

COLORADO TITLE SETTING BOARD

**IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR PROPOSED INITIATIVE 2023-2024 #189**

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #189

On behalf of Objector, Diana Holland, registered elector of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2023-2024 #189 (“Initiative #189”) and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT MARCH 6-7, 2024 HEARING

On March 7, 2024, the Title Board set the following ballot title and submission clause for Initiative #189:

A change to the Colorado Revised Statutes creating new election processes for U.S. Senate, U.S. House of Representatives, Colorado state legislature, and certain state offices, and, in connection therewith, allowing any voter to sign a petition for any candidate for these offices to get on the primary ballot; requiring these candidates to collect signatures from voters in order to appear on the primary election ballot, reducing the number of signatures required to petition onto the ballot, and eliminating the political party nominating process; creating an all-candidate primary election for these offices, where voters can vote for any one candidate per office, regardless of political party affiliation, and where the four candidates who receive the most votes advance to the general election; and in the general election, allowing voters to rank candidates and the candidate with the highest number of votes at the end of the voting tally is elected.

II. GROUND FOR REHEARING**The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation of the Single Subject Requirement.**

Pursuant to Colo. Const. art. V, §1(5.5),

no measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title . . . If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

See also 1-40-106.5, C.R.S. "When a proposed initiative comprises multiple subjects, the [Title] Board lacks jurisdiction to set its title." *Fine v. Ward (In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128)*, 2022 CO 37, ¶8.

The single-subject requirement exists "to prevent or inhibit various inappropriate or misleading practices that might otherwise occur." § 1-40-106.5(1)(d). Specifically, it is designed to prevent "the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits," § 1-40-106.5(1)(e)(I), and to "prevent surprise and fraud from being practiced upon voters" by ensuring that the title of the measure "apprise the people of the subject," § 1-40-106.5(1)(e)(II).

To meet the single-subject requirement, an initiative's provisions must be "necessarily and properly connected," *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 13. An initiative with provisions that are "disconnected or incongruous, —covering more than one subject and having at least two distinct and separate purposes which are not dependent upon or connected with each other, —violates this requirement." *Fine v. Ward*, 2022 CO ¶13 (internal citations omitted).

A. Changing Ballot Access by Eliminating the Political Party Nominating Process is a Separate Subject.

Initiative #189 improperly combines drastic changes to Colorado's ballot access process with changes to how primary elections and general elections operate. It is the inclusion of all of these subjects in one initiative that "is precisely the logrolling dilemma that the voters intended to avoid when they adopted the [single-subject] requirements." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 31 (Hobbs, J., dissenting). The elimination of the political party nominating process, including doing away with political party precinct caucus', assemblies and conventions for most state and all federal offices, is not necessarily and properly connected to the changes to primary elections or changes to general elections.

In *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, the Court considered an initiative that sought to reform state and local recall elections and which made non-elected officers subject to recall. 333 P.3d 76 (Colo. 2014). The Court explained that the two changes had "no necessary connection," depriving voters of the ability to assess each change on the merits:

In the case before us, some voters might favor changes to the manner in which recall elections for elected officers are triggered and conducted, but not favor establishing a new constitutional right to recall non-elected officers, or visa-versa. Initiative #76 unconstitutionally combines the two subjects in an attempt to attract voters who might oppose one of these two subjects if it were standing alone.

Id. at 86; see also, e.g., *In re Title, Ballot Title and Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1079 (Colo. 2010) ("An elector going to the polls in the upcoming general election might favor a beverage container tax while being opposed to depriving the General Assembly of

its legislative authority over the basin roundtables and the interbasin compact committee or vice versa.”).

Here, a voter may approve of using instant run-off voting in the general election but disapprove of divesting the political parties of a role in nominating candidates by eliminating political party nominations through the caucus and assembly process. Or vice versa. In either event, they will be confronted with a measure that is sold to the public as expanding voter choice when it eliminates one path to the ballot for candidates and reduces political party associational rights. Initiative #189 violates the single subject requirement.

