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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #188 ("Concerning the Conduct of Elections") **Petitioner:** Mark Chilson, v. **Respondents:** Jason Bertolacci and Owen Alexander Clough, and **Colorado Ballot Title Setting Board:** Theresa Conley, Christy Chase, and Jennifer Sullivan.	▲ **COURT USE ONLY** ▲
Attorneys for Respondents: Sarah M. Mercer, #39367 David B. Meschke, #47728 Rosa L. Baum, #56652 BROWNSTEIN HYATT FARBER SCHRECK LLP 675 15th St, Suite 2900 Denver, CO 80202 Tel: 303.223.1100 Fax: 303.223.1111 smercer@bhfs.com; dmeschke@bhfs.com; and rbaum@bhfs.com	Case Number: 2024SA120

RESPONDENTS' 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).

It contains 5,320 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/ David B. Meschke

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Respondents Jason Bertolacci and Owen Alexander Clough (collectively "Respondent Proponents"), through undersigned counsel, submit their Opening Brief in this original proceeding brought by Petitioner Mark Chilson ("Mr. Chilson" or "Petitioner") challenging whether Proposed Initiative 2023-2024 #188 ("Initiative #188" or the "Initiative") ("Concerning the Conduct of Elections") complied with article V, section 1(5.5) of the Colorado Constitution when Respondent Proponents resubmitted it as a new initiative to the Colorado Ballot Title Setting Board ("Title Board" or the "Board").

I. ISSUES PRESENTED FOR REVIEW

A. Whether this Court has jurisdiction over Petitioner's appeal.[1]

B. Whether the resubmitted version of Initiative #188 complied with Colo. Const. art. V, § 1(5.5)'s requirement that the revisions do not "involve more than the elimination of provisions to achieve a single subject."

STATEMENT OF THE CASE

Initiative #188 is one of several measures that Respondent Proponents have advanced through the citizen initiative process in an

[1] Respondent Proponents dispute that this Court has jurisdiction and raise this as a separate issue.

effort to modernize Colorado's election process so that voters are allotted greater participation in electing Colorado's federal and state officials. Respondent Proponents' measures would reform the Colorado election process so that officials are elected based on the fundamental precept of the will of a majority of voters. Specifically, Initiative #188 would create an all-candidate primary election, where all voters participate and all candidates appear on the same ballot regardless of political party affiliation, and where the four candidates who receive the most votes advance to the general election. The Initiative would also implement instant runoff voting in the general election, providing voters the opportunity to rank the candidates by preference. Instant runoff voting works hand in glove with the all-candidate primary election to prevent undesired outcomes. For example, if the general election is conducted by plurality voting instead of instant runoff voting, one of the four candidates advancing from the primary election could possibly be elected despite only receiving 26 percent of the vote.

Relevant to this appeal, Initiative #188 took a different route than most citizen initiatives. Respondent Proponents resubmitted Initiative

#188 as a new measure to the Title Board after, on rehearing, the Board voted that the Initiative's original version violated the single-subject requirement. Title Board first heard the original version of the Initiative at the March 7, 2024 Title Board hearing, where the Board voted 2-1 that the Initiative contained a single subject and set a title. But after objectors filed multiple motions for rehearing, the Title Board reversed course at the March 20, 2024 rehearing and voted 2-1 that Initiative #188 lacked a single subject. Specifically, Title Board Chair Theresa Conley changed her vote on single subject, reasoning that the measure's second subject was changing the role of the political parties in the process of candidates accessing the primary election ballot. She highlighted as an example Initiative #188's allowance of any voter, regardless of the voter's or the candidate's political affiliation, to sign any candidate's petition to appear on the all-candidate primary ballot. *See* Title Board Hearing at 3:17:50 (March 20, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html.

After the rehearing, Respondent Proponents struck language in Initiative #188's text to address the Title Board's single-subject

concerns and resubmitted the Initiative pursuant to article V, section 1(5.5) of the Colorado Constitution. Section 1(5.5) provides:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. 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. ***In such circumstance, however, 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***, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

Colo. Const. art. V, § 1(5.5) (emphasis added).

