

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2023-2024 #314

MOTION FOR REHEARING – INITIATIVE #314

On behalf of Jason Bertolacci and Owen Alexander Clough (the “Proponents”), registered electors of the State of Colorado and designated representatives of Proposed Ballot Initiative 2023-2024 #314 (“Initiative #314”), undersigned counsel hereby submit this Motion for Rehearing pursuant to C.R.S. § 1-40-107, and as grounds therefore states as follows:

I. Introduction

Initiative #314 is a short measure with one simple goal: to create a constitutional right so that all voters have the opportunity to vote for any eligible candidate in any taxpayer-funded election (other than presidential elections), regardless of any voter’s and any candidate’s political affiliation or non-affiliation. Indeed, the measure’s text is only a few lines long:

SECTION 13. Voter rights in elections. (1) ANY REGISTERED ELECTOR HAS THE RIGHT TO VOTE FOR ANY ELIGIBLE CANDIDATE, REGARDLESS OF THE POLITICAL AFFILIATION OR NON-AFFILIATION OF THE ELECTOR AND THE CANDIDATE, IN ANY TAXPAYER-FUNDED ELECTION, INCLUDING A PRIMARY ELECTION, FOR OFFICES SPECIFIC TO THE DISTRICTS OF THE ELECTOR’S REGISTRATION.

(2) THE RIGHT DESCRIBED IN SUBSECTION (1) DOES NOT APPLY TO PRIMARY ELECTIONS NOMINATING CANDIDATES FOR UNITED STATES PRESIDENT.

Despite the measure’s simplicity, the Title Board improperly speculated as to the language’s legal effects and application and determined that the measure contains two subjects: (1) a constitutional right for voter’s to vote for any eligible candidate in any election; and (2) allowing voters to vote in multiple party’s primary elections. The Proponents respectfully request that the Title Board reconsider.

II. Argument

As stated by the Proponents at both the Review and Comment hearing and the initial Title Board hearing, Initiative #314’s single subject is giving every registered elector the right to vote for any eligible candidate in taxpayer-funded elections. The Title Board nevertheless speculated that the measure would allow voters to vote in as many primary elections as that voter wanted. Not

only would Initiative #314 never have that legal effect because the First Amendment prohibits it,¹ but in conjuring a second subject, the Title Board improperly speculated on its potential legal application.

A. *Relevant Case Law*

The Colorado Supreme Court has expressly limited its role, and thus also the Title Board's role, in assessing whether a measure has a single subject:

- The Title Board cannot speculate on a measure's potential effects.
 - Neither the Title Board nor the Court can engage in “**mere speculation about the potential effects of the Initiative**” when determining whether a measure contains a single subject. *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008) (emphasis added).
 - “[T]he fact that the Titles do not discuss all of the potential impacts of the initiative is not improper, as the **Title Board may not speculate on the potential effects of the initiative if enacted.**” *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014) (emphasis added).
 - “It is not the function of the Board or this court to educate the voters on all aspects of the proposal **or to consider the practical effects of a proposed initiative.**” *Matter of Title, Ballot Title & Submission Clause, & Summary Pertaining to Lottery Funds Initiative Adopted on May 20, 1992 & Petition for Rehearing Denied on June 5, 1992*, 834 P.2d 261, 265 (Colo. 1992) (emphasis added).
 - The effect of an initiative is outside of the scope of review. *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 256*, 12 P.3d 246, 257 (Colo. 2000).
 - “This argument invites us to speculate on the motivations of initiative proponents or to construe the legal effect of the initiative as if it were law; neither is within the scope of our single-subject review.” *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 No. 200A*, 992 P.2d 27, 31 (Colo. 2000).
- The Title Board must not engage in predicting how a measure would apply when assessing single subject.
 - The Court's “limited review of the Title Board's actions” does not allow it to “determine the **future application** of an initiative in the process of reviewing the

¹ To be clear, the Proponents are not asking the Court to construe how the First Amendment's right of association would impact the measure's application. Rather, the Proponents contend that doing so, as well as considering its application to the existing election framework, is improper.

action of the Title Board in setting titles for a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000) (emphasis added).

