COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #201

MOTION FOR REHEARING

On behalf of Jason Bertolacci, registered elector of the State of Colorado, the undersigned counsel hereby submit this Motion for Rehearing for Proposed Initiative 2023-2024 #201 ("Initiative #201") pursuant to C.R.S. § 1-40-107, and as grounds therefore state as follows:

I. THE TITLE BOARD LACKS JURISDICTION TO SET A TITLE BECAUSE THE PROPOSED MEASURE IS SO VAGUE AND CONFUSING THAT IT CANNOT BE UNDERSTOOD.

Initiative #201's short length obscures that it is a perplexing measure that not only would fail to fully accomplish the proponents' intent but also is too vague and confusing to set a title. *See, e.g.*, *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016) ("The Colorado Constitution . . . mandates that an initiative's single subject shall be clearly expressed in its title," and therefore, the clear title standard requires that titles "allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal.").

First, although the proponents represent that Initiative #201 does not affect political party nominations for candidates outside of primary elections, the measure's plain language belies that assertion. Initiative #201's very first provision in Section 2 states that "[r]anked choice voting is prohibited from use in any nomination or election process for any public office in the state of Colorado." The measure does not define either "nomination process" or "election process." However, various political parties currently nominate candidates through a myriad of processes, including not only primary elections but also caucuses and other assembly processes. As a result, the measure would prohibit political parties from utilizing certain "ranked choice voting" methods in nominating candidates in both state-run primary elections and via any other method, including voting by party leadership. The fact that the measure so clearly undermines the proponents' intent deprives the Title Board of jurisdiction to set title.

Second, Initiative #201's definition of "ranked choice voting" is too vague and confusing for a title to be set. The definition contains multiple subparagraphs separated by "and" or "or," and it is unclear which paragraphs go together and

which represent a separate type of "ranked choice voting." For example, is paragraph (2)(b)(I)(A) in Section 2 intended to be read on its own, such that it would prohibit any voting method that would allow voters to vote for more than one candidate for each position to be filled? Indeed, that is how the title adopted by the Title Board reads. Or is that paragraph supposed to be read in connection with subparagraphs (B) and (C) because they all fall under paragraph (I)? The answer is important because the two interpretations are significantly different.

Similarly, several of the proponents' definitions of "ranked choice voting" are too vague to understand. The definition uses the word "tabulation" throughout but does not define the term or explain how tabulations are to be performed. Further, paragraph (2)(b)(II) appears to prohibit elections where voters rank candidates and votes are tabulated in multiple rounds after at least one candidate is eliminated. The measure does not specify how candidates are eliminated before these multiple rounds are conducted. And paragraph (2)(b)(III) would prohibit counting votes in a series of runoffs but does not specify how voters would vote before those rounds are conducted.

Third, the second sentence in paragraph (2)(b)(III) would ban any voting method in which the candidate who receives the greatest number of votes is nominated or elected. This sentence is disconnected from scope of the prior sentence, which specifies that the measure would prohibit any voting method with a series of runoffs until one candidate has more votes than the combined total of all other candidates. If read literally, this broad second sentence in paragraph (2)(b)(III) would prohibit nearly every voting method employed in this state. Embracing a generous interpretation of the measure, that clearly was not the proponents' intent, yet that is how the paragraph reads.

Ultimately, the substance of Initiative #201 suffers from too many unresolved issues for the Title Board to set a title that reasonably describes: (1) the scope of the measure and (2) which types of voting methods it would prohibit.

II. INITIATIVE #201 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

No matter how one reads Initiative #201, the measure contains several separate subjects improperly coiled in the folds that would lead to either voter surprise or impermissible logrolling. The single-subject requirement is designed to:

> forbid . . . the practice of putting together . . . subjects having no necessary or proper connection, for the purpose of enlisting in support of the [initiative] the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.

C.R.S. § 1-40-106.5(1)(e)(I); *see also In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002) (the single subject

rule helps avoid "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative"); *In re Title, Ballot Title & Submission Clause, for 2007–2008, #17*, 172 P.3d 871, 875 (Colo. 2007) ("We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme.").

Proponents represented at the initial Title Board hearing on March 20, 2024, that Initiative #201's single subject is to prohibit ranked choice voting in Colorado. Indeed, the heart of the measure is its lengthy definition of "ranked choice voting" in Section 2. But the measure contains several other subjects not necessarily or properly connected to that stated single subject. *In re Matt of Title, Ballot Title and Submission Clause for 2019–2020 #315*, 500 P.3d 363, 367 (Colo. 2020) (quoting *In re 2015–2016 #73*, 369 P.3d at 568) (in deciding whether an initiative addresses a single subject, the relevant question is if its provisions are "necessarily and properly connected rather than disconnected or incongruous"); *accord In re Title, Ballot Title & Submission Clause for 2009–2010 #91*, 235 P.3d 1071, 1077 (Colo. 2010) ("[W]hen an initiative's provisions seek to achieve purposes that bear no necessary or proper connection to the initiative's subject, the initiative violates the constitutional rule against multiple subjects.").

