

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-102(2), C.R.S. (2024)
Appeal from the Ballot Title Board

In the Matter of the Ballot Title of Proposed
Initiative 2023-2024 #310

MARK CHILSON,
Petitioner,

v.

JASON BERTOLACCI and OWEN
ALEXANDER CLOUGH

and

TITLE BOARD: Theresa Conley, Christy
Chase, and Jennifer Sullivan,
Respondents.

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Case No. 2024SA157

THE TITLE BOARD'S OPENING BRIEF

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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/s/ Michael Kotlarczyk

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ISSUES ON REVIEW

I. Whether the Title Board correctly determined that it had jurisdiction to set a title on 2023-2024 #310.

II. Whether the Title Board set a clear title.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #310 seeks to change Colorado’s election processes by (1) creating a ranked-choice voting system for general elections for most federal and state offices, and (2) selecting the candidates for the ranked-choice general election through an “all-candidate primary election,” with voters of any or no party able to vote for any candidate. *See Record*, p 5, filed May 6, 2024. The top four vote recipients in the primary would be placed on the general election ballot, which would allow voters to rank the candidates. *Id.* at 5, 8. In tabulating the votes in the general election, election officials would count the ballot as a vote for the highest-ranked active candidate and would proceed in successive rounds to eliminate the candidate with the fewest highest-ranked votes. *Id.* at 9. This process of elimination would

proceed until two active candidates remain, at which point the candidate with the highest vote total would be elected. *Id.*

The Title Board concluded, by a 2-1 vote, that #310 contained a single subject and it proceeded to set a title. *Id.* at 21. Petitioner Mark Chilson (as well as others) filed a timely motion for rehearing, which the Title Board denied, except to the extent it made changes to the title, by a 2-1 vote. *Id.* at 24.

The title is as follows:

A change to the Colorado Revised Statutes creating new election processes for certain federal and state offices, and, in connection therewith, creating a new all-candidate primary election for U.S. Senate, U.S. House of Representatives, governor, attorney general, secretary of state, treasurer, CU board of regents, state board of education, and the Colorado state legislature; allowing voters to vote for any one candidate per office, regardless of the voter's or candidate's political party affiliation; providing that the four candidates for each office who receive the most votes advance to the general election; and in the general election, allowing voters to rank candidates for each office on their ballot, adopting a process for how the ranked votes are tallied, and determining the winner to be the candidate with the highest number of votes in the final tally.

Id. at 23.

SUMMARY OF ARGUMENT

Proposed initiative 2023-2024 #310 makes changes to the election system in both the general and primary election. Because it impacts both elections, Petitioner argues it contains multiple subjects. But the changes to the primary and general elections both seek to further the same purpose: to increase voter choice. And not only do both changes work towards that end, they mutually reinforce one another.

If enacted, #310 would create ranked-choice voting in the general election. Rather than select a single candidate, voters would be able to rank their preferences with respect to each of the four candidates appearing on the ballot. And those four would be selected by a unitary primary system, where all candidates, regardless of party, would appear on the same ballot. This would allow all voters to vote for any candidate at the primary election, again with the purpose of expanding voter choice. And the two provisions work hand-in-hand. If voters are going to have the opportunity to rank their choices in the general election, it makes sense to create a primary system that allows multiple

candidates from across the political spectrum to qualify for the general election ballot, rather than just a single candidate from each party.

Petitioner's two clear title objections are also misplaced. He first objects that the title fails to inform voters that any person will be able to sign petitions to nominate minor party and unaffiliated candidates. But that is not a change to existing law and so does not need to be articulated in the title. Petitioner also maintains that the title should contain more detail about how the ranked choice voting system would proceed, with candidates being eliminated in successive rounds. That level of detail, however, would weigh down the title and is not essential to describing the central features of the measure. Instead, the title informs voters that #310 would allow voters to rank candidates and that it would create a process for how those ranked votes are to be tallied, without delving into the complex details of how exactly the system would be implemented. This decision rests comfortably within the Board's discretion to resolve the tension between brevity and comprehensiveness in a title.

ARGUMENT

I. The Title Board had jurisdiction to set a title.

A. Standard of review and preservation.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will “overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). “In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. In doing so, the Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. “A proposed initiative must concern only one subject—that is to say it must effect or carry out only one general object or purpose.” *In re Title, Ballot Title, & Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Title Board agrees this issue is preserved. *See Record*, pp 25-26.

B. The proposed initiative contains a single subject.

Proposed initiative 2023-2024 #310 is designed to increase voter choice. It seeks to do so by providing a single ballot primary that selects the top four candidates to be voted on in a general election with ranked choice voting. Whether #310 will succeed in increasing voter choice and producing candidates who better reflect the majority will is a contested point, as the motions for rehearing filed in this measure (and in the

many other iterations of this measure heard by the Board this cycle) can attest. *See Record*, pp 25-41. But the Title Board is not charged with considering #310's merits or its efficacy at accomplishing its purpose. *See In re 2019-2020 #3*, 2019 CO 57, ¶ 8; *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Board must ensure that the initiative furthers just one purpose and that its various parts are necessarily and properly connected. *See In re 2005-2006 #74*, 136 P.3d at 239 The Board here correctly determined that #310 meets this standard.

Petitioner identifies seven purposes he contends are reflected in the measure, but they generally express the idea that the changes to the primary and the changes to the general election advance different purposes and therefore express different subjects. The changes to the two elections are all in furtherance of Proponents' goal of expanding voter choice in elections. In the primary election, rather than limit voters to voting only for candidates who are in the same party as the voter (or, for unaffiliated voters, voting for only one party's set of candidates), #310 allows any voter to vote for any candidate, regardless of party. The desire to expand voter choice then carries forward to the

general election, where rather than vote for a single candidate, #310 allows voters to rank all the candidates rather than express a single vote for one. Whether expanding voter choice in this way leads to better election outcomes is subject to reasonable disagreement. But they are connected as part of a single subject.

