SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 9, 2024 10:09 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 ANSWER 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 4,408 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.

X 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/Scott E. Gessler
Scott E. Gessler

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I. SUMMARY OF ARGUMENT

This Court may consider challenges to the Title Board's jurisdiction under Colo. Const. Art. V, § 1(5.5). C.R.S. § 1-40-107 does not preclude the Title Board from considering challenges to its jurisdiction to set a single subject, preclude challengers from submitting motion for rehearing to challenge jurisdiction, or preclude this Court from considering challenges to the Title Board's jurisdiction. Subsection 107(1), which allows motions for rehearing to challenge single subject, title, fiscal summary, and repeal of constitutional provisions, does not limit challenges to the Title Board's jurisdiction. And this Court has never adopted the Proponents' cramped reading. Indeed, this Court has reviewed Title Board jurisdiction under Colo. Const. Art. V, §§ 1(5) and 1(5.5), as well as numerous other statutory provisions.

The Proponents removed two provisions—one requiring candidates to petition on to the primary ballot, and one allowing candidates to place their names and party affiliation (or non-affiliation) on nominating petitions. Both "involved more than the elimination of provisions to achieve a single subject."[1]

To avoid this conclusion, the Proponents mischaracterize one board member's comment, and then ascribe that comment to the entire board. But a review of the March 20, 2024, Title Board meeting, at which the Title Board found that the original

[1] Colo. Const. Art. V, § 1(5.5).

version of Proposed Initiative #188 contained a second subject, shows that every single board member focused solely on the fact that the measure allowed any unaffiliated elector or non-party member to sign a political party nominee's candidate petition, thus removing a political party's right to ensure that only party members nominate party candidates. This served as the only the basis for the Title Board's determination that the measure contained a second subject. Removal of the other two provisions were unnecessary to achieve singles subject.

The Proponents cannot argue that the Board viewed elimination of those provisions necessary to achieve single subject by citing to deliberations for Proposed Initiative #188, or any other measure. Finally, the eliminated language is properly connected to the other provisions of the proposed measure, and therefore elimination of the language was not necessary to achieve a single subject.

Finally, the Proponents argue that they substantially complied with Section 1(5.5). The substantial compliance test only applies to technical compliance with statutory procedures, not legal standards such as the Board's jurisdiction. And indeed, this Court has never applied the substantial compliance to its single subject analysis. Incorporation of the substantial compliance test would make the single subject standard unworkable, by allowing proponents to more than one subject if they show "minimal" noncompliance, an overall purpose of allowing initiatives to go forward,

and good faith. Finally, the Proponents do not meet the substantial compliance test. The removal of two substantive legal provisions shows extensive noncompliance, the noncompliance defeats the explicit purpose of Section 1(5.5), and the Proponents deliberately chose to eliminate the provisions that violate Section 1(5.5).

II. 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 will only overturn the Board's decision in a clear case.[2] At the same time, this Court's "deference . . . is not absolute; [it has] an obligation to examine the initiative's wording to determine whether it comports with the constitutional requirements."[3]

The issue was preserved in Petitioner Chilson's *Motion for Rehearing*.

III. ARGUMENT

A. This Court has jurisdiction to consider violations of Colo. Const. Art. V, § 1(5.5).

The Title Board does not object to this Court's jurisdiction to consider a challenge under C.R.S. § 1-40-107(2) concerning the Title Board's violation of Section

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

[3] *Fine v. Ward (In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128)*, 2022 CO 37, ¶ 9 (internal quotations and citations omitted).

1(5.5); only the Proponents raise the jurisdictional argument. Their interpretation, however, misapprehends both C.R.S. § 1-40-107 and Colo. Const. Art. V, § 1(5.5) Indeed, this Court's jurisprudence rejects Proponents cramped interpretation, which would improperly insulate constitutional violations from effective judicial review.

