

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 2, 2024 6:01 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2024) Appeal from the Ballot Title Board</p> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #188 (“Concerning the Conduct of Elections”)</p> <p>Petitioner: Mark Chilson,</p> <p>v.</p> <p>Respondents: Jason Bertolacci and Owen Alexander Clough,</p> <p>Title Board: Theresa Conley, Christy Chase, and Jennifer Sullivan.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No. 2024SA120</p>
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<p style="text-align: center;">THE TITLE BOARD’S OPENING 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:

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ISSUE ON REVIEW

The Colorado Constitution allows initiative proponents to revise and resubmit initiatives to the Title Board, without first going through review and comment, if (i) the original initiative contained multiple subjects and (ii) they revised the initiative only by eliminating provisions to achieve a single subject. The Title Board determined that Proponents revised Proposed Initiative 2023-2024 #188 only by eliminating provisions related to single subject. Did the Board err in concluding it had jurisdiction to consider #188 as resubmitted?

STATEMENT OF THE CASE

The version of Proposed Initiative 2023-2024 #188 now before the Court (“Resubmitted #188”) seeks to create new election processes for certain state and federal officials. *See* Record, pp 3-22, filed Apr. 25, 2024. The proposal would create an all-candidate primary, with the top four candidates advancing to the general election, and would provide a ranked choice voting system for the general election. *See id.*

On March 7, the Board concluded that a prior version of this measure (“Original #188”) contained a single subject and set a title. *See* Ex. A. But the Board reversed itself on rehearing and concluded it lacked jurisdiction to set a title because the measure contained multiple subjects. *See id.*

Ordinarily, after rehearing, proponents could either: (1) seek this Court’s review under § 1-40-107(2), C.R.S. (2023), challenging the single subject determination; or (2) file a new initiative “with the directors of the legislative council and the office of legislative legal services for review and comment,” pursuant to § 1-40-105. However, the Colorado Constitution also permits the proponents to resubmit their proposal directly to the Title Board, without first going through review and comment, if they only removed provisions to comply with single subject.

If a measure contains more than one subject . . . 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 . . . , 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.

Colo. Const. art. V, § 1(5.5) (“Section 5.5”).¹

Proponents invoked this provision and resubmitted their proposal after eliminating language from Original #188. The Board considered Resubmitted #188 at its April 4, 2024 meeting. *See* Record, p 23. By a 2-1 vote, the Board determined that it had jurisdiction to accept the resubmitted measure pursuant to Section 5.5. *Id.* The dissenting board member disagreed that the Proponents could employ the Section 5.5 procedure after proceeding to a rehearing on #188 as originally submitted. *See Hearing Before Title Board on Proposed Initiative 2023-2024 #188* (Apr. 4, 2024) <https://tinyurl.com/bdhs8m7n>, at 2:59:00 (“April 4 Hearing”). Petitioner does not challenge this determination in his petition. On the only issue raised in the petition—whether Proponents eliminated provisions unrelated to single subject—all three Board members agreed that Proponents satisfied Section 5.5. *Id.* at

¹ Petitioner does not argue that the changes were “so substantial” that the Board erred by failing to return the measure for review and comment. *See id.*

3:43:30, 3:51:45. The Board then concluded that the resubmitted measure contained a single subject and set title. *See* Record, p 23.

Petitioner Chilson filed a motion for rehearing. Petitioner’s motion argued that two changes Proponents made in their resubmittal “involve[d] more’ than the ‘elimination of provisions’ to achieve a single subject.” *Id.* at 27. The Board disagreed and denied Petitioner’s motion for rehearing in its entirety. *Id.* at 25-26.

SUMMARY OF ARGUMENT

This is not a typical Title Board appeal. Petitioner does not challenge the Board’s single subject determination or dispute the clarity of the title set by the Board. Instead, Petitioner contends that the Board did not have jurisdiction to set a title at all under a rarely-invoked provision of the Colorado Constitution—Section 5.5—that allows initiative proponents to bypass legislative review and comment in

limited circumstances.² The Board correctly determined that it did have jurisdiction.

