

COLORADO TITLE SETTING BOARD

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IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE  
FOR INITIATIVE 2023-2024 #210

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**MOTION FOR REHEARING – INITIATIVE #210**

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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 #210 (“Initiative #210”), 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 #210 is a nonpartisan measure brought by the Proponents, who are the designated representatives of a bipartisan group of civic and political leaders, to modernize Colorado’s election process so that voters, including unaffiliated voters, have greater participation in electing Colorado’s federal and state elected officials.

Initiative #210’s central purpose is to expand voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters. Initiative #210 would accomplish this single subject by allowing candidates to collect signatures from registered voters—affiliated with any political party or with none—in order to appear on the all-candidate primary election ballot;<sup>1</sup> giving voters the right to participate in an all-candidate primary election, where all candidates appear on the same ballot regardless of political party affiliation and where the four candidates who receive the most votes advance to the general election;<sup>2</sup> and using instant runoff voting in the general election, where voters may rank the candidates by preference in order to prevent the undesired potential outcome of electing a candidate who received just 26% of the vote.

A consequence of this objective is that Initiative #210 reduces the power that political party insiders have in selecting candidates for office—a practice that has proved to limit the choice of voters at the ballot box to candidates who often feel too extreme. The measure addresses this problem by making deliberate and focused changes to Colorado’s system of narrowing the field of candidates and electing a candidate to office that empower voters over party insiders at each stage of the voting process thereby spurring candidates to speak to all voters, not just to the party base. These changes ultimately will result in elected candidates who better reflect the will of the majority of the electorate.

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<sup>1</sup> Initiative #210 maintains the party assembly process for nominating candidates to the all-candidate primary election.

<sup>2</sup> An important feature of the measure is that the all-candidate primary does not serve to nominate a candidate as a political party’s standard bearer.

At the measure’s initial Title Board hearing on March 20, 2024, the Title Board incorrectly found that it lacked jurisdiction to set a title on Initiative #210 on grounds that the measure violated the single-subject requirement by including a provision allowing all any voter, regardless of political party affiliation or non-affiliation, to sign a petition in support of any candidate specific to that voter’s registration seeking to access the all-candidate primary election ballot for certain designated covered offices. In doing so, the Title Board failed to: (1) understand why this allowance is necessarily or properly connected to Initiative #210’s central purpose; (2) recognize that the ability for any voter to sign any petition for a candidate seeking ballot access to the all-candidate primary election ballot is neither misleading nor surreptitious; (3) liberally construe the single-subject requirement as required by the Colorado Supreme Court; and (4) remain within the confines of its delegated authority. These errors can be corrected on rehearing.

Because each of Initiative #210’s changes to Colorado election system necessarily or properly connects to the measure’s primary objective of modernizing the voting system to expand voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters, the Title Board’s initial ruling was in error and it should reverse its determination on rehearing.

## **II. Argument**

### ***a. Initiative #210 has a single subject because each of its provisions are necessarily or properly connected.***

During the hearing, the Title Board’s chief concern appeared to be that Initiative #210’s provision allowing any elector, regardless of political party affiliation or non-affiliation, to sign the petition for any candidate specific to the voter’s registration to access the all-candidate primary election ballot constituted a separate subject because it altered the relevance of political parties in the system by theoretically allowing a candidate affiliated with one political party to access the all-candidate primary election ballot by gathering signatures from voters affiliated with a different political party. *See* Title Board Meeting at 3:45:20; 3:49:30 (Mar. 20, 2024) (identifying the change in the political party’s role as a second subject); *Id.* at 6:49:35 (incorporating discussion of prior measures into discussion on declining jurisdiction on Initiative #210).<sup>3</sup> But allowing any voter, regardless of political affiliation or non-affiliation, to sign candidate petitions is necessarily or properly connected to the measure’s single subject of creating a voting process that more accurately represents the will of a majority of voters. Ballot access is one step in the process of voters selecting which candidates they want to see on their ballot and then electing a candidate to hold office.

As required by C.R.S. § 1-40-106.5(1)(a), citizen-initiated ballot measures are “limited to a single subject.” This requirement aims “[t]o forbid the treatment of incongruous subjects in the same measure, especially 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 secure the enactment of measures that could not be carried upon their own merits.” C.R.S. § 1-40-106.5(1)(e)(I). The Colorado Supreme Court has further explained that

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<sup>3</sup> Proponents note that one Title Board member voiced concerns about Initiative #210’s adoption of both the all-candidate primary election and instant runoff voting in the general election, but two Board members disagreed that the features violated the single subject requirement.