The Proponents do not directly challenge Chilson's appellate rights. Rather, they focus on C.R.S. § 1-40-107(1), which establishes procedures for motions for rehearing. They argue that a challenger can only challenge the Title Board's statutory violations of single subject, title and submission clause, fiscal note, or constitutional repeal. Under their approach, Section 107(1) does not allow a challenge to the Title Board's decisions interpreting the Colorado Constitution, or statutes outside the Proponents four citations. Then, by extension, they argue that an appeal under C.R.S. § 1-40-107(2) is "not proper."

Procedurally, the Proponents argued against the *Motion for Rehearing* at the Title Board meeting on April 17, 2024, but they never challenged Chilson's ability to bring a motion for rehearing under Section 1(5.5).[4] Accordingly, they have forfeited their jurisdictional argument.[5] And their effort to cite a comment by a board member are

[4] Title Board Hearing April 17, 2024, at 7:45-11:55. Available at https://csos.granicus.com/player/clip/453?view_id=1&redirect=true, last accessed May 8, 2024.

unavailing. Board member Conley's comment that she "didn't know if this [appeal would be] subject to the Supreme Court"[6] had nothing to do with jurisdictional questions about whether an appeal under Section 1(5.5) would be permitted under Section 107(2). Rather, her comment stemmed from her concern that a resubmission of Proposed Initiative #188 would be considered a second rehearing prohibited by this Court's decision in *Nova v. Colbert (In re Title)*.[7]

The Title Board properly considered Chilson's *Motion for Rehearing* under Section 107(1), because that motion went to the very heart of the Title Board's jurisdiction to consider single subject and set a title. This court has recognized that under the appellate procedures of Section 107(2), it may properly consider arguments that challenge the Title Board's jurisdiction.[8]

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[5] *People v. Perez-Rodriguez*, 2017 COA 77, ¶ 24, *citing and quoting United States v. Olano*, 507 U.S. 725, 733-34, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) ("Forfeiture is the failure to make the timely assertion of a right").

[6] *Petitioner's Opening Brief* at 13.

[7] Title Board Hearing, April 4, 2024, at 2:27:00. Available at https://csos.granicus.com/player/clip/443?view_id=1&redirect=true, last accessed May 8, 2024.

[8] *See, e.g., Nova v. Colbert (In re Title)*, 2020 CO 5, ¶ 8; *Herpin v. Head (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 485, 494 (Colo. 2000); *Hayes v. Ottke (In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69)*, 2013 CO 1, ¶ 4; *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause)*, 999 P.2d 819, 820 (Colo. 2000).

In short, this Court has never interpreted Section 107(2) to preclude petitioners or proponents from appealing the Title Board's jurisdiction, based on statutory or constitutional provisions do not fall within the Proponents' cited statutory bases for a rehearing. Three other examples conclusively demonstrate this:

First, this Court has considered an appeal that argued the Title Board failed to fulfill its duties under Section 1(5.5). Specifically, the petitioners argued that the Title Board had a duty to determine whether certain deleted language would fulfill single subject requirements,[9] and this Court readily analyzed the resubmission language in Section 1(5.5).[10] Importantly, the petitioners' appeal was brought under Section 107(2);[11] at the time, the rehearing procedures under Section 107(1) only explicitly identified challenges to single subject or the title and submission clause.[12] But the Court nonetheless considered the Section 1(5.5) issues.

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[9] *Court v. Pool (In re Initiative 1996-4),* 916 P.2d 528, 534 (1996).

[10] *Id.*

[11] *Id.* at 530.

[12] In 1995, C.R.S. § 1-40-107(1) read in relevant part:

> Any person presenting an initiative petition or any registered elector who is not satisfied with the titles, submission clause, and summary provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or

Second, this Court has explicitly considered challenges under Colo. Const. Art. V, § 1(5), involving the mandatory review and comment session. For example, this Court carefully considered a challenge to the Title Board's jurisdiction, arising from the failure to properly submit a measure for review and comment under Section 1(5).[13] Again, the appeal was brought under Section 107(2),[14] and at that time the rehearing procedures under Section 107(1) only explicitly identified challenges to single subject or the title and submission clause.[15]

> constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the titles and summary are set.