If the Title Board finds that an initiative has more than one subject, Section 5.5 allows the proponents an expedited means of putting forward a new initiative. Rather than starting the entire process over by submitting a new measure for legislative review and comment—the first step in the initiative and title setting process—the proponents can go straight back to Title Board under Section 5.5. But the proponents only may do so if the changes they made did not “involve more than the elimination of provisions to achieve a single subject.” Colo. Const. art. V, § 1(5.5).

Resubmitted #188 made a number of deletions to Original #188. Petitioner challenges two of those deletions here, arguing they went farther than was necessary to achieve single subject. But both were responsive to single subject concerns identified by the Board at the

² A closely related issue under Section 5.5 is also raised in *In re Title, Ballot Title, & Submission Clause for 2023-2024 #175*, 2024SA117.

rehearing on Original #188. Therefore, the Board appropriately determined that the revisions in Resubmitted #188 complied with Section 5.5 and its actions should be affirmed.

ARGUMENT

I. The Board properly concluded that the changes made to #188, as resubmitted, did not “involve more than the elimination of provisions to achieve a single subject.”

A. Standard of review and preservation.

This Court has not specifically addressed the standard of review that applies to the Title Board’s decision whether a resubmitted measure satisfies Section 5.5. But in construing the Board’s other responsibilities imposed by Section 5.5—ensuring “no measure shall be proposed by petition containing more than one subject” and ensuring that subject is “clearly expressed in its title”—the Court has, without exception, extended a deferential standard of review. *See In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 1 (“[W]e draw 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.”). This is because “the General Assembly has squarely placed the responsibility of carrying out the dual mandate of Article V, section 1(5.5) on the Title Board.” *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). All the Board’s decisions under Section 5.5 are therefore entitled to deference.

Like the single-subject and clear-title inquiries, resubmission under Section 5.5 gives the Board the “difficult task of balancing the competing interests of the proponents of the proposed initiative against concerns raised by its opponents and other members of the public.” *Hayes v. Ottke*, 2013 CO 1, ¶ 15. For example, the Board must implement all of Section 5.5 so as to “assist potential proponents in implementing their right to initiate laws while concurrently protecting the voters against confusion and fraud.” *Id.* (quoting *In re 1999-2000 #25*, 974 P.2d at 465). This balancing should not be second-guessed by the Court except “in a clear case.” *In re 2017-2018 #4*, 2017 CO 57, ¶ 1.

Accordingly, the Court should “draw all legitimate presumptions in favor of the propriety of” the Title Board’s decision that Proponents’ revisions satisfied Section 5.5. *Id.*

The Board agrees that Petitioner preserved this issue for appeal. *See Record*, p 27.

B. The Board correctly determined that #188, as resubmitted, complied with Section 5.5.

Petitioner contends that two changes made by Proponents when they resubmitted #188 “involve[d] more than the elimination of provisions to achieve a single subject” and therefore the Board lacked jurisdiction to consider the Resubmitted #188. Colo. Const. art. V § 1(5.5). To evaluate Petitioner’s arguments, one must first understand the single subject issues flagged by the Title Board in Original #188.

The Board first set title in Original #188, before reversing itself at a lengthy rehearing. At the rehearing, two Board members concluded

that Original #188 contained multiple subjects.³ Unlike a court, the Title Board does not memorialize the bases for its decisions in a written order. The oral statements made by Title Board members at the public hearing are the best means for understanding the grounds for decision.

The two Board members who found multiple subjects at the rehearing for Original #188 had slightly different reasons for doing so. Board member Theresa Conley (designee of the Secretary of State) found two subjects: (1) the voting mechanisms, a single-ballot primary where the top four candidates proceed to a general election with ranked choice voting, and (2) the ballot access mechanisms, which would have authorized voters of any party and unaffiliated voters to sign candidate petitions for any candidate and eliminated the party assembly process as a means for candidates to access the ballot. *See* March 20 Hearing, at

³ The substantive discussion at the rehearing addressed #186, a very similar measure. The Board incorporated its discussion on #186 into the record for #188. *See Hearing Before Title Board on Proposed Initiative 2023-2024 #186, 188* (Mar. 20, 2024), <https://tinyurl.com/yc2ctxjz>, at 2:48:45 (“March 20 Hearing”).