B. Combining the Creation of a Blanket Primary with a Requirement for Instant Runoff Voting in the General Election Violates the Single Subject Requirement.

In *In re 2021-2022 #16*, the Colorado Supreme Court explained that it “must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme.” ¶ 21. The Court stated that its “concern was that two disconnected provisions could be described as a single subject if done at a sufficiently high level of generality. *Id.* In that case, the Court considered whether provisions of an initiative that not only expanded the definition of “animal cruelty” but also expanded the definition of “sexual act with an animal” each related to the “central theme of expanding the animal cruelty statutes to include livestock.” *Id.* at ¶¶ 22-23. The Court concluded that, “although related when considered at a high level of generality, the provisions served different purposes not sufficiently connected to constitute a single subject.” *Id.* at ¶ 41.

Initiative #189 suffers the same problem. Under the broad guise of “new voting processes to expand voter choice” per the proponents’ stated single subject, or the equally overbroad “creating new election processes for U.S. Senate, U.S. House of Representatives, Colorado state legislature, and certain state offices” per the single subject clause in the initial title set by the Title Board, the measure proposes sweeping, but incongruous, changes to primary elections and to general elections. First, for primary elections, Initiative #187 eliminates political party primaries and establishes an all-candidate primary election ballot, where all candidates of all political parties are placed on the same ballot, and voters may rank up to four candidates per office regardless of political affiliation of the voter or the candidates. The measure requires that only the four primary candidates who receive the most votes, regardless of political affiliation, advance to the general election. This type of primary, often called a blanket primary or jungle primary, (hereinafter “blanket primary”), can result in only candidates from one political party moving on to the general election, and can reduce the chances that unaffiliated candidates or candidates from a minor political party can make the general election ballot.¹ The measure eliminates political party primaries in favor of all-candidate primaries and directs the method of voting for primary elections (voters vote for one candidate only).

Next, for the general election, Initiative #189 changes the method of voting for general elections for all federal and some, but not all, state candidates to instant run-off voting, (“IRV”),

¹[If Nevada Had Top-Five in Place in 2022, Minor Parties Would Have Almost Surely Been Off the Ballot for Governor and U.S. Senator | Ballot Access News \(ballot-access.org\); 117PublicCommentTemplin.pdf \(state.co.us\); 119PublicCommentTemplin.pdf \(state.co.us\).](#)

instead of voters voting for one candidate. This new election model directs voters to rank the candidates who advanced to the general election in order of preference. In an IRV election, ballots are initially counted to establish the number of votes for each candidate. If a candidate has more than half of the first-choice votes, that candidate wins. If not, then the candidate with the fewest votes is eliminated, and the voters who selected that candidate as their first choice have their votes added to the total of the candidate who was their next choice. That process continues until one candidate has more than half of the votes, and that person is declared the winner.

The use of IRV in Colorado elections has been a topic of legislative and public debate for years.² There are strong proponents and opponents of IRV.³ Although Colorado law presently allows municipalities to use IRV, *see* C.R.S. §1-7-1001 *et seq.*, some cities have rejected it to date.⁴ The use of IRV in general elections is not interrelated to the transition to blanket primary elections.

A change to the primary election from one where the winning candidate from each of the two major political parties, along with any other qualified unaffiliated or minor party candidates, can advance to the general election, to a new blanket primary model where only the top four vote-getters in the primary election advance, is also a charged subject.⁵ Critics contend that this type of primary will result in less ballot access for minor political party and unaffiliated candidates, and reduce the number of candidates in the general election leading to less voter choice.⁶ The use of a blanket primary is not interrelated to the transition to IRV in some general elections.⁷ Both of these changes to election law could stand on their own and are not dependent upon the other.

