SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 2, 2024 9:45 PM
Original Proceeding Pursuant to C.R.S. § 1-40-102(2) Appeal from the Ballot Title Board	
In the Matter of the Ballot Title of Proposed Initiative 2023-2024 #188 **MARK CHILSON,** Petitioner, v. **JASON BERTOLACCI and OWEN ALEXANDER CLOUGH,** and **COLORADO BALLOT TITLE SETTING BOARD**: Theresa Conley, Christy Chase, and Jennifer Sullivan **Respondents**.	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Scott E. Gessler (28944), Geoffrey N. Blue (32684), Gessler Blue LLC 7350 E. Progress Place, Suite 100 Greenwood Village, CO 80111 Tel. (303) 906-1050 or (720) 839-6637	Case Number: 2024SA120
PETITIONER'S OPENING BRIEF	

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).

X It contains 2,640 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).

X **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.

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/Scott E. Gessler
Scott E. Gessler

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I. ISSUE PRESENTED FOR REVIEW

If the Title Board rejects a measure due to multiple subjects, the proponents may resubmit the measure after eliminating provisions to achieve single subject. Here, the Board rejected the proposed measure and the Proponents revised the measure to achieve single subject. But they also eliminated language unnecessary to achieve single subject. The proponents may resubmit, "unless the revisions involve more than the elimination of provisions to achieve a single subject." Did the elimination of additional provisions violate this provision and deprive the Title Board of jurisdiction?

II. NATURE OF THE CASE

This is an issue of first impression, involving the application of Colo. Const. Art. V, Sec. 1(5.5). In part, that section allows proponents of a proposed ballot measure to "revise[] and resubmit[]" the measure "for the fixing of a proper title without the necessity of review and comment on the revised measure . . . unless the revisions involve more than the elimination of provisions to achieve a single subject."[1]

Proponents Bertolacci and Clough (the "Proponents") submitted Proposed Initiative # 188 to the General Assembly's Legislative Council Staff and Office of Legislative Legal Services General Assembly in February 2024. The Review and

[1] Colo. Const. Art V., § 1(5.5).

Comment hearing took place on February 20, 2024,[2] and the Proponents filed their proposed measure with the Title Board three days later, on February 23, 2024. The Title Board conducted a hearing on March 7, 2024, at which time it accepted jurisdiction and set a title and submission clause.

Two electors challenged the Title Board's action by filing motions for rehearing on March 13, 2024. The Title Board considered the motions for rehearing on March 20, 2024, at which time it reversed its position and granted the motions for rehearing. The Board held that that it did not have jurisdiction to set a title because Proposed Initiative #188 contained more than one subject. Specifically, the Board reasoned that allowing any elector to sign a petition for any candidate constituted a separate subject from the all-candidate primary and instant runoff general election provisions.

As noted above, Colo. Const. Art. V, § 1(5.5) allows proponents to "revise and resubmit" a measure to remove language that creates multiple subjects. Accordingly, two days later, on March 22, 2024, the Proponents resubmitted Proposed Initiative #188 to the Title Board. In their resubmission, the Proponents sought to excise portions of the measure that allowed any elector to sign a petition for any candidate.

[2] https://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%2523188.002.pdf.

In whole, the Petitioners excised the following language from Proposed Initiative #188:

(1) Section 1, the declaration:

> (d) Sign petitions for any candidate to qualify for the all-candidate primary election.

(2) Section 12, proposed C.R.S. § 1-4-603(2):

> CANDIDATES FOR COVERED OFFICES SPECIFIED IN SECTION 1-4-502(1.5) SHALL BE PLACED ON THE ALL-CANDIDATE PRIMARY ELECTION BALLOT BY PETITION, AS PROVIDED IN PART 8 OF THIS ARTICLE.

(3) Section 19 (revised Section 18), proposed C.R.S. § 1-4-802.5(1)(b):

> A CANDIDATE FOR A COVERED OFFICE MAY OBTAIN SIGNATURES FROM ELECTORS AFFILIATED WITH ANY POLITICAL PARTY AND ELECTORS UNAFFILIATED WITH ANY POLITICAL PARTY.

