

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #197</p> <p>Petitioner: Linda Good f/k/a Linda Bissett,</p> <p>v.</p> <p>Respondents: Jason Bertolacci and Owen Alexander Clough,</p> <p>and</p> <p>Title Board: Theresa Conley, Christy Chase, Jennifer Sullivan</p>	
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<p>RESPONDENTS' OPENING BRIEF</p>	

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 3,229 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/ Rosa Baum

TABLE OF CONTENTS

	Page(s)
ISSUE PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
STANDARD OF REVIEW.....	5
ARGUMENT	6
I. Initiative #197 encompasses a single subject.	6
A. Proponents’ selection of a ranked voting method for elections to fill vacancies in the General Assembly is an implementing measure of Initiative #197.....	7
B. Ms. Good’s interpretation that the state constitution requires candidates be elected based off a plurality of the vote is both overly narrow and incorrect.	11
C. Initiative #197’s components will not surprise Colorado voters.	13
II. Title Board set a clear and concise title that accurately describes Initiative #197.....	15
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74, 962 P.2d 927 (Colo. 1998)</i>	5, 10
<i>In re Title, Ballot Title and Submission Clause and Summary for 1999–2000 No. 200A, 992 P.2d 27 (Colo. 2000)</i>	8
<i>Baber v. Dunlap, 376 F. Supp. 3d 125 (D. Maine 2018)</i>	12
<i>In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45, 234 P.3d 642 (Colo. 2010)</i>	5
<i>In re Title, Ballot Title & Submission Clause for 2015–2016 #73, 369 P.3d 565 (Colo. 2016)</i>	6, 15, 17
<i>In re Title, Ballot Title & Submission Clause for 2017–2018 #4, 395 P.3d 318 (Colo. 2017)</i>	6
<i>Matter of Title, Ballot Title, & Submission Clause for 2021-2022 #16, 489 P.3d 1217 (Colo. 2021)</i>	6, 7, 9, 10, 11, 14
<i>In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256, 12 P.3d 246 (Colo. 2000)</i>	7
<i>Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89, 328 P.3d 172 (Colo. 2014)</i>	5, 13
<i>Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315, 500 P.3d 363 (Colo. 2020)</i>	6, 9
<i>Wesberry v. Sanders, 376 U.S. 1 (1964)</i>	12

Constitutional Provisions

Colo. Const., art. IV, § 3	11
Colo. Const. art. V, § 1(5.5)	15
Colo. Const. art. V, § 2(3)	16
Colo. Const. art. VII.....	12

Statutes

C.R.S. § 1-40-106(3)(b).....	16
C.R.S. § 1-40-106.5(2)	5
C.R.S. § 1-40-107(2)	1, 5
C.R.S. § 1-7-1003	8, 13

Other Authorities

<i>How Ranked Choice Voting Survives the 'One Person, One Vote' Challenge</i> , Fair Vote (Dec. 5, 2018)	12
Richard H. Pildes & G. Michael Parsons, <i>The Legality of Ranked-Choice Voting</i> , CALIF. L. REV. 1773, 1781-84 (2021)	10
Title Board Hearing (March 6, 2024)	14
Trish Zornio, <i>Zornio: Colorado's Vacancy Committees are Undemocratic. But What's the Alternative?</i> , The Colorado Sun (Jan. 8, 2024)	2

Respondents Jason Bertolacci and Owen Alexander Clough, the proponents of Proposed Initiative 2023-2024 #197 (collectively “Respondent Proponents”), through undersigned counsel, submit their Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2023-2024 #197 (unofficially captioned “Elections to Fill Vacancies in the General Assembly”).

ISSUE PRESENTED FOR REVIEW¹

- A. Whether the Title Board erred in finding that Initiative #197 satisfies the single-subject requirement for citizen-initiated ballot measures, and specifically that Initiative #197’s feature that would require a ranked voting method in elections to fill vacancies in the state legislature is not a second subject.