The Title Board heard the resubmitted Initiative #188 at the April 4, 2024 Title Board hearing. The Board first determined by a 2-1 vote that article V, section 1(5.5) permitted the resubmittal of a ballot measure after that measure's rehearing and that Title Board had

jurisdiction to accept the resubmitted measure. The Board next voted 3-0 that the resubmitted measure complied with article V, section 1(5.5). The Board then voted 2-1 that the resubmitted Initiative #188 contains a single subject and set a title.

Petitioner filed a motion for rehearing challenging whether resubmitted Initiative #188 complied with the language in article V, section 1(5.5) that the revisions to an initiative may not "involve more" than the "elimination of provisions" to achieve a single subject.[2] Two other objectors—Patrick Dillon and Caryn Ann Harlos—filed a motion for rehearing arguing that the measure violates the single-subject and clear title requirements. Respondent Proponents also filed a motion for rehearing requesting that the Title Board amend Initiative #188's title to comply with clear title requirements. The Title Board heard the objectors' motions at the April 17, 2024 rehearing and denied them in

[2] Petitioner did not raise whether resubmitted Initiative #188 violates the single-subject or clear title requirements and thus has waived those arguments. *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) ("[P]etitioners failed to raise this contention in their motion for rehearing, and, accordingly, we refuse to address the issue here.") *Moody v. People*, 159 P.3d 611, 614 (Colo. 2007) (It is a "basic principle of appellate jurisprudence that arguments not advanced on appeal are generally deemed waived.").

their entirety. The Board, however, granted Respondent Proponents' motion to the extent the Board made changes to Initiative #188's title. Petitioner subsequently appealed.[3]

Respondent Proponents now ask this Court to affirm the Title Board for the reasons set forth below.

SUMMARY OF THE ARGUMENT

This appeal is separate and apart from whether Initiative #188 contains a single subject or whether the title set complies with the clear title requirement. Rather, the relevant issues are whether this Court has jurisdiction to hear Petitioner's appeal and, if the Court does have jurisdiction, whether Initiative #188 complied with the constitutional provision for resubmissions to the Title Board. Petitioner's appeal should be dismissed under either issue.

First, as a preliminary matter, Respondent Proponents disagree with Petitioner that this Court has jurisdiction to consider his appeal. Section 1-40-107, C.R.S., sets forth limited grounds to challenge the Title Board's determinations. An objector may file a motion for

[3] Mr. Dillon and Ms. Harlos did not appeal to this Court.

rehearing contesting: (1) the Title Board's decision on whether a measure contains more than a single subject; (2) the language in the title set by the Title Board; (3) whether the fiscal summary is misleading, prejudicial, or fails to comply with the requirements in section 1-40-105.5 (1.5), C.R.S.; or (4) the Title Board's decision on whether a measure that proposes a constitutional amendment only repeals in whole or in part a provision of the state constitution. *See* § 1-40-107(1)(a); *see also* § 1-40-107(1)(b) (laying out requirements for motions for rehearing on the four topics listed in section 1-40-107(1)(a)). Appeals of Title Board decisions to this Court are likewise limited to those four topics. *See* § 1-40-107(2). Because Petitioner's motion for rehearing and subsequent appeal address only whether resubmitted Initiative #188 complied with the language in article V, section 1(5.5) of the Colorado Constitution, neither the Title Board on rehearing nor this Court on appeal has jurisdiction to consider his argument.[4] Petitioner's appeal must be denied for this reason alone.

[4] During the Title Board hearing on April 4, 2024, Respondent Proponents' counsel argued that challenges under this constitutional provision would likely need to be made in state district court—they

Second, even if this Court were to consider the merits of Petitioner's appeal, it still fails. The only issue Petitioner raises on appeal is whether Respondent Proponents complies with the procedure outlined in article V, section 1(5.5) of the Colorado Constitution for resubmitting ballot measures to the Title Board by striking provisions to achieve a single subject. The answer, as the Title Board correctly determined, is yes.