(4) Section 19 (revised Section 18), proposed C.R.S. § 1-4-802(5)(2)(A):

> THE PETITION MAY INDICATE THE NAME OF THE CANDIDATE'S POLITICAL PARTY AFFILIATION OR NON-AFFILIATION IN NOT MORE THAN THREE WORDS.

(5) Section 20 (which was not renumbered in the revision), proposed C.R.S. § 1-4-904(2)(a):

> FOR AN OFFICE OTHER THAN A COVERED OFFICE.

(6) Section 20 (which was not renumbered in the revision), proposed C.R.S. § 1-4-904(2)(b):

> FOR AN OFFICE OTHER THAN A COVERED OFFICE.

(7) Section 20 (which was not renumbered in the revision), proposed C.R.S. § 1-4-904(2.5):

> PETITIONS TO NOMINATE CANDIDATES FOR THE ALL-CANDIDATE PRIMARY PURSUANT TO SECTION 1-4-802.5 MAY BE SIGNED BY ANY ELIGIBLE ELECTOR WHO HAS NOT SIGNED ANY OTHER PETITION FOR ANY OTHER CANDIDATE FOR THE SAME OFFICE.

On April 4, 2024, the Board considered the resubmitted Proposed Initiative #188 and set a title. With the revisions in place, the Board found that the excised portions eliminated the separate subject that had previously caused the Board to reject the measure. Accordingly, the Board held that the measure constituted a single subject and then proceeded to set a title and submission clause.

Petitioner Chilson (among others) filed a Motion for Rehearing on April 11, 2024, which the Board denied on April 18, 2024. The Petition for Review followed on April 25, 2024.

III. SUMMARY OF ARGUMENT

Article V, Section 1(5.5) of the Colorado Constitution allows proponents to make substantial changes to a proposed measure, without going through a review and comment hearing. Specifically, if the Title Board rejects a proposed measure because it contains more than one subject, proponents may remove the language that creates a separate subject and resubmit the measure. But Section 1(5.5) also contains an

important limitation. It prohibits resubmission of the proposed measure if "the revisions involve more than the elimination of provisions to achieve a single subject."

Here, the Title Board rejected Proposed Ballot Initiative #188 because it contained more than one subject. Specifically, the provisions that allowed any elector to sign the petition for any candidate—regardless of political party—created a separate subject. The Proponents removed the language that allowed any elector to sign any candidate petition, but they also went beyond that. They eliminated language that mandated all candidates must petition on to the ballot (thus allowing political parties to nominate candidates by assembly), and they also eliminated language that allowed nominating petitions to identify a candidate's party affiliation or non-affiliation in three words or less. Elimination of these two provisions were not necessary to achieve single subject, and both could (and should) have remained in the proposed measure, because inclusion of the provisions would not have created a separate subject involving who could sign nominating petitions.

The elimination of this additional language violated Section 1(5.5), and Title Board was without jurisdiction to consider the resubmitted measure or to set a title and submission clause.

IV. STANDARD OF REVIEW

In reviewing Title Board action, this court "draw[s]" all legitimate presumptions in favor of the propriety of the Title Board's decision and only overturn the Board's decision in a clear case.[3] The issue was preserved in Petitioner Chilson's *Motion for Rehearing*.

V. ARGUMENT

A. The Proponents removed two provisions in the resubmitted measure that "involve[d] more than the elimination of provisions to achieve a single subject."

This is an issue of first impression; this Court is asked to determine whether proponents may revise and resubmit a measure even if the resubmission eliminates provisions not necessary to achieve a single subject. The relevant portion of Section 1(5.5) states that if the Title Board finds multiple subjects:

> the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject . . .[4]

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[3] *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 2017 CO 57, 20.

[4] Colo. Const. Art V., § 1(5.5).

Many of the Proponents' revisions eliminated language that allowed any elector to sign a nominating petition for any candidate. Critically, the proponents eliminated proposed C.R.S. § 1-4-802.5(1)(b), which stated:

> A CANDIDATE FOR A COVERED OFFICE MAY OBTAIN SIGNATURES FROM ELECTORS AFFILIATED WITH ANY POLITICAL PARTY AND ELECTORS UNAFFILIATED WITH ANY POLITICAL PARTY.