First and foremost, because Initiative #201 encompasses both nomination and election processes, it would remove the ability of political parties to decide how to nominate or elect their own candidates through certain prohibited ranked choice voting methods. Paragraph (1) under Section 2 defines the measure's scope as "any nomination or election process." If proponents wanted to capture only primary elections, they should not have separated "nomination" from "election" and should have narrowly defined "election processes." But they did not. *See McCoy v. People*, 442 P.3d 379, 389 (Colo. 2019) (courts construe statutory schemes "as a whole, giving consistent, harmonious, and sensible effect to all of its parts"); *see also In re Title, Ballot Title & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 646 (Colo. 2010) ("[W]e must review the initiative as a whole rather than piecemeal . . . ."). Given this wide scope, voters would be surprised to learn that by voting for a measure purporting to constitutionally ban ranked choice voting, they also would be restricting the ways in which parties choose their nominees, which burdens a political party's freedom of association and private conduct. Voters would be particularly surprised to learn that Initiative #201 would prohibit political parties from using certain ranked voting methods in any nomination or election outside of state-run primary elections. Indeed, banning the use of certain ranked voting methods in any nomination or election process is separate and distinct from prohibiting these methods in publicly-funded elections. *See In re 2009–2010 #91*, 235 P.3d at 1076 (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998* #64, 960 P.2d 1192, 1196 (Colo. 1998)) ("[W]here an initiative advances separate and distinct purposes, 'the fact that both purposes relate to a broad concept or subject is insufficient to satisfy the single subject requirement.'") (alteration in original).

Second, coiled up in the folds of Initiative #201 is that it would overturn the 2008 Voter Choice Act and House Bill 21-1071, which collectively permit local governments to implement instant runoff voting, a type of ranked voting method, in their nonpartisan elections. *See* C.R.S. §§ 1-7-116; 1-7-1001, *et seq.* The General Assembly could not re-pass the bill because Initiative #201 is a constitutional amendment. Voters would be surprised to learn that a measure that would prohibit voting methods currently not utilized in any state-wide election would also likely permanently halt several municipalities from continuing to use their preferred voting method. This is especially true for voters who do not live in jurisdictions where municipal elections have been conducted using instant runoff voting and may be unfamiliar that this form of ranked choice voting already is currently used in Colorado.

Third, Initiative #201 would prohibit various voting methods that are not versions of ranked choice voting.[1] Although not entirely clear, paragraph (2)(b)(I) in Section 2 of the measure appears to prevent jurisdictions from using voting methods where voters vote for more than one candidate if the method also involves multiple tabulations. Based on its plain language, this paragraph would prohibit certain offshoots of approval voting.[2] Ranked voting methods, however, do not permit voters to vote for multiple candidates for the same seat—indeed, voters voting for more than one candidate for one seat could violate the fundamental constitutional principle of "one person, one vote." *See Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (holding that equality of voting—one person, one vote—"means that, as nearly as practicable, one [person's] vote is to be worth as much as another's"); *see also Baber v. Dunlap*, 376 F. Supp. 3d 125, 140 (D. Maine 2018) (reasoning that "'one person, one vote' does not stand in opposition to ranked balloting, so long as all electors are treated equally at the ballot"). Rather, ranked voting methods permit voters to ***rank*** candidates using a single vote. *See* "How Ranked Choice Voting Survives the 'One Person, One Vote' Challenge," Fair Vote (Dec. 5, 2018), *available at* https://fairvote.org/how_ranked_choice_voting_survives_the_one_person_one_vote_challenge/ (explaining that under the single transferable vote concept inherent to ranked voting systems "[v]oters aren't casting a ballot for more than one candidate. They are expressing their preferences and only their choice in the final round of tabulation counts toward the results"). And, as described above, the second sentence in paragraph (2)(b)(III) arguably would ban any voting method where the candidate who receives the greatest number of votes is nominated or elected. Neither prohibition is necessary or proper to effectuate the proponents' single subject.

Fourth, if the title set by Title Board at the initial hearing accurately captures the measure, then Initiative #201 presents a serious logrolling risk. The title states that the measure would "prohibit[] the use of any voting method where

[1] Ironically, as described further below, the measure would not prohibit the use of ranked voting methods in primary elections where multiple candidates advance to the general election.