[13] *In re Title v. John Fielder*, 12 P.3d 246, 250-254 (Colo. 2000); *see also In re Title*, 797 P.2d 1283, 1288 (1990) ("[s]ince the proponents did not comply with the constitutionally-required procedure for comments and review, the Board was without jurisdiction").

[14] *In re Title v. John Fielder,* 12 P.3d at 249.

[15] In 1999, C.R.S. § 1-40-107(1) read in relevant part:

> Any person presenting an initiative petition or any registered elector who is not satisfied with the titles, submission clause, and summary provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the titles and summary are set.

Third, the Court in 2008 properly considered an appeal for failure to resubmit a measure for review and comment under C.R.S § 1-40-105.[16] The petitioners appealed under Section 107(2).[17] Again, at that time as grounds for rehearing under Section 107(1) only explicitly cited single subject (with a statutory citation to Section 106.5) and title and submission clause.[18] And again, the court properly considered a jurisdictional challenge to the Title Board's actions.

In short, this Court's jurisprudence firmly establishes that appeals under Section 107(2) are not limited to the permissive grounds for rehearing under Section 107(1).

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[16] *Blake v. King (In re Title, Ballot Title, & Submission Clause)*, 185 P.3d 142, 147-148 (Colo. 2008).

[17] *Id.* at 144.

[18] In 2007, C.R.S. § 1-40-107(1) read in relevant part:

> Any person presenting an initiative petition or any registered elector who is not satisfied with a decision of the title board with respect to whether a petition contains more than a single subject pursuant to section 1-40-106.5, or who is not satisfied with the titles and submission clause provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the decision is made or the titles and submission clause are set.

Finally, the resubmission procedure of Section 1(5.5) is properly interpreted as an implementing measure that must be integrated with the Title Board's overall procedures and single subject jurisdiction. Accordingly, this Court has interpreted Section 1(5.5) as a fully integrated provision that governs single subject requirements. Indeed, when referring to the constitutional single subject requirements contained in Section 1(5.5), this Court has cited the entirety of Section 1(5.5).[19] And this approach is consistent with the statutory mandate that "[i]t is the intent of the general assembly that section 1 (5.5) . . . be liberally construed"[20] and that Section 1(5.5) "was designed to prevent or inhibit various inappropriate or misleading practices that might otherwise occur."[21]

Finally, the Proponents' theory to strip this Court of jurisdiction to consider the entirety of Section 1(5.5) would effectively insulate from this Court's review resubmission procedures, review and comment procedures, and any other challenges not specifically cited in Section 107(1). According to the Proponents, no person (either a challenger or a proponent) would be allowed to file a motion for rehearing to

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[19] *See, e.g., Court v. Pool (In re Initiative 1996-4)*, 916 P.2d 528, 524 (Colo. 1996).

[20] C.R.S. § 1-40-106.5(2).

[21] C.R.S. § 1-40-106.5(1)(d).

challenge the Title Board's authority under those constitutional and statutory provisions.

As a result, Section 107(2) would not allow direct appeal to this Court. Rather, a challenger would need to seek injunctive relief in district court or file an emergency appeal under C.A.R. 21 asking this Court to exercise its original jurisdiction. Either instance would be cumbersome and difficult—the antithesis of the statutory effort to create an expedited, streamlined appellate process. Further, this separate process could easily produce an absurd, bifurcated process if the Title Board rendered a decision under single subject and, for example, the constitutionally required review and comment procedures under Section 1(5). One half of the decision would be subject to Section 107's rehearing and appellate procedures, while the other half would require injunctive relief in district court. This would result in two proceedings, with two different legal standards for relief, and different evidentiary standards.