Consistent with this change, the proponents eliminated language in the declaration and also eliminated proposed C.R.S. § 1-4-904(2.5), which stated:

> PETITIONS TO NOMINATE CANDIDATES FOR THE ALL-CANDIDATE PRIMARY PURSUANT TO SECTION 1-4-802.5 MAY BE SIGNED BY ANY ELIGIBLE ELECTOR WHO HAS NOT SIGNED ANY OTHER PETITION FOR ANY OTHER CANDIDATE FOR THE SAME OFFICE.

Likewise, the Proponents also removed language that exempted a "covered office" from requirements that only electors affiliated with a political party could sign a nominating petition for a candidate representing that same political party, and that also removed "covered office" from existing law that allowed eligible electors to sign minor party and unaffiliated candidate nominating petitions. Petitioner Chilson does not challenge these revisions as going beyond the changes were necessary to remove the second subject. That second subject consisted of the provisions that that allowed any elector to sign nominating petitions for any candidate, including major party nominees.

But in two instances the Proponents also eliminated language unconnected to the second subject regarding who could sign nominating petitions, and therefore the Proponents eliminated language unnecessary to achieve single subject.

First, they removed proposed C.R.S. § 1-4-603(2) as follows:

> CANDIDATES FOR COVERED OFFICES SPECIFIED IN SECTION 1-4-502(1.5) SHALL BE PLACED ON THE ALL-CANDIDATE PRIMARY ELECTION BALLOT BY PETITION, AS PROVIDED IN PART 8 OF THIS ARTICLE.

This provision, by its terms, has nothing to do with the who may sign candidate nominating petitions, including nominating petitions for major parties. Rather, this provision requires all candidates to petition on to the primary ballot. By removing this provision, the Proponents substantively changed their proposed measure by allowing major parties to nominate candidates by assembly. This is a substantial change in the nominating process, separate and apart from who may sign nominating petitions.

Second, the Proponents also removed proposed C.R.S. § 1-4-802(5)(2)(A), which stated:

> THE PETITION MAY INDICATE THE NAME OF THE CANDIDATE'S POLITICAL PARTY AFFILIATION OR NON-AFFILIATION IN NOT MORE THAN THREE WORDS.

This is, again, a substantial change unconnected to whom may sign candidate nominating petitions. The provision governs whether a candidate may designate his or her affiliation or non-affiliation, and how many words a candidate may use for that

designation. How a candidate may designate affiliation or non-affiliation on a nominating petition is unconnected to who may sign a nominating petition.

The elimination of these two clauses "involve more than the elimination of provisions to achieve a single subject."[5] Both provisions are unconnected to the issue of whether any elector may sign nominating petitions for any candidate. Indeed, one provision eliminates the requirement for nominating petitions, and the other provision eliminates the mechanism for identifying party affiliation or non-affiliation on nominating petitions. Importantly, both provisions could comfortably remain in the revised measure without affecting the second subject of who could sign nominating petitions. In short, leaving the two clauses in the revised measure would still have allowed the measure to achieve a single subject.

B. The plain language of Section 1(5.5) prohibits proponents from eliminating language that is unnecessary to achieve a single subject.

As this Court has emphasized, a proposed initiative must go through the review and comment process, as required by Colo. Const. Art. V, § 1(5).[6] And any substantial change to the language in a proposed measure must be in response to a question from

[5] Colo. Const. Art V., § 1(5.5).

[6] *In re Title*, 797 P.2d 1283, 1288 (Colo. 1990).

legislative council and the office of legislative legal services.[7] These requirements protect the public by ensuring the public's right to understand the contents of an initiative. Absent these limitations on substantial changes following review and comment:

> [t]he public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated if the intent and meaning of the central features of a proposal submitted to the Board for the purpose of fixing a title thereto is substantially different from the intent and meaning of the central features of an earlier version thereof that was submitted to the legislative offices.[8]

A resubmission under Section 1(5.5) is a narrow exception to the strict requirements of review and comment, as well as the prohibition on substantial changes that do not directly address a question raised in the review and comment hearing. Under the exception in Section 1(5.5), proponents may eliminate large swaths of a proposed measure "without the necessity of review and comment on the revised measure."[9] That is what the Proponents did here—they made major revisions to the Proposed Initiative #188, without going through a review and comment hearing, and without addressing a specific question raised in review and comment. Rather, their

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[7] C.R.S. § 1-40-105(2); *In re Title v. John Fielder*, 12 P.3d 246, 253 (Colo. 2000).