“[a] proposed initiative violates this requirement when it ‘relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.’” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative “Public Rights in Waters II,”* 898 P.2d 1076, 1078-79 (Colo. 1995)). By contrast, “a proposed measure that ‘tends to effect or carry out one general objective or purpose presents only one subject.’” *Id.* (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999)). Put another way, “[s]o long as the proposal encompasses a single subject, even if the subject is general, it does not violate the constitution.” *Id.*

Initiative #210 is a narrowly tailored measure intended to modernize Colorado’s election system by further empowering voters. As explained above, Initiative #210 effectuates its single and distinct purpose by making purposeful changes to the voting system in order to expand voter choice at multiple steps of the election process to elect candidates who reflect the will of the majority of voters. Which candidates voters wish to see on their primary election ballot is a necessary corollary to the winnowing of candidates through the elections process and thus is as important and critical to the voting process as how candidates are elected to office. These elements bookend the voting process to expand voter choice. And while they might target different steps of the electoral process, they each are necessary or proper to Initiative #210’s uniting objective. As explained by the Colorado Supreme Court, “[m]ultiple 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,” but “[s]uch analysis . . . is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado’s constitution.” *Matter of Title, Ballot Title, & Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998).

Indeed, given that Initiative #210 creates a novel all-candidate primary election, the Proponents must establish the process by which candidates access the all-candidate primary election ballot. Colorado’s current Election Code does not suffice because currently major political party candidates must advance to the general election ballot through partisan primary elections while minor party and unaffiliated candidates may access the general election ballot through other means. Silence on the question would create an unworkable statutory scheme. Thus, by allowing all registered electors to sign any petition for a candidate seeking access to the all-candidate primary election ballot, the Proponents created a ballot access mechanism that, above all else, promoted the input of the largest pool of electors to motivate candidates to seek support from a larger pool of electors. This mechanism is connected to the measure’s single subject and the Proponent’s objective.

In fact, Initiative #210’s treatment of signatures on petitions is similar to provisions that have previously passed single-subject scrutiny. For example, Proposed Initiative #112 for the 2013-2014 election cycle, which was deemed to have a single subject and for which the Title Board set a title, implemented a “two round” voting process with the second round incorporating instant runoff voting. It also specified a petition process under which candidates could access the first round election ballots, established recount provisions for the first round election, and changed the timing of the surveying of returns by the canvass board and compilation of the returns by the Colorado Secretary of State. Critically, under Proposed Initiative #112, through a web-based portal, electors would have received access to “a list of *all* the candidates in their district circulating

petitions” and would have been given the opportunity to “indicate which petitions they wish[ed] to sign.” (Emphasis added). There, no different from here, the provisions of the measure relating to which petitions electors were allowed to sign carried out the measure’s general objective and were, thus, necessarily and properly connected. *See In re Title, Ballot Title, and Submission Clause, & Summary for 2005-2006 #73*, 135 P.3d 736, 737 (Colo. 2006) (“[T]o pass constitutional muster, a proposed initiative must concern only one subject—that is to say it must effect or carry out only one general object or purpose.”).

Because Initiative #210’s provision allowing any elector, regardless of political party affiliation or non-affiliation, is thus connected to the other provisions of the measure, the Title Board should reverse its initial decision on rehearing and find that the measure contains a single subject.

***b. Initiative #210’s allowance of any voter to sign any petition for a candidate for the all-candidate primary election is neither misleading nor surreptitious.***

The Title Board’s apparent concern that Initiative #210’s allowance of any voter to sign any petition for a candidate for the all-candidate primary election would be misleading or surreptitious to voters, or would be revealed as coiled in the folds, is unwarranted. In addition to ensuring that the provisions of a measure are necessarily or properly connected, the single-subject requirement also prevents “surreptitious measures . . . to prevent surprise and fraud from being practiced upon voters.” C.R.S. § 1-40-106.5(1)(e)(II). The Colorado Supreme Court has explained that in reviewing whether a measure encompasses more than a single subject, the focus is property on the two “evils” the single subject requirement ails to prevent: logrolling and surprise. *See Matter of Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1224 (Colo. 2021).

Here, there is no indication that the measure seeks to garner support from various voter factions with conflicting goals. *See Id.* Indeed, as Title Board member Deputy Director Christy Chase noted during the Title Board hearing, the intent of the measure is to enable more of a variety of voters to engage in the petition process and advance the candidate they want onto the ballot. *See Title Board Meeting at 3:46:50* (Mar. 20, 2024). This change is part and parcel to the Proponent’s single subject. Therefore, there is no risk of logrolling due to the nature of the allowing any elector to sign the petition of any candidate. The entire thrust of Initiative #210 is to involve the voices and choices of more voters during the various stages of the electoral process. This element is not distinct from that effort and therefore voters are unlikely to favor one aspect of Initiative #210 and not this element.

Moreover, there is no indication that voters would be surprised or misled by a provision that allows any voter to sign the petition of any candidate to access the all-candidate primary election ballot. Voters reading or researching the measure would naturally inquire how the candidates are to get their names onto the all-candidate primary election ballot. This natural progression indicates the interrelated nature of the question. *See In re 2021-2022 #16*, 489 P.3d at 1223–24 (tying together provisions of a measure under its “general objective” based on the “natural next question”). Had the Title Board properly found title, it would have been appropriate to include language in the title briefly describing that Initiative #210 allows any elector, regardless of political party affiliation or non-affiliation, to sign any petition for a candidate to access the all-

candidate primary election ballot. The risk of voter surprise—or said differently that an element of the measure is coiled in the folds—is not present.<sup>4</sup>

Because Initiative #210’s allowance of any voter to sign any petition for a candidate to access the all-candidate primary election is neither surreptitious nor misleading, it is not a provision that the single-subject requirement must avert, and the Title Board’s ruling should be reversed.