And such a multi-faceted challenge to the Title Board's is not hypothetical. In *In re Title v. John Fielder* the petitioners challenged the Title Board's actions with respect to review and comment procedures under Section 1(5), determination of a single subject, and the setting of a title and submission clause.[22]

[22] *In re Title v. John Fielder*, 12 P.3d *passim*.

B. Striking the sections governing candidate names on petitions and mandating nomination through petition was unnecessary to achieve single subject.

The Proponents defend striking language involving candidate names on petitions by citing the "scope of concerns" purportedly articulated by board member Conley,[23] and arguing that the second subject, in Conley's view was "that candidates petitioning onto the all-candidate primary were subject to more permissive requirements."[24] This argument contains three flaws. First, board member Conley was but one member; she did not speak for the entire Board, only herself. Second, the Proponents mischaracterize the reason Conley found a second subject. And third, every board member discussed and focused on one second subject, only—the elimination of a political party's rights to determine its nominee, because the measure gave non-party members the ability to sign a party nominee's candidate petition.

Board member Conley's "concerns" cited by Proponents did not reflect the reasoning of the board members who found a second subject, and at no point did she find a second based on a general view of that candidates petitioning on to the ballot faced "more permissive requirements." Indeed, the Proponents cite to no evidence to

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[23] *Petitioners' Opening Brief* at 20.

[24] *Id.* at 22.

support this characterization. Board member Conley—like every board member—focused on one issue only: non-party members ability to party candidate petitions.

To discern the board members' reasoning, one must look to *all* of the board members' comments at the March 20th Title Board meeting, when the Title Board found that the original version of Proposed Initiative #188 contained a second subject. At that meeting, the Title Board found an impermissible second subject because the measure fundamentally changed the ability of political party members to control the nomination of their own candidates. The measure granted a member of any party, and any unaffiliated voter, the right to sign a party nominee's candidate petition. Thus, a party nominee could be nominated for the primary ballot with no support from his or her own party members, and this change in the role and authority of political parties formed a separate subject.

This was the *only* separate subject that the Board identified, and each board member clearly articulated this as the *only* reason for a second subject at its March 20, 2024. During Board discussion immediately prior to a vote, each board member spoke. Board member Christy Chase (who voted that the measure contained a single subject) directly confronted the one, single-subject objection raised by other board members; that the measure allowed non-party members to sign party member petitions:

> It seems to me that the intent of the measure is to enable more of a variety of voters to be engaged in that petition process and getting the candidates they want on the ballot. And so if that has the effect of diluting a party designation, maybe that's an outcome . . . I don't see that as a second subject."[25]

In opposition, board member Jennifer Sullivan voted to find that the measure contained a second subject, stating "the concept of allowing any voter to sign a petition to access the primary ballot is separate from allowing, creating a new primary, creating a new single ballot primary."[26]

And board member Conley agreed with Chase:

> I had not thought about, oh you can sign for any candidate. I hadn't, I hadn't thought about it in the vein of oh, so there could be a Dem, you know, running in Boulder that is only, that only Republicans sign their um, sign their petitions. The fact that they're saying being a Democrat kind of means something . . . but I see it as a second subject.[27]

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[25] Title Board Hearing, March 20, 2024, 3:46:26. Available at https://csos.granicus.com/player/clip/439?view_id=1&redirect=true. Accessed on May 8, 2028.

[26] Title Board Hearing, March 20, 2024, 3:49:00. Available at https://csos.granicus.com/player/clip/439?view_id=1&redirect=true. Accessed on May 8, 2028.

[27] Title Board Hearing, March 20, 2024, 3:45:08. Available at https://csos.granicus.com/player/clip/439?view_id=1&redirect=true. Accessed on May 8, 2028.