Article V, section 1(5.5) is straightforward. Proponents may resubmit a ballot measure directly to the Title Board, without the need for additional review and comment, if the revisions do not "involve more than the elimination of provisions to achieve a single subject." Colo. Const. art. V, § 1(5.5). The resubmitted Initiative #188 complied because the stricken language concerned topics that had previously caused the Title Board members to vote against the measure's single subject. These include language in the original Initiative #188 that Chair Conley identified as causing her to change her vote on single

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would be "a different type of lawsuit," subject to review, but not under the typical ballot initiative procedures. *See* Title Board Hearing continuation at 3:01:20 (April 4, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html.

subject at the March 20, 2024 rehearing, as well as language that could be construed as triggering single-subject concerns that the Title Board members had expressed at prior Title Board hearings addressing initiatives similar to Initiative #188. The stricken provisions achieved the desired single-subject result. The Title Board voted 2-1 at both the April 4, 2024 hearing and the April 17, 2024 rehearing that resubmitted Initiative #188 contained a single subject, with Chair Conley voting in favor both times.[5] And, regardless, the Initiative substantially complied with the constitutional provision.

[5] Title Board member Jennifer Sullivan consistently voted that Initiative #188, even with the revisions, fails the single-subject requirement because it affects both the primary election and the general election. Striking language to address Ms. Sullivan's concerns would have effectively gutted Initiative #188 in a manner contrary to Respondent Proponents' intent of establishing a new unified election system. *See Storer v. Brown*, 415 U.S. 724, 735 (1974) (observing that the primary election "is not merely an exercise or warm-up for the general election but an integral part of the entire election process, the initial stage in a two-stage process by which the people choose their public officers"). For that reason, Respondent Proponents eliminated language in the original Initiative #188 to address Chair Conley's concerns instead. Title Board member Christy Chase did not express single-subject concerns as to any version of Initiative #188.

Therefore, Respondent Proponents respectfully request that this Court reject Petitioner's appeal and affirm the Title Board's decision to accept resubmitted Initiative #188 and set title.

STANDARD OF REVIEW

This Court is vested with the authority to review the rulings of the Title Board. *See* § 1-40-107(2). As part of this review, this Court "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's action." *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) (quoting *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010)) (alteration in original).

Whether the Title Board or this Court has jurisdiction to consider Petitioner's motion for rehearing and appeal is a question of statutory interpretation that is subject to de novo review. *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #74*, 455 P.3d 759, 761 (Colo. 2020). The Court's primary responsibility in interpreting any statute is to "give effect to the legislative purpose underlying its enactment." *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000*

#219, 999 P.2d 819, 820 (Colo. 2000). If the statute's language "is clear and unambiguous on its face, there is no need to apply rules of statutory construction because it may be presumed that the legislature meant what it clearly said." *Id.*

ARGUMENT

Petitioner's appeal should be denied because not only does this Court lack jurisdiction to hear Petitioner's one issue, the Title Board correctly determined that resubmitted Initiative #188 complied with article V, section 1(5.5) of the state Constitution.

I. This Court lacks jurisdiction under section 1-40-107 to hear Petitioner's ground for appeal.

Whether this Court has jurisdiction to hear Petitioner's appeal is a simple question of statutory interpretation. Because Petitioner's only issue on appeal does not fall within any of the four grounds in the statute he identifies as providing jurisdiction, this issue is not properly before the Court.

As this Court has previously noted, "[t]he process for a motion for rehearing of an initial decision of the Title Board is set forth in section 1-40-107." *In re 2019-2020 #74*, 455 P.3d at 761 (describing that "[t]his

section explains that any proponent of an initiative or any registered elector who disagrees with the Title Board's decision as to whether the initiative meets the constitutional single-subject requirement or who is not satisfied with the titles set by the Board may file a motion for rehearing"). This section "details what kinds of claims can be made in motions for rehearing." *Id.* (citing § 1-40-107(1)(b)).

Section 1-40-107(1)(a) provides four specific grounds to challenge Title Board actions. They are:

1) "whether a [ballot measure] contains more than a single subject pursuant to section 1-40-106.5";

2) whether the title adopted by the Title Board is "unfair" or "do[es] not fairly express the true meaning and intent" of the measure;

3) whether "[t]he fiscal summary is misleading or prejudicial," or "does not comply with the requirements set forth in section 1-40-105.5 (1.5)"; and

4) whether a measure "that proposes a constitutional amendment only repeals in whole or in part a provision of the state constitution."

