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<tr><td>SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="2">

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<tr><td>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.</td></tr>
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<tr><td colspan="2" align="center">RESPONDENTS’ ANSWER BRIEF</td></tr>
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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 3,325 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

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT 1
ARGUMENT 4
I. This Court lacks jurisdiction under section 1-40-107 to hear Petitioner's ground for appeal. 4
II. Resubmitted Initiative #188 complied with the resubmittal provision in article V, section 1(5.5) of the Colorado Constitution. 5
A. The Title Board expressed multiple single-subject concerns with Respondent Proponents' measures. 6
B. Resubmitted Initiative #188 deleted the two provisions at issue to achieve a single subject. 10
C. The two deleted provisions at issue did not make substantial changes to the measure. 14
CONCLUSION 19

<u>**TABLE OF AUTHORITIES**</u>

Page(s)

Cases

Fabec v. Beck,
922 P.2d 330 (Colo. 1996) 18

In re Proposed Ballot Initiative on Parental Rights,
913 P.2d 1127 (Colo. 1996) 15

Matter of Title, Ballot Tittle and Submission Clause for 2019-2020 #74,
455 P.3d 759 (Colo. 2020) 5

Moody v. People,
159 P.3d 611 (Colo. 2007) 15

Constitutional Provisions

Colo. Const. art. V, § 1(5.5) .... *passim*

Statutes

C.R.S. § 1-4-101.5 7

C.R.S. § 1-4-502(1.5) 3, 11, 16

C.R.S. § 1-4-603(2) .... *passim*

C.R.S. § 1-4-702.5 .... 11, 16

C.R.S. § 1-4-801(1) 17

C.R.S. § 1-4-802.5(2)(a) .... *passim*

C.R.S. § 1-40-107 .... 4, 5

Other Authorities

Colorado General Assembly, *2023-2024 #308 – Concerning the Conduct of Elections (2024)* 8, 19

Results for Proposed Initiative 2023-2024 #186 (March 20, 2024) 8

Title Board Hearing (March 20, 2024) 8, 9, 12, 14

Title Board Hearing continuation (April 4, 2024)........ 15

Respondents Jason Bertolacci and Owen Alexander Clough (collectively "Respondent Proponents"), through undersigned counsel, submit their Answer Brief in this original proceeding brought by Petitioner Mark Chilson ("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").

SUMMARY OF THE ARGUMENT

Petitioner's argument can be summarized as follows: Because two deletions made to resubmitted Initiative #188 substantially changed the measure in a way not necessary to address one particular single-subject concern expressed by Chair Conley, the resubmission failed to comply with article V, section 1(5.5) of the Colorado Constitution and Title Board lacked jurisdiction to consider it. This argument suffers from several fatal flaws.

First, Petitioner incorrectly assumes that because he filed a motion for rehearing challenging Initiative #188, this Court has jurisdiction to hear his appeal. As described in Respondent Proponents' Opening Brief, a challenge to whether a resubmitted measure to the Title Board complied with article V, section 1(5.5) of the Colorado Constitution does not fall within one of the four grounds for a motion for rehearing or an appeal of a Title Board decision.

Second, as to the merits of Petitioner's appeal, Petitioner's only stated issue for this appeal is whether the revisions made to resubmitted Initiative #188 "involve more than the elimination of provisions to achieve a single subject." Pet'r's Opening Br. at 1, 5 (citing Colo. Const. art. V, § 1(5.5)). But when arguing that the Initiative failed to comply with this constitutional provision, Petitioner fails to realize that the single-subject concerns expressed by the Title Board were broader than the one narrow concern Petitioner identifies, which is who may sign candidate nominating petitions. The Title Board's single-subject concerns also included changing the meaning of political party affiliation as part of ballot access and eliminating the ability of

candidates to access the primary election ballot through the political party assembly and caucus processes.

Third, Petitioner overlooks that the two deletions at issue[1] in resubmitted Initiative #188 address those two single-subject concerns expressed by the Title Board, which were topics that had previously caused Title Board members to vote against the original Initiative #188 and/or its sister initiatives encompassing a single subject. Respondent Proponents therefore deleted this language with the hope that the Title Board would find that resubmitted Initiative #188 constitutes a single subject, which the Title Board ultimately found it did.

Fourth, Petitioner incorrectly represents that the two deletions in resubmitted Initiative #188 were "major revisions" and "substantial changes" to the measure. But Petitioner's characterization conflicts

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[1] The two deletions are:

1. Proposed C.R.S. § 1-4-603(2) in Section 12 of the measure: "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."
2. Proposed C.R.S. § 1-4-802.5(2)(a) in Section 19 (revised Section 18) of the measure: "THE PETITION MAY INDICATE THE NAME OF THE CANDIDATE'S POLITICAL PARTY AFFILIATION OR NON-AFFILIATION IN NOT MORE THAN THREE WORDS."

with the Initiative's language and its interplay with existing statutes. Neither deletion was substantial, nor does either defeat strict or substantial compliance with article V, section 1(5.5).