[2] The measure would not, however, prohibit traditional approval voting, which does not involve multiple tabulations. *See* https://ballotpedia.org/Approval_voting.

voters are allowed to rank candidates or vote for more than one candidate for a single public office." Ranking candidates and voting for more than one candidate are two separate methods of voter participation. As a result, Initiative #201 attempts to garner support from voters who want to prohibit voting for more than one candidate, a proposal likely most Coloradans would agree to support, and those that want to prohibit ranking candidates, which is a voting method of significant public debate.[3] Voters should not be faced with such a choice in one measure. *In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995) (explaining that 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").

Therefore, these separate subjects, many of which voters would be surprised to learn are included among the measure's features, deprive the Title Board of jurisdiction to set a title.

III. THE TITLE FAILS TO ACCURATELY DESCRIBE THE MEASURE AND WOULD MISLEAD VOTERS.

Finally, even if the Title Board were to affirm it has jurisdiction to set a title, setting a title for Initiative #201 is problematic for at least several reasons. First, an accurate title cannot be set because, as described above, the measure is so vague and confusing that it cannot be adequately understood or described. In fact, this motion can be granted, and the measure returned to the proponents, on this basis alone.

Second, the draft title approved at the March 20th hearing must be amended so that the title fully and accurately captures the measure's central features and does not mislead voters. Thus, at least the following changes must be made:

1. The title as drafted does not accurately describe the measure's definition of "ranked choice voting." Specifically, the title states that Initiative #201 would prohibit "***any voting method*** where voters are allowed to ***rank candidates*** or vote for ***more than one candidate*** for a single public office." (Emphasis added.) But "any voting method" is too broad and must be stricken.

    a. The measure would not prohibit every ranked voting method, but rather simply those methods vaguely and confusingly described in paragraphs (2)(b)(II) and (III) of Section 2. For example, subparagraph (II) would only prohibit ranked voting methods where votes are tabulated in multiple rounds <u>after</u> at least one candidate is eliminated. And by its very terms,

[3] *See* https://leg.colorado.gov/sites/default/files/r21-1348_rcv_memo.pdf.

paragraphs (2)(b)(II) and (III) apply only if a single candidate is elected or nominated from that voting method. As a result, Initiative #201 would not prohibit, for example, the use of a ranked voting method to narrow the field of candidates from a primary election to a general election, as more than one candidate would be advancing to the general election. Therefore, the title must delineate precisely which ranked voting methods the measure would prohibit.

b. The title's use of the phrase "vote for more than one candidate" is inaccurate because Initiative #201's prohibition on voting methods where voters vote for more than one candidate for a specific seat applies only in a narrow context. Specifically, paragraph (2)(b)(I) prohibits voting for more than one candidate only if there are multiple tabulations, (*see* § 2, ¶ (2)(b)(I)(B)), and a winner is determined by a later tabulation, (*see* § 2, ¶ (2)(b)(I)(C)). This qualifier must be included in the title.

2. The title as drafted fails to clarify that Initiative #201 applies to how political parties select their nominees through primary elections or other processes. This is a fundamental change to political party independence that a voter would be surprised to learn.

3. The title fails to specify that the measure applies to any of the following elections: town, city, county, district, state, and federal.

4. The title must specify that it would overturn a whole statutory scheme under which municipalities currently have the freedom to employ instant runoff voting in nonpartisan elections.

5. The title as drafted misleads voters as to multi-winner elections by indicating that Initiative #201 would prohibit voters from "vot[ing] for more than one candidate for a ***single public office***." (Emphasis added.) This language suggests that the measure would prohibit voters from participating in multi-winner elections where several candidates are elected to a public office. The measure itself, however, specifies that the prohibition on voters voting for more than one candidate applies to positions to be filled, not "a single public office." The title must be edited to make this clarification.

6. The title as drafted misleads voters into thinking that ranking candidates is a vote for multiple candidates, even though that is untrue.

7. The title as drafted suggests that voters always vote to nominate candidates, even though political parties are free to nominate candidates in a number of ways.

8. The title fails to recognize that Initiative #201 arguably does not apply to members of the General Assembly because members of the General Assembly technically do not hold an office. Rather, they hold a seat for a particular type of office as a *member* of the General Assembly.

Therefore, the title must be amended to make these changes because otherwise the title would not "correctly and fairly express the true intent and meaning" of the measure. *See* C.R.S. § 1-40-106(3)(b). Indeed, Title Board's "duty is to ensure that the title, ballot title and submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the board." *In re Ballot Title 1997–1998 # 62*, 961 P.2d 1077, 1082 (Colo. 1998) (quoting *In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 719 (Colo. 1994)).

CONCLUSION

Accordingly, the Objector respectfully requests that this Motion for Rehearing be granted, and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 27th day of March 2024.

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