§ 1-40-107(1)(a).

Section 1-40-107(2) then prescribes that if the proponents, opponents who filed a motion for rehearing, or any other elector who

appeared before the Title Board in support of or in opposition to such a motion "is not satisfied with the ruling of the title board upon the motion," then that person may file an appeal to this Court. § 1-40-107(2). Nowhere does section 1-40-107 permit an appeal on grounds that were not proper for a motion for rehearing. Indeed, petitioners are expressly limited under section 1-40-107(2) to appealing the Title Board's decision to grant or deny a motion for rehearing on the above four grounds.

Petitioner's issue on appeal falls outside section 1-40-107's purview. As Petitioner represents in his Petition for Review, he "raises one issue" in this appeal: whether resubmitted Initiative #188 meets article V, section 1(5.5)'s requirement for resubmission. Pet'n for Review, at 4. This issue is not one of the four permissible grounds for a motion for rehearing, and thus is not proper for an appeal. Indeed, Chair Conley raised this jurisdictional impediment, noting that she "didn't know if this [appeal would be] subject to the Supreme Court." Title Board Hearing continuation at 3:00:40 (April 4, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html.

Thus, although the jurisdictional statement in Petitioner's Petition for Review states that he "is entitled to review before the Supreme Court under C.R.S. § 1-40-107(2)," Pet'n for Review, at 3, no such entitlement exists.

Petitioner is appealing to this Court pursuant to a statutory provision that does not provide him the possibility for relief for the issue he asserts. Petitioner simply cannot appeal under section 1-40-107 on this ground.

Respondent Proponents anticipate that Petitioner may argue that his single issue for this appeal falls within the purview of the single-subject ground under section 1-40-107 because article V, section 1(5.5) of the Colorado Constitution mentions the words "single subject." But those words do not provide jurisdiction. While Petitioner's issue addresses whether "the revisions [to Initiative #188] involve more than the elimination of provisions to achieve a single subject," *see* Colo. Const. art. V, § 1(5.5), it ***does not*** concern "whether [Initiative #188] contains more than a single subject pursuant to section 1-40-106.5." *See* § 1-40-107(1)(a)(I). Indeed, Petitioner's whole argument is that the

strike-throughs made in resubmitted Initiative #188 went beyond achieving a single subject. This issue is separate and distinct from whether resubmitted Initiative #188 contains a single subject.

Therefore, because Petitioner's sole issue on appeal is based on a ground not covered by section 1-40-107, this Court lacks jurisdiction to address it and must dismiss the appeal.

II. Resubmitted Initiative #188 complied with the resubmittal provision in article V, section 1(5.5) of the Colorado Constitution.

Even if the Court were to consider the merits of Petitioner's only stated issue on appeal, Respondent Proponents' revisions to Initiative #188 comply with the state constitutional requirement for resubmitting measures directly to the Title Board. By his own admission, Petitioner does not raise—and the edits made to Initiative #188 do not trigger—any concerns that the revisions were "so substantial that . . . review and comment is in the public interest." *See* Colo. Const. art. V, § 1(5.5). Thus, the only question on the merits before the Court is whether Respondent Proponents' revisions "involve more than the elimination of

provisions to achieve a single subject." *Id.* Resubmitted Initiative #188 satisfied this standard.

A. Respondent Proponents' revisions in resubmitted Initiative #188 involved only the elimination of provisions to achieve a single subject.

To understand the changes Respondent Proponents implemented in resubmitted Initiative #188, a brief description of the Initiative's substance is useful. Initiative #188—both the original and resubmitted versions—would reform Colorado's election process to provide more choice to voters so that candidates are elected with support from the will of a majority of the voters. To effectuate this purpose, section 5 of the Initiative establishes an all-candidate primary election in which every voter and candidate, regardless of political party affiliation or non-affiliation, participates and the four candidates who receive the greatest number of votes advance to the general election. *See* Proposed Initiative 2023-2024 #188, Sec. 5, § 1-4-101.5, Certificate Packet at 5–7. section 9 of the Initiative then provides that voters elect candidates in the general election via instant runoff voting, where voters are permitted to rank their top four candidates by preference and the

candidate who receives a majority of votes at the end of the ranked voting tally wins. *See Id.* at Sec. 9, § 1-4-207, Certificate Packet at 8–10. This ability to rank candidates is imperative, as it avoids undesired outcomes such as spoiler candidates and vote splitting, and prevents the possibility that a candidate is elected after obtaining a minority—as low as 26 percent—of the vote.