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

ARGUMENT

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

Petitioner's Opening Brief does not address whether this Court has jurisdiction to decide his sole issue on appeal. But, as anticipated, Petitioner's only issue is whether resubmitted Initiative #188 meets article V, section 1(5.5)'s requirement for resubmission. As described in Respondent Proponents' Opening Brief, because this issue does not fall within any of the four grounds in the statute Petitioner identifies in his Petition for Review as providing jurisdiction, *see* Pet. for Review, at 3 (identifying section 1-40-207, C.R.S., as the source of jurisdiction), this issue is not properly before the Court. *See* C.R.S. § 1-40-107 (listing four grounds for challenging Title Board actions in a motion for rehearing

and permitting appeals of Title Board decisions to grant or deny such motions); *Matter of Title, Ballot Tittle and Submission Clause for 2019-2020 #74*, 455 P.3d 759, 761 (Colo. 2020) (explaining that section 1-40-107 "details what kinds of claims can be made in motions for rehearing").

Respondent Proponents therefore reiterate that because Petitioner's lone issue on appeal is outside section 1-40-107's purview, 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.**

As stated in Petitioner's Opening Brief, the only issue he presents for review is whether the deletion of two specific provisions in resubmitted Initiative #188 violated article V, section 1(5.5)'s language that resubmissions can be made "unless the revisions involve more than the elimination of provisions to achieve a single subject." Pet'r's Opening Br., at 1 (quoting Colo. Const. art. V, § 1(5.5)). Petitioner's argument that two deletions in resubmitted Initiative #188 fail to comply with this resubmission language is built on a faulty foundation.

He makes the following assumptions and pronouncements, none of which withstand scrutiny:

1. The Title Board's single-subject concern was limited to who may sign candidate nominating petitions;
2. The two deletions at issue were "unnecessary" to quell the single-subject concern over who may sign candidate nominating petitions; and
3. The two deletions were substantial changes or major revisions to the measure.

As described below, Petitioner's argument overlooks that the two identified deletions were narrowly tailored to address specific single-subject concerns previously identified by Title Board members and thus were made in order to achieve a single subject.

A. The Title Board has expressed multiple single-subject concerns to Respondent Proponents.

Petitioner argues in his Opening Brief that the Title Board's only single-subject concern was Initiative #188's provisions "allowing any elector to sign a petition for any candidate." Pet'r's Opening Br., at 2; *see also id.* at 5, 8–9. He mentions no other single-subject concern expressed by the Title Board. As a result, he overlooks that the Title Board had multiple concerns with Respondent Proponents' measures

that went beyond simply who could sign candidate petitions. Unsurprisingly, Petitioner therefore did not glean that the two deleted provisions were made to address those other concerns.

As described in their Opening Brief, Respondent Proponents filed multiple measures with Title Board. Most of these measures would create 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, where voters rank candidates by preference under instant runoff voting and elect the candidate who receives a majority of votes at the end of the ranked voting tally. *See* Proposed Initiative 2023-2024 #188, Sec. 5, § 1-4-101.5, Certificate Packet at 5–7; *id.* at Sec. 9, § 1-4-207, Certificate Packet at 8–10. Respondent Proponents then engaged in an iterative process with the Title Board members over their concerns with the various iterations, including their concerns as to single subject.

As part of the process, Respondent Proponents learned of two relevant concerns for purposes of this appeal. First, two Title Board

members expressed that requiring candidates to petition onto the all-candidate primary election ballot, and thus eliminating the ability of candidates to access the ballot through a political party assembly or caucus process, violated the single-subject requirement. *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. For example, Chair Conley specifically identified this feature as an impermissible second subject. *See* Title Board Hearing at 1:28:00 (March 20, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html (Chair Conley distinguishing between the "mechanics of voting" and "ballot access"); *id.* at 1:29:10 (Chair Conley identifying in hearing on Initiative #186 the "changing" of the "party process" of getting on the ballot as a single-subject concern). When striking language in Initiative #188 as part of the resubmittal, Respondent Proponents recognized that proposed section 1-4-603(2) could trigger the same concerns because it could be interpreted as requiring candidates to petition onto the all-candidate ballot. *See id*. at 1:27:45 (Chair Conley focusing single-subject

concerns on the measure's ballot access sections and asking whether it is necessary to remove the "party path" in the nomination process). Respondent Proponents thus deleted that language.

