 10-12. However, Petitioner Good does raise a new argument that a different provision violates § 1-40-106.5(e)(II), C.R.S., which the Board addresses below.

B. Petitioner Good failed to preserve the argument that scheduling provisions of #197 will surprise voters.

Petitioner Good raises a new argument in her opening brief and Answer Brief, claiming that #197 “[creates] a new and unchecked power to the Executive Branch by assigning the sole power to determine when,

and if, an election is held.” Petr’s Opening Br., p 31; Answer Br., 18. She apparently offers this as further support for the argument that #197 violates § 1-40-106.5(e)(II), C.R.S. by risking voter surprise. But Petitioner Good did not raise this argument in her Motion for Rehearing, in her remarks during the Rehearing, nor in her Petition for Review. *See* Record, p 7; Hearing (<https://tinyurl.com/8b6m vdc5>), at 19:15; Petition for Review, pp 3-4. Accordingly, it has been waived. *See, e.g., In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d at 1130 n.3 (refusing to address issue not raised before Title Board). Nonetheless, the Board will address the argument for the sake of completeness.

Petitioner Good argues that “voters will be surprised to *potentially* find themselves without representation in the General Assembly for long periods of time.” Petr’s Answer Br., p 18. As noted previously, this argument is predicated on the hypothetical risk of political mischief by a Governor who refuses to call a vacancy election. But “[w]hether [an] Initiative will indeed have the effects the petitioners claim is beyond the scope of [this Court’s] review.” *In re 1999-00 #256*, at 257.

Accordingly, such speculation about future interpretations and potential impacts cannot establish a violation of § 1-40-106.5(e)(II), C.R.S.

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 24th day of April, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 24th day of April, 2024, addressed as follows:

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