And minutes later, Conley again focused on non-party members' ability to sign party nominee candidate petitions:

> to me there doesn't have to be a party primary. I think it's the access . . . I do see that as a separate subject and I think this is consistent with [other proposed initiatives] in terms of that party role, and I really wanted to try and strike the signatures, but I think realizing that you can have someone designated as a member of a party that was in no way put on the ballot by other members of that party, whether it be a small group of people at an assembly or a larger group of people through signatures I think is a second subject.[28]

Conley was not concerned about party primaries, forthrightly stating that there need not be a party primary. Rather, she focused solely on the ability of political parties to ensure that their candidates—their standard-bearers in the primary election—were nominated by party members, instead of unaffiliated voters or members of a different political party. And the only way the measure damaged political party integrity was through the petition process. This is what caused the board to find a second subject.

Next, the Proponents defend striking the requirement that candidates be nominated by petition. As noted above, the Board only focused on opening party

[28] Title Board Hearing, March 20, 2024, 3:50:08. Available at https://csos.granicus.com/player/clip/439?view_id=1&redirect=true. Accessed on May 8, 2028.

nominee candidate petitions to non-party members. Board member Conley disclaimed any concern about the elimination of the assembly process.

But Proponents raise a single subject argument that revolve around *other* ballot initiatives, in which a similar provision "caused several Title Board members pause."[29] The Proponents cite only to the results of a vote for Proposed Initiative #186, which does not indicate the basis for the Board's decision. And in fairness to the Proponents, it is exceedingly difficult—if not impossible—to discern the basis for the Board's decision from the audio recording of the Board's discussion. As a result, reference to Proposed Ballot Initiative #186 cannot serve as an adequate basis for making changes to Proposed Ballot Initiative #188. Had the Board viewed as a second subject the measure's requirement that candidates petition on the ballot, they would have clearly stated that in their discussion of Proposed Ballot Initiative #188. Or alternatively there would be clear evidence elsewhere. But that is not the case.

And logically, the requirement that candidates petition on to the ballot is necessarily and properly connected to the measure's efforts to entirely revamp the primary process. The measure changes the petition nominating process in multiple ways, including reducing the number of required signatures, allowing multiple party or non-party candidates to participate in a single primary, and changing the very purpose

[29] *Petitioners' Opening Brief* at 23.

of the primary (from choosing party nominees to instead reducing the number of candidates who can contest the general election). The requirement that candidates petition on to the ballot—thus demonstrating broad support—can properly be seen as an implementing measure, connected to the measure's overall purpose to broaden the primary.

And requiring candidates to petition on to the ballot does not conflict with political party rights. Limiting party nominee petition-signers to political party members protects a political party's right to ensure its nominees receive only support from political party members. Removal of the petition requirement is therefore not necessary to achieve a single subject.

Ultimately, the Proponents hedge their language, never fully claiming that elimination of the candidate petition language was necessary to achieve single subject. They argue that they removed the petition-only language (1) because it "caused several Title Board members pause,"[30] or (2) to address one board member's "single subject concerns,"[31] or (3) to "eliminate the possibility" that it could be viewed as a second subject.[32] Proponents essentially treat the removal of this language as an additional,

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[30] *Petitioner's Opening Brief* at 23.

[31] *Id.* at 24.

[32] *Id.*

precautionary action. But they cannot demonstrate that removal of the language was necessary to "achieve a single subject." Rather, it the Proponents' "revisions involve[d] more than the elimination of provisions to achieve a single subject."[33]

C. Substantial compliance does not apply to single-subject legal standards, including those contained in Section 1(5.5).

Proponents' substantial compliance argument fails, because this Court has never applied the substantial compliance standard to legal standards governing the Title Board's jurisdiction, standards for single-subject, or the standards for ballot title and submission clauses. Indeed, the Proponents do not cite a single case in which this Court has ever applied substantial compliance standards to any determination involving the legal standards employed by the Title Board.