1:27:45, 2:18:30, 2:23:00. Board member Jennifer Sullivan (designee of the Attorney General) expressed some concern about the ballot access piece as well but believed the changes to the voting mechanisms in the primary and general elections—creating a single-ballot primary and creating ranked choice voting in the general election—were themselves separate subjects. *See id.* at 1:32:00, 2:19:15, 2:22:30.

The Title Board thus found Original #188 violated the single subject requirement and concluded that it could not set title. “If the Board rejects an initiative for violating the single subject requirement, then proponents may pursue two courses: 1) Proponents may commence a new review and comment process, or 2) Proponents may present a revised [initiative] to the Board.” *In re Proposed Initiative 1996-4*, 916 P.2d 528, 534 (Colo. 1996). Here, Proponents chose the second option: rather than submit a new measure to legislative council for review and comment, they presented a revised version directly to the Board pursuant to Section 5.5.

Resubmitted #188 only removed provisions from Original #188. See Ex. B (redline showing changes between Resubmitted #188 and Original #188). Specifically, Resubmitted #188 removed the provisions that allowed voters of any party or no party to sign candidate petitions. Petitioner argues that two of the changes made by Proponents were not necessary to achieve single subject and so violated Section 5.5's requirement that a resubmission directly to the Board cannot "involve more than the elimination of provisions to achieve a single subject." Colo. Const. art. V, § 1(5.5). The Board properly determined the changes were appropriate.

First, Petitioners argue that the removal of § 1-4-203(2) in Resubmitted #188 was not necessary to achieve single subject. Record, p 28. That provision stated:

(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.

Ex. B at 9. This provision allowed candidates to be placed on the ballot only by petition, and not assembly. This was directly identified by

Board Member Conley as a single subject concern at the rehearing on Original #188. *See* March 20 Hearing at 1:27:45 (“Do you need to remove the party path [i.e. party assemblies] in that nomination process to really generate more candidates [for the all-candidate primary?]”). Deleting this provision was thus directly responsive to a single subject concern expressed by a member of the Board.

Second, Petitioners argue that removing a clause from § 1-4-802.5(2)(A) was not necessary for single subject purposes. That provision stated:

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

Id. at 13. Original #188 would have changed current law—which requires petitions to include the candidate’s party, *see* § 1-4-801(1), C.R.S. (2023)—by making such party affiliation optional. Resubmitted #188 no longer allows voters of any party to sign any candidate petition, however—only those affiliated with the candidate petitioning for signatures may sign the petition under Resubmitted #188. Keeping a

change to the petition form in Resubmitted #188—which otherwise now addresses only changes to the ballots and voting processes for primary and general elections—would have potentially created a second subject that is not “necessarily and properly connected” to the voting changes contained in #188. *See In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 13 (“To decide whether an initiative addresses a single subject, we ask if its provisions are necessarily and properly connected rather than disconnected or incongruous.”) (quotations omitted).

These revisions thus sought to satisfy the single subject concerns expressed by Board members at the rehearing on Original #188. Although the Board’s precise single subject rulings are not committed to writing, both challenged revisions in Resubmitted #188 respond directly to concerns—about removing party assembly and allowing voters of different parties to sign petitions—Board members expressed at the rehearing on Original #188. Accordingly, the Board appropriately concluded that the revisions in Resubmitted #188 did not “involve more

than the elimination of provisions to achieve a single subject” and so the Board had jurisdiction to set a title under Section 5.5.

CONCLUSION

The Court should affirm the actions of the Title Board.

Respectfully submitted on this 2nd day of May, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 2nd day of May, 2024, addressed as follows:

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