- “Neither this court, nor the Board may go beyond ascertaining the intent of the initiative so as to interpret the meaning of the proposed language **or suggest how it will be applied if adopted.**” *Matter of Proposed Initiative On Parental Notification of Abortions For Minors*, 794 P.2d 238, 241 (Colo. 1990) (emphasis added); *see also Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 64*, 960 P.2d 1192 (Colo. 1998); *Matter of Title, Ballot Title & Submission Clause, & Summary With Regard to a Proposed Petition for an Amend. to the Const. of State of Colo. Adding Section 2 to Article VII (Petitions)*, 907 P.2d 586, 590 (Colo. 1995); *In re Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994).
- “We do not determine the initiative’s efficacy, construction, or future application, **which is properly determined if and after the voters approve the proposal.**” *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010) (emphasis added).
- “Crucially, when reviewing the Title Board’s decision, we do not consider the merits of the proposed initiative. Nor do we review the initiative’s **efficacy, construction, or future application**, as those issues do not come up unless and until the voters approve the amendment. *Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) (internal citations omitted) (emphasis added).
- “In determining whether a proposed measure contains more than one subject, **we may not interpret its language or predict its application** if it is adopted.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #255*, 4 P.3d 485, 496 (2000) (emphasis added).
- The Title Board must refrain from parsing out simple proposals.
 - “Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado’s constitution.” *In re Proposed Initiative for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998); *see also Matter of Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1221 (Colo. 2021).
 - “In short, Petitioner thinly parses the language of the measure in an attempt to create separate and distinct subjects. In order to do this, Petitioner speculates about the effects of the measure, postulating that if the measure is interpreted in a

way that fits his conclusions, then the measure will have multiple effects. This approach is erroneous.” *In re Title, Ballot Title, Submission Clause for 2007-2008* /62, 184 P.3d 52, 59 (Colo. 2008).

B. Initiative #314 has a single subject.

Based on the above guidance from the Colorado Supreme Court, the Title Board should have refrained from speculating on the measure’s potential effects or predicting its application to existing Colorado election law. The Title Board did both when it articulated a second subject—that the measure would allow voters to vote in multiple primary elections.

Colorado’s current election law provides for major political party primary elections, as well as permitting minor political parties to hold primary elections if they so choose. One ***potential*** application of Initiative #314, as identified by the Title Board, would be that it could allow voters to vote in multiple of these primaries so that voters would have the opportunity to vote for any candidate regardless of political affiliation. But this is simply one (unconstitutional) way of effectuating Initiative #314’s voting right. And it certainly is not the only way of conceivably doing so.

The Colorado Supreme Court has consistently cautioned against interpreting a measure’s legal effects and application when assessing single subject. This makes sense because measures could be applied in different ways depending upon, for example, their interaction with federal law and the preferences of the state legislature.² Indeed, Initiative #314 likely would require that the state legislature pass laws in order to implement the voting right, including laws to avoid implicating political party’s First Amendment right of association. *See California Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding that California’s blanket primary violates a political party’s First Amendment right of association).

Illustrating this point further, the Colorado Supreme Court has affirmed the Title Board’s decision to refrain from speculating as to a measure’s legal application in the measure’s title.³

² Measures seeking to amend the Colorado Constitution are even more likely to have multiple potential effects. *In re Title and Ballot Title and Submission Clause for 2005-2006* #55, 138 P.3d 273, 284 (Colo. 2006), *as modified on denial of reh’g* (June 26, 2006) (Coats, J., dissenting) (“[A]ny provision expressed with sufficient generality to be appropriate for inclusion in a constitution will necessarily have a potential for, and be intended to have, multiple effects. Such a construction would clearly bar the due process clause or guarantees of free speech from being considered by the initiative process. Nothing in the language or history of the single-subject requirement for popular initiatives . . . remotely suggests that in addition to being limited to a single subject, a proposal can also have but one, identifiable impact or effect; and any such requirement, if applied uniformly, would preclude all but the most trivial popularly-initiated proposals.”)