As a general doctrine, substantial compliance does not apply to governing legal standards or jurisdictional requirements. Rather it applies to efforts to comply with technical statutory requirements, such as signature requirements. For that reason, this Court has only applied the substantial compliance test once when reviewing Title Board actions. In that limited instance, a state agency (the Office of State Planning and Budgeting) erred by submitting a fiscal impact statement to the Title Board five

[33] Colo. Const. Art. V, § 1(5.5).

minutes late, and then revising it three hours later.[34] Despite the agency's failure to technically comply with its deadline, the Court found that a five minute delay was not fatal to the Board's consideration, or the proponents' review, of a fiscal impact statement.[35] But outside of this one instance, involving the very narrow issue of technical compliance with a deadline, this Court has never applied substantial compliance to the standards governing single subject, title and submission clause accuracy, or the Title Board's decisions.

And applying the substantial compliance test to Title Board standards would be unworkable. For example, to say that proponents "substantially complied" with single subject means that they failed to meet the single subject requirements, but that (1) they had a good reason for departing from single subject, (2) the second subject was only a minor departure, and (3) the overall purposes of the single subject requirements were met. This approach would fundamentally alter this Court's single-subject analysis. For example, Proponents could argue that a proposed measure only violates single subject a little bit, but that violation is acceptable because the proponents violated single subject in good faith, and the overall purpose of Colo. Const. Article V

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[34] *Herpin v. Head, (In re Title, Ballot Title & Submission Clause),* 4 P.3d 485, 492-493 (Colo. 2000).

[35] *Id.*

is to allow citizens to submit initiatives to the electorate. Such an approach would effectively negate single subject requirements.

The Proponents' misapplication of the substantial compliance shows just how unworkable that test is for legal standards governing the Title Board's decision making, including the legal standards in Section 1(5.5).

First, the Proponents claim that the extent of noncompliance is minimal, because Petitioner Chilson only identifies two clauses. And they claim that those two clauses do not substantively change the proposed measure. If one chooses to count the number of substantive clauses removed by Proponents, the total is five. And two out of five is 40%. This is not a "minimal" amount of noncompliance.

Further, the two clauses—requiring petitions, and allowing candidates to place their party affiliation on nominating petitions—are meaningful legal changes. They foreclose party nominating assemblies, and they alter candidates' discretion and ability to place their names and party (or nonparty) affiliation on nominating petitions. In short, these are more than technical changes or mere clarification. They are meaningful legal changes, and one cannot argue that the extent of noncompliance is minimal.

Second, elimination of the above language defeats the purpose of Section 1(5.5). Proponents claim that the purpose of Section 1(5.5) is to allow resubmission

that does not "substantively alter" the measure.[36] This purpose is found nowhere in the plain language, and as noted above, Petitioner's Opening Brief at 24. The additional eliminated language does, in fact, substantively alter the measure. But more directly the purpose of Section 1(5.5) can be found in the plain language. "[T]he 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."[37] The purpose is to allow a narrow, limited exception to Section 1(5), and confine resubmission to instances where the proponents only eliminate provisions necessary to achieve single subject.

The third prong is the reason for the noncompliance. Here, the Proponents did not make an inadvertent error or overlook a minor technical requirement that did not result in any harm to the public. The Proponents made a purposeful, deliberate decision to eliminate language unnecessary to achieve single subject. They chose to violate the requirements of Section 1(5.5), perhaps to streamline or clarify the measure. That conscious choice does not allow them to claim substantial compliance. To be sure, the Proponents argue they made the change in good faith. But *every*

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[36] *Petitioners' Opening Brief* at 28.

[37] Colo. Const. Art. V, § 1(5.5).

proponent can always argue they make choices and draft proposed ballot language in good faith. The substantial compliance test looks to the reason for noncompliance; and here the Proponents' deliberate choice constituted the reason for their noncompliance with Section 1(5.5).

Respectfully submitted this 9th day of May 2024,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 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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