In response to the Title Board's single-subject concerns throughout the initiative process, Respondent Proponents have altered their reforms and removed provisions that they had perceived as implementing details. As described below, the revisions for resubmitted Initiative #188 strike language concerning those features that raised single-subject concerns during Title Board hearings and thus eliminated language to achieve a single subject.

1. The language struck in resubmitted Initiative #188 addresses the Title Board's single subject concerns regarding Respondent Proponents' policy decision to allow any voter to sign any candidate's petition, regardless of political party affiliation.

At the rehearing for the original Initiative #188, the Title Board expressed concerns that opening up the petition process to allow any

voter to sign any candidate's petition to access the all-candidate primary ballot, regardless of the voter's or the candidate's political party affiliation or non-affiliation, constituted a second subject. *See* Title Board Hearing at 3:16:50 (March 20, 2024). Specifically, Chair Conley joined Title Board member Jennifer Sullivan and voted that the original Initiative #188 violated the single-subject requirement because Chair Conley construed this feature, which would in theory allow a candidate affiliated with one party to petition onto the primary election ballot solely by obtaining signatures from voters affiliated with a different political party, to change the meaning of party affiliation. *Id.* at 3:17:50.

While Respondent Proponents maintain that the provisions for accessing the newly minted all-candidate primary election in the original Initiative #188 were mere implementing provisions, Respondent Proponents heeded the Title Board's concerns. Resubmitted Initiative #188 strikes language in three places that were unambiguously the source of this specific single-subject concern:

1) It removes language in the Declaration that the measure would establish that all voters have the right to "[s]ign

petitions for any candidate to qualify for the all-candidate primary election";

2) It removes language added to new section 1-4-802.5(1)(b) that had provided: "A CANDIDATE FOR A COVERED OFFICE MAY OBTAIN SIGNATURES FROM ELECTORS AFFILIATED WITH ANY POLITICAL PARTY AND ELECTORS UNAFFILIATED WITH ANY POLITICAL PARTY"; and

3) It removes language added to new section 1-4-904(2.5) that had provided: "PETITIONS TO NOMINATE CANDIDATE 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," as well as several other necessary corresponding changes in section 1-4-904.

These revisions all sought to maintain the status quo, as counsel for Respondent Proponents stated during the Title Board hearing on resubmitted Initiative #188, and thus do not alter who is eligible to sign a petition to nominate a candidate affiliated with a major political party for nomination to a primary. *See* Title Board Hearing continuation at 3:13:25 (April 4, 2024). Petitioner does not challenge the removal of language in these three places, but rather argues that the removal of language in two other places was unnecessary and thus fails to comply with article V, section 1(5.5) of the Colorado Constitution.

2. The deleted sentence in section 1-4-802.5(2)(a) also addressed single-subject concerns related to political party affiliation of candidates petitioning onto the primary election ballot.

Relying on Petitioner's motion for rehearing, Petitioner is likely to assert that the deletion of the second sentence in section 1-4-802.5(2)(a) in the resubmitted Initiative #188 was unnecessary to achieve single subject. The stricken language states: "The petition may indicate the name of the candidate's political party affiliation or non-affiliation in not more than three words." Respondent Proponents anticipate that Petitioner will argue that providing that a petition for signatures "may" indicate the name of a candidate's political party or non-affiliation on the ballot is divorced from allowing non-party members to sign petitions for party designated candidates.[6]

Petitioner's viewpoint overlooks the scope of Chair Conley's concerns about changing the meaning of political party affiliation. While Chair Conley cited the example of candidates of one political

[6] In his Motion for Rehearing, Petitioner incorrectly states that the stricken language in section 1-4-802.5(2)(a) pertained to indicating the name of candidate's political affiliation on the primary election ballot rather than the petition to gather signatures.