Second, during the rehearing for original Initiative #188, Chair Conley expressed additional concerns that the measure's provisions would change the meaning of political party affiliation as part of ballot access. While she cited the example of candidates of one political party reaching the primary election ballot by obtaining petition signatures solely from voters of a different political party, the essence of her concern was 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 that "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). Respondent Proponents deleted language in section 1-4-802.5(2)(a) to address this concern.

Therefore, Petitioner's narrow view of the Title Board's relevant single-subject concerns should be rejected.

B. Resubmitted Initiative #188 deleted the two provisions at issue to achieve a single subject.

After narrowing the relevant single-subject concerns to one, Petitioner argues in his Opening Brief that the two specific deletions were "unnecessary" to achieve a single subject because they are unrelated to "allowing any elector to sign a petition for any candidate." Pet'r's Opening Br., at 8–9. Once again, Petitioner misses that the two deletions at issue address the aforementioned single-subject concerns raised by the Title Board.

The deletion of proposed section 1-4-603(2) in resubmitted Initiative #188 directly relates to the Title Board's rulings from the same day as original Initiative #188's rehearing that the feature in its sister measures requiring candidates to petition onto the all-candidate primary election ballot violated the single-subject requirement. Even though other places in Initiative #188 provide for candidates to access

the primary election ballot through the assembly process,[2] the proposed section 1-4-603(2)'s language that candidates "shall be placed on the all-candidate primary election ballot by petition" could be construed as conflicting with these other provisions or even overriding them to require candidates to petition onto the primary election ballot. Respondent Proponents therefore deleted section 1-4-603(2) to eliminate the possibility that resubmitted Initiative #188 suffer the same fate as its sister measures.

Likewise, Respondent Proponents deleted proposed section 1-4-802.5(2)(a) in connection with the other deletions to address Chair Conley's concern expressed during original Initiative #188's rehearing that political party affiliation in the petition signature process could not be altered without likely triggering a second subject. The other deletions in resubmitted Initiative #188 clearly pertain to this concern because they removed language that would allow any voter to sign any

[2] For example, and as described further below, Section 10 of Initiative #188 states in proposed C.R.S. § 1-4-502(1.5) that candidates may access the all-candidate primary election ballot through the assembly or convention process or via petition, and proposed C.R.S. § 1-4-702.5 in Section 15 of the measure provides for nominations of candidates for all-candidate primary election for covered offices by convention.

candidate's petition, regardless of the voter's and the candidate's political affiliation. *See* Resp'ts' Opening Br., at 17–19. Petitioner does not contest these revisions. But the deletion of proposed section 1-4-802.5(2)(a) also addresses Chair Conley's concern because that provision could have been reasonably interpreted to allow candidates to avoid placing their party affiliation on signature petitions. Indeed, Respondent Proponents had included proposed section 1-4-802.5(2)(a) in the original Initiative #188 because requiring candidates to place their political party affiliation on the petitions, as opposed to allowing them to, would be less essential if any elector could sign any candidate's petition. But it is illogical to keep any provision from the original Initiative #188 that would change the role of political party affiliation in the petition signature process, proposed section 1-4-802.5(2)(a) included, given the Title Board's concerns. Because Chair Conley expressed her opinion that changing the role of political parties, including voter confusion over candidate's political party affiliation vis a vis petition signatures, violated the single-subject requirement, Respondent Proponents needed to delete this provision. *See* Title Board Hearing at

3:17:50 (March 20, 2024) (identifying as a second subject the "changing of the role of the political parties").

It should be noted that Petitioner appears to argue in his Opening Brief that the relevant standard under article V, section 1(5.5) of the Colorado Constitution is whether the revisions were absolutely "necessary" to achieve single subject. But this qualifier does not appear in the constitutional provision, which makes sense. Proponents of a ballot measure cannot be sure if their revisions would achieve a single subject until the resubmitted measure is once again considered by the Title Board. Only the Title Board can determine whether the revisions are sufficient to achieve a single subject. Respondent Proponents made the deletions to ensure that resubmitted Initiative #188 addressed the Title Board's stated single-subject concerns[3] to give the measure the best chance of achieving a single subject. Indeed, Chair Conley's stated

[3] As described in Respondent Proponents' Opening Brief, Title Board member Jennifer Sullivan consistently voted that Initiative #188 and its sister measures fail the single-subject requirement because they affect both the primary election and the general election, while Title Board member Christy Chase consistently voted that these measures contained a single subject. Therefore, Chair Conley's vote was determinative, and Respondent Proponents modified their versions in order to address her concerns and hopefully obtain this second vote.

concerns—concerns to which Respondent Proponents' deletions are responsive—are consistent. Chair Conley stated that her hesitancy was focused on the "dilution of the political party system." Title Board Hearing at 1:27:30 (March 20, 2024). Resubmitted Initiative #188 did not delete any language that was unrelated to the Title Board's stated single-subject concerns. This is all article V, section 1(5.5) requires.