[8] *In re Title, Ballot Title & Submission Clause, etc.*, 830 P.2d 963, 968 (Colo. 1992).

[9] Colo. Const. Art. V, § 1(5.5).

revisions were made under the authority of Section 1(5.5), which allows changes in order to achieve a single subject.

But Section 1(5.5) contains an important limitation to the exception for a review and comment hearing. It prohibits revisions to a proposed initiative that "involve more than the elimination of provisions to achieve a single subject." Colorado law contains expansive and strict requirements for a review and comment session. Section 1(5.5)'s creates an exception, but that exception is narrow because it only allows revisions necessary to achieve single subject. This limitation comports with the general requirements for a public review and comment hearing, to allow the public to understand a proposed measure. Indeed, any substantial change in a measure can have a pronounced effect on the meaning and operation of the law. The purpose of review and comment is to shed light on the operation of the measure. Under the terms of Section 1(5.5), the proponents can bypass a review and comment hearing, but only if they limit their revisions to those necessary to achieve single subject. This limitation protects the public's right to know how a measure operates. Any change can have a profound effect on the operation of a proposed measure, and by preventing changes that go beyond the necessity of achieving single subject, Section 1(5.5) created a limited mechanism for bypassing normal review and comment procedures.

Importantly, unlike the standards under C.R.S. § 1-40-105(2), the language of Section 1(5.5) does not grant proponents the ability to streamline or clarify an initiative as part of their resubmission. That opportunity, of course, exists prior to and during the Title Board's initial hearing to determine single subject. But proponents may not clarify or streamline a proposed measure as part of the resubmission process. Section 1(5.5) contains no exception for clarifications; revisions may only be made to achieve single subject. Revisions that involve more are explicitly prohibited by the section's plain language.

C. The Title Board had no jurisdiction to consider the resubmitted measure, because the Proponents eliminated provisions unnecessary to achieve single subject.

In order to exercise jurisdiction to set a title and submission clause, the Title Board must comply with constitutionally required procedures.[10] In discussing the extent of the Title Board's authority, this Court has held that "administrative agencies are without power to act contrary to the law or clear legislative intent or to exceed the authority conferred upon them by statute"[11] and that "an administrative agency must

[10] *In re Title*, 797 P.2d 1283, 1288 (Colo. 1990).

[11] *Id.*, *citing Colorado Division of Employment v. Industrial Commission*, 665 P.2d 631 (Colo. App. 1983).

comply strictly with its enabling statutes, and such agency has no authority to set aside or circumvent legislative mandates."[12]

Here, the constitutional mandate is straightforward; proponents may resubmit a proposed initiative that the Title Board earlier rejected on single subject grounds by eliminating language necessary to achieve single subject, "*unless* the revisions involve more than the elimination of provisions to achieve a single subject."[13] In short, the proponents may not eliminate language beyond that which is necessary to achieve single subject.

Importantly, the plain language of Section 1(5.5) prohibits proponents from resubmitting a proposed measure if the revisions are not necessary to achieve single subject. Here, the Proponents eliminate provisions that involved "more" than necessary to achieve single subject. Thus, they failed to comply with the resubmission requirements of Section 1(5.5), and the Title Board was without jurisdiction to reconsider Proposed Initiative #188 under the procedures contained in Section 1(5.5).

Respectfully submitted this 2nd day of May 2024,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

[12] *Id., citing Dodge v. Department of Social Services,* 657 P.2d 969 (Colo. App. 1982).

[13] Colo. Const. Art. V, § 1(5.5)

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, I electronically filed the foregoing with the Clerk of the Court using the CCES system, which notified all parties and their counsel of record.

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