³ Further, the Colorado Supreme Court has made clear that it is not appropriate for the Title Board to include language in the title which explores the measure’s interaction with existing law. *See In re Title, Ballot Title, Submission Clause for 2007–2008* #62, 184 P.3d 52, 60 (Colo. 2008) (quoting *In re Proposed Initiative 1999–2000* #246(e), 8 P.3d 1194, 1197 (Colo. 2000)) (“The interplay of a ballot initiative with various provisions of existing law is an issue for post-election litigation, not the basis for a ballot title challenge. The Title Board has substantial discretion in formulating the verbiage of a title and is not required to draw a ‘before and after’ picture of the law in the ballot title.”).

This includes avoiding spelling out a measure’s potential conflict with federal law or expressing the fiscal impact of potential resulting lawsuits in the title. *See Matter of Branch Banking Initiative Adopted on Mar. 19, 1980, & Amended on Apr. 8, 1980*, 200 Colo. 85, 90, 612 P.2d 96, 99 (1980) (upholding Board’s decision not to include the proposed initiative’s possible conflict with federal banking law); *Matter of Title, Ballot Title & Submission Clause, & Summary Adopted Nov. 1, 1995, By Title Bd. Pertaining to a Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 27–28 (Colo. 1996) (upholding Board’s decision not to include a statement expressing the fiscal impact of potential equal protection lawsuits on the state in the title because it would have required the Board “to speculate as to the effect of the equal protection clauses of the United States and Colorado Constitutions on the Initiative”).

Neither of the two dangers of omnibus measures are present with Initiative #314. The measure “does not seek to garner support from various factions by combining unrelated subjects in a single proposal.” *See Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 178 (Colo. 2014). Initiative #314 is one, single proposal—a voter will either like the opportunity to vote for any candidate in any election, including primary elections, or will not.

Likewise, voters will not be surprised by effects that are “hidden” in the body of an initiative that is misleading or overly complex. *See Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*, 961 P.2d 456, 461 (Colo. 1998); *see also In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 581 (Colo. 2012) (finding no risk of voter confusion when the “plain language of the measure unambiguously” explains the measure). Voters will undoubtedly know that the primary effect of Initiative #314 is that, regardless of their or the candidate’s political party affiliation, they will have the right to vote for any eligible candidate in taxpayer-funded elections, other than presidential elections. *See Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 178 (Colo. 2014) (“[T]here is no serious risk that the voters will be unaware of the primary effects of Initiative # 89 because each of the sections relates to the same subject, the plain language of Initiative # 89 creates a public right [to the environment] and then lays out the procedures for implementing and enforcing that right, and the proposal is not particularly lengthy or complex.”); *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 581 n.2 (Colo. 2012) (“[Petitioner] argues that, if adopted, Initiative 45 would so drastically alter the landscape of Colorado water law that it could not possibly contain a single subject. We again emphasize that our limited role in this process prohibits us from opining on how Initiative 45 might operate if applied.”). To the extent that Initiative #314’s legal implementation is “hidden,” that aspect pertains to the measure’s interaction with federal and state election law, which is a task that the Colorado Supreme Court has articulated that it, at this juncture, and Title Board are not equipped to judge. *See, e.g., In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 235(a)*, 3 P.3d 1219, 1225 (Colo. 2000) (“This court cannot determine the future application of an initiative in the process of reviewing the action of the Title Board in setting titles for a proposed initiative.”).

Ultimately, notwithstanding Proponents' above arguments on the proper scope of the Title Board's review, even if it were appropriate to consider the manner in which Initiative #314 *could* be implemented, such analysis would not run afoul of single subject concerns. The Title Board would merely be considering the Initiative's implementation. And as the Title Board is well aware, "[i]mplementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *In re 1999–2000 No. 200A*, 992 P.2d at 30 (quoting *Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997–1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998)). The various implementing provisions the Title Board discussed during Initiative #314's initial hearing are undeniably directly tied to the Initiative's central focus: establishing a right for all voters to have the opportunity to vote for any eligible candidate in any taxpayer-funded election (other than presidential elections), regardless of any voter's and any candidate's political affiliation or non-affiliation.

III. Conclusion

For the foregoing reasons, the Proponents respectfully request that the Title Board determine that Initiative #314 has a single subject and that the Title Board has jurisdiction to set a title.

Respectfully submitted this 25th day of April, 2024.

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