party reaching the primary election ballot by obtaining petition signatures solely from voters of a different political party, Respondent Proponents understood the essence of her concern to be that political party affiliation in the petition signature process could not be altered without likely triggering a second subject. *See* Title Board Hearing at 3:17:50 (March 20, 2024) (noting "changing of the role of the political parties" as "highlighted" by the possible situation where a candidate with a certain political party affiliation reaches the ballot with support from differently affiliated voters is a second subject). The permissive language in section 1-4-802.5(2)(a) prompts this concern because that language could be reasonably interpreted to allow candidates to avoid placing their party affiliation on signature petitions. Without deleting this language, it is more than possible that resubmitted Initiative #188 would not have achieved a single subject because current Colorado statute requires that "[e]very petition to nominate candidate for a primary election . . . *shall* designate in not more than three words the name of the political party which the candidate represents." § 1-4-801(1), C.R.S. (emphasis added). As a result, leaving in statute the

conflicting language—a permissive requirement for political party identification on petitions for the all-candidate primary under section 1-4-802.5(2)(a) but a mandate under section 1-4-801(1)—risked not only confusion but also creating the very second subject that Chair Conley identified: that candidates petitioning onto the all-candidate primary were subject to more permissive requirements, which created a second subject.

Respondent Proponents therefore deleted this provision when resubmitting Initiative #188 to maintain the status quo for accessing the primary election ballot and avoid triggering a single-subject violation.

3. Revisions in the resubmitted measure also addressed single-subject concerns related to Respondent Proponents' alterations in other measures as to how candidates accessed the all-candidate primary election ballot.

Petitioner also identifies the deletion of section 1-4-603(2) in the resubmitted Initiative #188 as unnecessary to achieve single subject. The stricken language states: "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." Petitioner's argument, however, ignores that this deletion is responsive to single-subject concerns the Title Board raised as to similar measures to Initiative #188.

Several of Respondent Proponents' prior initiatives—iterations not before the Court—required that candidates petition onto the all-candidate primary election ballot and eliminated the ability of candidates to access the ballot through a political party assembly or caucus process.[7] The feature caused several Title Board members pause. Indeed, at these measures' rehearings, which occurred on the same day as the original Initiative #188's rehearing, Chair Conley casted the deciding vote and specifically identified this feature as an impermissible second subject. *See, e.g.*, Results for Proposed Initiative 2023-2024 #186 (March 20, 2024), available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2023-2024/186Results.html.

[7] Proposed Initiatives 2023-2024 ##186, 187, 189, 190, and 191 contained this policy choice.

When striking language in Initiative #188 to resubmit to the Title Board, Respondent Proponents recognized that the language in section 1-4-603(2) could trigger the same concerns. Although other provisions in Initiative #188 provide for candidates to access the primary election ballot through the assembly process, section 1-4-603(2)'s use of the term "shall" could be construed as requiring candidates to use the petition process to access the primary election ballot. The word "shall" is often interpreted as creating a duty to act in the expressed manner. *See* Thomas Morris, *Must and Shall: A Statutory Distinction*, Colorado LegiSource (Dec. 13, 2012), *available at* https://legisource.net/2012/12/13/must-and-shall-a-statutory-distinction/. The resubmitted Initiative #188 strikes this language for this very reason. Indeed, Chair Conley expressly noted that this deletion was "responsive to the single subject concerns that [she] had." Title Board Hearing continuation at 3:29:30 (April 4, 2024).

Importantly, it is immaterial that this revision addresses a different single-subject concern expressed by the Title Board. Article V, section 1(5.5) does not limit revisions to one perceived second subject or

require that revisions relate only to the single-subject violation expressed by Title Board in a particular hearing. Rather, the constitutional provision limits revisions to "the elimination of provisions *to achieve a single subject*." Colo. Const. art. V, § 1(5.5) (emphasis added). Respondent Proponents deleted section 1-4-603(2) to eliminate the possibility that resubmitted Initiative #188 suffer the same fate as its sister measures. Therefore, while this deletion certainly provides clarity and reduces potential ambiguity, it also conforms with the constitutional requirement that revisions must be within the confines of achieving a single subject.