***c. The Title Board erred by failing to liberally construe the single-subject requirement.***

By admitting on the record that whether Initiative #210 encompassed a single subject was a close call, the Title Board failed to follow its statutory obligation to construe the single-subject requirement liberally when it failed to set a title. *See, e.g.*, Title Board Meeting at 1:37:20 (Mar. 20, 2024) (noting that the Board was going round and around about whether Proponents’ measures reflected a single subject); *id.* at 1:54:10 (stating that the Board was going in circles). The statutory single-subject requirement, per its own plain language, must be “liberally construed.” C.R.S. § 1-40-106.5(2). The purpose of this generous standard is to both “avert the practices against which [the single-subject requirement is] aimed at and, at the same time, to preserve and protect the right of initiative and referendum.” *Id.* And the Colorado Supreme Court has further affirmed, that “[t]he single-subject requirement must be liberally construed . . . so as not to impose undue restrictions on the initiative process.” *In re 1997-1998 No. 74*, 962 P.2d at 929. Importantly, this means the task is not “to speculate on the motivations of initiative proponents or to construe the legal effect of the initiative as if it were law.” *In re Title, Ballot Title and Submission Clause, & Summary for 1999-2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000). As noted above, “[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until and initiative measure has been broken into pieces.” *In 1997-1998 No. 74*, 962 P.2d at 929.

And yet, rather than liberally construe the single subject requirement as mandated, here, the Title Board plainly stated that it viewed close calls as indicators that no single subject existed. *See* Title Board Meeting at 1:37:20 (Mar. 20, 2024); *id.* at 1:54:10. This was an incorrect statement and application of the law and merits reversal of the Title Board’s single subject determination for Initiative #210.

***d. The Title Board overstepped its jurisdiction by speculating as to the effect of the measure.***

To arrive at its determination that Initiative #210 did not meet the single subject requirement, the Title Board strayed beyond its jurisdiction and considered both the effect of the measure on the political parties and whether voters would be confused by the implications of the measure. First, as Title Board Member Deputy Director Chase commented, the Board’s focus on the consequences to a political party’s power due to Initiative #210’s allowance of any voter to sign the petition for any candidate to access the all-candidate primary election ballot does not fall under the Board’s authority to consider single subject. *See* Title Board Meeting at 3:46:50 (Mar.

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<sup>4</sup> Again, as noted above, Initiative #210 does not change a political party’s option to place a candidate on the all-candidate primary election ballot by assembly. Allowing any voter to sign a petition for a candidate specific to their electoral district is simply one way that candidates may get on the all-candidate primary election ballot.

20, 2024). It is not the Board's task "to speculate on the motivations of initiative proponents or to construe the legal effect of the initiative as if it were law." *In re Tile, Ballot Title & Submission Clause and Summary for 1999-2000 No. 200A*, 992 P.2d 27, 31 (Colo. 2000). Here, the Title Board looked beyond the text and objective of the measure and gauged its secondary effects. This step was improper. Because the Title Board strayed from its mandate, the Title Board's finding should be reversed and single subject should be found. There is a direct connection between Initiative #210's provision regarding which electors are eligible to sign petitions of candidates seeking access to the all-candidate primary election and the other provisions of the measure.

Relatedly, the Title Board speculated as to whether voters would be confused by the hypothetical outcome of Initiative #210 that a candidate who identified on the all-candidate primary election ballot as being from a certain major political party could theoretically gain access to that ballot by collecting signatures from electors affiliated with a different major political party. *See* Title Board Meeting at 3:24:15 (Mar. 20, 2024). Not only is such speculation construing the potential effects of the measure, but the United States Supreme Court has expressly rejected this same concern regarding voter confusion in a case involving Washington state's blanket primary election system. Of course, as Title Board indicated and Proponents recognize, the constitutional question here is different. But when discussing this idea of a free-floating free of voter confusion, the Supreme Court reasoned that "our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 454 (2008) (quoting *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 220 (1986)). "There is simply no basis to presume that a well-informed electorate will interpret a candidates party-preference designation to mean that the candidate is the party's chosen nominee or representative or that the party associates with or approves of the candidate." *Id.* Therefore, Title Board based its second subject off of a fear that this country's highest Court has determined to be unfounded. The Board's ruling finding Initiative #210 to encompass a second subject should be reversed.

### **III. Conclusion**

For the reasons stated above, each of Initiative #210's provisions, including the provision allowing any eligible elector, regardless of political party affiliation or non-affiliation, to sign a petition for any candidate seeking access to the all-candidate primary election, necessarily or properly connects to the measure's primary objective of expanding voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters. Accordingly, the measure satisfies the liberally construed single-subject requirement of C.R.S. § 1-40-106.5, and the Proponents respectfully request that this Motion for Rehearing be granted and that a title be set at a rehearing held pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 27th day of March, 2024.

*/s/ David B. Meschke*

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