Indeed, there is no “necessary or proper connection” between these two separate policy changes. § 1-40-106.5(1)(e)(I), C.R.S. Initiative #189 overhauls the primary system process with the stated effect of eliminating political party involvement in the primary system—another highly contentious policy change, and combines it with the potentially more voter-friendly change of IRV in the general election. This changes the current method of political parties choosing their candidate via a primary election; and makes major changes to the general election process, including how many candidates can appear on the general election ballot, how they are counted, and abandoning plurality requirements for winners. These policies are not interrelated, nor is one an implementing provision of the other. *See Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 646 (Colo. 2010) (“An initiative may contain several purposes, but they must be interrelated . . . Implementing provisions that are directly tied to the initiative's central focus are not separate subjects.”). Rather, these two public

² [r21-1348_rcv_memo.pdf \(colorado.gov\)](#), December 21, 2021.

³ [Ranked Choice Voting for Colorado – More Choice, More Voice \(rcvforcolorado.org\)](#); [Study: Ranked Choice Voting Diminishes Minority Voting \(dailysignal.com\)](#), January 16, 2024.

⁴ [What is ranked-choice voting? Election system gets new push in Denver \(denverpost.com\)](#), April 17, 2023.

⁵ [ANALYSIS: California’s ‘jungle primary’ has unintended consequences for Democrats - ABC News \(go.com\)](#), June 3, 2018.

⁶ [117PublicCommentTemplin.pdf \(state.co.us\)](#); [119PublicCommentTemplin.pdf \(state.co.us\)](#)

⁷ Notably, Colorado already has an open primary that permits unaffiliated voters to vote in either the Democratic or Republican Party primary. *See* C.R.S. §1-7-201(2.3).

policies are mutually exclusive and independent of one another—yet contained under the vague and overbroad umbrella of “elections.” Initiative #189 could be split into two separate ballot measures and these two subjects would still function as the proponents intend, underscoring why they contain no “necessary or proper connection.” Instead, they are two highly complex policy changes regarding separate types of elections lumped together under the same broad title.

A central purpose of the single-subject requirement is that it "precludes the joining together of multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or even conflicting interests." *In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995). As members of the Title Board recognized at the initial hearing, even while ultimately setting title for this Initiative, some voters might well support IRV elections while preferring to keep primary elections as they are, and others might feel precisely the opposite. The mere fact that both topics involve “election processes” is not enough to make them necessarily and properly connected.

The title is materially misleading by stating that the initiative consists of a change to the Colorado Revised Statutes simply “creating” new election processes; as importantly, the initiative wholly deletes and adjusts multiple existing processes.

The initiative not only creates extensive new structures and processes for elections at all levels in Colorado; it wholly eliminates or materially alters multiple existing structures and processes with which the voters are familiar. This fact is obfuscated by the introductory language to the title suggesting that the measure would only “create” new processes. At a minimum, to avoid materially misleading the voters, the title would have to advise the voters that it is also “wholly deleting” and “adjusting” multiple processes with which they are comfortable and have long been familiar. A proper and fair title would also, thereby, necessarily reveal that multiple subjects were being, albeit improperly, addressed in the single measure.

III. CONCLUSION

Based on the foregoing, Objector requests a rehearing of the Title Board for Initiative 2023-2024 #189 because the initiative contains multiple subjects. As a result, the Title Board lacks jurisdiction to set a title and should reject the measure in its entirety.

Respectfully submitted this 14th day of March, 2024.

TIERNEY LAWRENCE STILES LLC

By: /s/ Martha M. Tierney
Martha M. Tierney, Atty Reg. No. 27521
Edward T. Ramey, Atty Reg. No. 6748
Tierney Lawrence Stiles LLC
225 E. 16th Avenue, Suite 350
Denver, Colorado 80203
Phone Number: (303) 356-4870
E-mail: mtierney@tls.legal

ATTORNEYS FOR OBJECTOR

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of March 2024, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #189** was filed and served on Proponents Jason Bertolacci and Owen Alexander Clough, via email to their counsel of record as follows:

Sarah Mercer
Brownstein Hyatt Farber Schreck, LLP
675 15th Street, Suite 2900
Denver, CO 80202
smerc@bhfs.com
Attorneys for Proponents Jason Bertolacci and Owen Alexander Clough

/s/ Martha M. Tierney