B. At a minimum, Respondent Proponents' revisions substantially complied with the constitutional requirements for resubmitting an initiative.

Finally, should this Court determine that resubmitted Initiative #188 did not strictly comply with article V, section 1(5.5) of the Colorado Constitution, the measure nevertheless substantially complied.

This Court has consistently held that "[t]he right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution." *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo.

1994). "Because of the importance of these rights, constitutional and statutory provisions governing the initiative process should be liberally construed" so that the constitutional right to initiative is "facilitated and not hampered by either technical statutory provisions or technical construction thereof . . . ." *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (quoting *Loonan*, 882 P.2d at 1384). Based on these principles, this Court held that "substantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum." *Loonan*, 882 P.2d at 1384.

Three factors are relevant in assessing substantial compliance: "(1) the extent of noncompliance, (2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance, and (3) whether there was a good-faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate." *Fabec*, 922 P.2d at 341. Resubmitted Initiative #188 meets each of these factors.

First, noncompliance with article V, section 1(5.5), to the extent there even is any, is minimal. As described above, Petitioner has

identified only two places where he believes the removal of language went beyond achieving a single subject. The language stricken in these two instances—in proposed section 1-4-603(2) and proposed section 1-4-802.5(2)(a)—not only addresses single-subject concerns expressed by the Title Board but provides clarity and is not substantive. *See* Title Board Hearing continuation at 3:29:00 (April 4, 2024). In neither instance do the two deletions substantively change Initiative #188. As described above, striking proposed section 1-4-603(2) removes any latent ambiguity that access to the all-candidate primary election ballot is limited to those who submit petitions, and thus removes the potential that the Title Board could construe the provision as eliminating the ability of candidates to gain access to the primary election ballot through the assembly process—a single-subject concern Chair Conley raised as to Initiative #188's sister measures. Likewise, proposed section 1-4-802.5(2)(a) removes language that candidate petitions may indicate political party affiliation, which had arguably conflicted with

language in other provisions that required placement of a candidate's political party affiliation on the petition.[8] *See* § 1-4-801(1).

Second, the purpose of the relevant provisions in article V, section 1(5.5), as expressed in the text, is to allow proponents to resubmit measures to the Title Board and bypass the review and comment process so long as the revisions strike language to achieve a single subject and are not so substantial that another review and comment hearing is necessary for the public. Because the removed language identified by Petitioner does not substantively alter Initiative #188 except as to the single-subject concerns identified by Chair Conley, additional review and comment would not be beneficial. In fact, after Respondent Proponents submitted a measure to Legislative Council that is nearly identical to resubmitted Initiative #118—Proposed

[8] These deletions are akin to technical corrections. *See Spelts v. Klausing*, 649 P.2d 303, 311 (Colo. 1982) ("To invalidate this initiative on the basis of the Board's technical correction of a previously unrecognized error, when the correction is made at the beginning of a hearing on the titles, submission clause, and summary, rather than before the petition was submitted to the Secretary of State for title-setting, would be contrary to the spirit of our constitutional right of initiative.").

Initiative 2023-2024 #308—Legislative Council Staff issued a letter stating that review and comment was unnecessary.[9]

Third, Respondent Proponents' revisions to resubmitted Initiative #188 were all intended to achieve a single subject and remove single-subject concerns expressed by Chair Conley. As described above, the changes were benign and made in good faith. Nothing inherent in the changes reflects a conscious decision to mislead the electorate.

Therefore, should this Court determine that resubmitted Initiative #188 did not strictly comply with article V, section 1(5.5) of the Colorado Constitution, it nevertheless achieves substantial compliance.

CONCLUSION

For the reasons stated above, Respondents respectfully request the Court affirm the Title Board.

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[9] *See* Colorado General Assembly, *2023-2024 #308 – Concerning the Conduct of Elections* (2024), *available at* https://leg.colorado.gov/content/concerning-conduct-elections-57 (noting that the measure's "current status" is "letter issued").

Respectfully submitted on May 2, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, I electronically filed a true and correct copy of the foregoing **RESPONDENTS OPENING BRIEF** with the clerk of Court via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

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