But even if article V, section 1(5.5) requires that revisions be absolutely necessary to achieve single subject, Respondent Proponents met this requirement given the Title Board's prior statements detailing their concerns.

C. The two deleted provisions at issue did not make substantial changes to the measure.

Petitioner also argues throughout in his Opening Brief that the two deletions he identifies are "substantial changes" and "major revisions."[4] Although unclear from the brief's text, Petitioner appears to

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[4] Even though Petitioner utilizes the word "substantial," rather than "substantive," he does not appear to be arguing that under article V, section 1(5.5) these deletions are "so substantial that such review and comment is in the public interest." His argument has aways been limited to whether the revisions involve more than the elimination of provisions to achieve a single subject." However, if his argument is

be attempting to rebut statements made by Title Board members that these two deletions did not defeat resubmittal because, even if they may not be absolutely necessary to achieve single subject, they were not substantive changes. *See* Title Board Hearing continuation at 3:29:00 (April 4, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html. But Petitioner misunderstands the impact the two deletions at issue have on resubmitted Initiative #188 when arguing that these changes are "substantial."

First, Petitioner characterizes the deletion in proposed C.R.S. § 1-4-603(2) as "substantively chang[ing] [Respondent Proponents'] proposed measure by allowing major parties to nominate candidates by assembly." *See* Pet'r's Opening Br., at 8. But, as described above, other provisions in Initiative #188 would permit candidates to access the all-candidate primary election through the assembly process. They include

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broader to include that second clause in article V, section 1(5.5), he nevertheless waived the argument by not raising it until his Opening Brief. *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.").

proposed C.R.S. § 1-4-502(1.5) in Section 10 of the measure, which provides that candidates may access this primary election ballot "by assembly or convention under section 1-4-702.5," and proposed C.R.S. § 1-4-702.5 in Section 15 of the measure, which expressly states that "political parties may choose to nominate candidates by assembly or convention to the all-candidate primary election for covered offices." *See* Proposed Initiative 2023-2024 #188, Secs. 10 & 15, §§ 1-4-502(1.5), 1-4-702.5, Certificate Packet at 8, 10. In short, the deletion arguably made no change to the measure's substance. Respondents did not delete proposed C.R.S. § 1-4-603(2) because they suddenly decided to allow major political parties to nominate candidates by assembly to the ballot. Rather, to quell any related single-subject concerns, Respondent Proponents deleted proposed C.R.S. § 1-4-603(2) to remove possible conflict as to whether candidates had to use the petition process to access the all-candidate primary election ballot.

Second, Petitioner argues that striking the provision in proposed C.R.S. § 1-4-802.5(2)(a) that would allow petitions to indicate the name of candidate's political party affiliation in no more than three words is

also a substantial change. *See* Pet'r's Opening Br., at 8–9. But Petitioner's rationale—that doing so "eliminates the mechanism for identifying party affiliation or non-affiliation on nominating petitions"—ignores other provisions in Colorado's election code requiring placement of a candidate's political party affiliation on the petition. *See* C.R.S. § 1-4-801(1) ("Every petition to nominate candidates for a primary election shall state the name of the office for which the person is a candidate and the candidate's name and address and shall designate in not more than three words the name of the political party which the candidate represents."). Proposed C.R.S. § 1-4-802.5(2)(a) would have changed the "shall" to a "may" for petitions to the all-candidate primary election. By deleting that provision in the resubmission, resubmitted Initiative #188 would make no changes to existing law as to the listing of candidates' political party affiliation on petitions. This deletion is thus far from a "major revision."

Ultimately, the *de minimis* nature of these two revisions illustrate why the resubmittal complied with article V, section 1(5.5) of the Colorado Constitution. And, 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. The two revisions at issue address single-subject concerns expressed by the Title Board, were made in good faith, and in no way reflect a conscious decision to mislead the electorate. *See Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (listing the relevant factors in assessing substantial compliance as "(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"). Indeed, after Respondent Proponents submitted a measure to Legislative Council that is nearly identical to resubmitted Initiative #188 and that similarly altered these same provisions—Proposed Initiative 2023-2024 #308—Legislative Council Staff issued a

letter stating that review and comment was unnecessary.[5] If the similar changes to Proposed Initiative #308 were so substantial, then Legislative Council Staff would have held a review and comment hearing.

Therefore, Petitioner's argument about "substantial changes" carries no weight.

CONCLUSION

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

[5] *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 9, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2024, I electronically filed a true and correct copy of the foregoing **RESPONDENTS ANSWER 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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