Not only do the primary and general election processes both work to further voter choice, but they also work together to further a common purpose. *See In re 2005-2006 #74*, 136 P.3d at 239. Consider a voter who agrees that ranked-choice voting would increase voter choice in Colorado's elections. Would such a voter prefer to rank candidates who emerge from a partisan primary—one Republican, one Democrat, and maybe minor party candidates—or to rank the four candidates with the most support across the state? That may be an empirical claim that the record does not definitively answer. But it was reasonable for the Proponents to conclude that increasing voter choice in the general election necessarily and properly required that the candidates in that general election would be selected based on the four highest vote

recipients rather than a single candidate emerging from a partisan primary field.

Proposed initiative #310 also does not present risks of logrolling or voter surprise, the two dangers the single subject requirement seeks to avoid. See *In re Title, Ballot Title, & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 7. This system does not present a serious risk of logrolling: supporters of increasing voter choice through a ranked choice voting general election would be unlikely to want to maintain a first-past-the-post partisan primary election. Instead, both the primary and general election work in tandem to create a system with (under Proponents' theory) increased voter choice. Nor does this present a risk that voters would be surprised by a "surreptitious provision coiled up in the folds of a complex initiative." *Id.* The changes to the two elections both serve the purpose of expanded voter choice, are self-reinforcing, and are disclosed in the title. Therefore, the dangers sought to be avoided by the single subject rule are not present in this initiative.

II. The title set by the Board satisfies the clear title standard.

A. Standard of review and preservation.

When 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. “The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *Id.* The Court will reverse the title set by the Board “only if a title is insufficient, unfair, or misleading.” *Id.* ¶ 8.

The Title Board agrees this issue is preserved. *See Record*, pp 27-28.

B. The title identifies the central features of the measure.

Petitioner raises two clear title objections. First, Petitioner contends that the title should “explain how unaffiliated and minority party voters can obtain signatures from any person” to appear on the

ballot. Pet'n at 6. But that's the current law, too: "Petitions to nominate candidates from a minor political party or unaffiliated candidates in a partisan election may be signed by any eligible elector who has not signed any other petition for any other candidate for the same office." § 1-4-904(2)(b), C.R.S. Proposed initiative #310 thus does not change the governing legal standard, it only clarifies that the preexisting law would also apply to the new all-candidate primary. *See Record*, p 13 ("This subsection 2(b) applies to petitions for candidates affiliated with a minor political party . . . seeking to petition onto the all-candidate primary election ballot.").

Titles need to describe what the proposed initiative would *change*, not what it would keep the same. The Board "is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶ 19. The title thus does not need to explain that the measure would continue current law, which already allows any voter can sign unaffiliated and minor party petitions.

And in any event, this continuation of existing law cannot plausibly be read as a central feature of #310. The title must “summarize the central features of the proposed initiative.” *Id.* This “does not mean that the [t]itles need to contain every detail of the proposal.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23. The continuation of existing minor party and unaffiliated candidate petitioning processes is thus a detail and not a central feature of this measure that creates a ranked choice voting system, and therefore was not required to be included in the title.

Petitioner’s second objection runs headlong into the Title Board’s “discretion [to] resolv[e] interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. Petitioner thinks the title should provide more detail about how instant runoff voting works in #310—that “if no person wins a majority of votes, then voters’ secondary and tertiary candidate preferences determine the outcome of the election, based on the elimination of votes for candidates in each round of instant

runoff tabulation.” Pet’n at 6. Petitioner desires a level of detail that is not required.

The title informs voters that #310 “allow[s] voters to rank candidates,” “adopt[s] a process for how the ranked votes are tallied,” and “determine[s] the winner to be the candidate with the highest number of votes in the final tally.” Record, p 23. From the perspective of the voter, this summarizes the measure’s “central features.” *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The voter reading this title would understand that, if adopted, #310 would allow them to rank their candidate preferences, with the winner to be determined based on voters’ rankings. The actual mechanics of *how* those ranked votes are tabulated—with election officials counting the ballot as a vote for the highest-ranked active candidate, proceeding in successive rounds to eliminate the candidate with the fewest highest-ranked votes, and continuing this process of elimination until there were two active candidates, at which point the candidate with the highest vote total would be elected—is a level of detail that is not required in the title.

“Ballot titles shall be brief.” § 1-40-106(3)(b). As demonstrated both in the petition for review and in the above description of the instant runoff voting system, the actual mechanics of the system cannot be succinctly described. This Court has recognized that a title need not articulate complex statutory schemes. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000) (“In this case, the definition of ‘committed area’ is lengthy and complicated. . . . The omission of the definition of ‘committed area’ from the titles does not render them misleading or inaccurate. It was therefore within the Board’s discretion to omit the complex definition of ‘committed area’ from the titles.”); *In re Title, Ballot Title & Submission Clause for 1997-1998 #75*, 960 P.2d 672, 673 (Colo. 1998) (“The definition of ‘exempt wells’ under section 37-92-602 is complex. Therefore, it would be impossible to define ‘nonexempt well’ within the titles and summary of the Initiative without a detailed statutory explanation.”). The Board has therefore appropriately balanced length and complexity in setting the title by stating that #310 would allow voters to rank candidates and create a process for how those ranked

votes are to be counted, without detailing the precise mechanics of that process.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 10th 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 CCE, at Denver, Colorado, this 10th day of May, 2024, addressed as follows:

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