STATEMENT OF THE CASE

Petitioner Linda Good brings this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal from a decision of the Ballot

¹ The following issue presented for appeal reframes the three issues in the “Grounds for Appeal” in Ms. Good’s Petition for Review. Specifically, Ms. Good’s second and third issues are subparts of the first issue because they both address whether requiring a ranked voting method be used in elections to fill vacancies in the state legislature is an impermissible second subject.

Title Setting Board (“Title Board”) to set a title on Proposed Initiative 2023-2024 #197 (“Initiative #197” or “the Initiative”).

Initiative #197 is one of several measures that Respondent Proponents have proposed through the citizen initiative process to modernize Colorado’s election process so that voters, including unaffiliated voters, are allotted greater participation in electing Colorado’s federal and state elected officials so that these officials are elected based on the fundamental precept of the will of a majority of the people. Initiative #197 addresses one specific ill of the current election system: Political party vacancy committees, which consist of a small number of party insiders, select approximately one-third of the members of the Colorado General Assembly, leaving a significant percentage of Colorado voters without a direct say in selecting their representative to the state legislature.² The Initiative presents one potential solution to the problem by eliminating the current political party appointment

² See Trish Zornio, *Zornio: Colorado’s Vacancy Committees are Undemocratic. But What’s the Alternative?*, The Colorado Sun (Jan. 8, 2024) available at <https://coloradosun.com/2024/01/08/colorado-vacancy-legislature-opinion-zornio/>

process for filling a vacant seat in the General Assembly caused by the death or resignation of a member, and instead establishing an election to fill that vacancy.³

At its March 6, 2024 hearing, the Title Board voted 3-0 that Initiative #197 constituted a single subject and then set a title for the Initiative. When asked again at the Initiative's March 20, 2024 rehearing, the Board voted 3-0 to deny Ms. Good's motion for rehearing. Proponents now ask this Court to affirm the Title Board.

³ Other measures proposed by Respondent Proponents focus, for example, on the broader process to elect candidates. These measures would give 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, and implement instant runoff voting in the general election, providing voters the opportunity to rank the candidates by preference. The latter feature is critical to prevent the undesired potential outcome of electing a candidate who received just 26% of the vote. These measures are not before the Court in this appeal. Nevertheless, Initiative #197 and these other measures all advance Respondent Proponents' central purpose: expanding voter choice to elect candidates who better represent the will of a majority of the voters.

SUMMARY OF THE ARGUMENT

The Title Board correctly identified a single subject for Initiative #197, determined it therefore had jurisdiction over the Initiative, and set a brief and comprehensive title for the Initiative. In her Petition for Review to this Court, Ms. Good lists three issues, but each can be distilled to one argument: that Initiative #197's inclusion of implementing a ranked voting method—as opposed to a single choice voting method, where voters mark one candidate per office on their ballot—for filling vacancies in the Colorado General Assembly constitutes a second subject.

Based on her grounds for appeal, Ms. Good presents an overly narrow interpretation of the state constitutional mandates governing citizen-initiated ballot measures and elections in general. First, Initiative #197's selection of a ranked voting method for conducting elections to fill vacancies in the General Assembly is an implementing provision that does not frustrate single subject. Second, the state constitution does not require that the winning candidate in an election need only receive a plurality of the votes cast in the relevant election. And finally, Initiative #197 is a straightforward measure with a clear and concise title that is

unlikely to cause voter surprise or confusion. Ultimately, each element of Initiative #197 falls under and contributes to its single subject: filling vacancies in the state legislature by voters through an election.

Therefore, Respondent Proponents respectfully request that this Court affirm the Title Board's single subject determination and the clear title it set.

STANDARD OF REVIEW

This Court is vested with the authority to review the rulings of the Title Board. C.R.S. § 1-40-107(2). As part of this review, this Court “employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board’s action.” *Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) (quoting *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010)) (alteration in original). The statutory single-subject requirement, per its own plain language, must be “liberally construed.” C.R.S. § 1-40-106.5(2). Maintaining this liberal approach to the requirement is critical “so as not to impose undue restrictions on the initiative process.” *Matter of Title, Ballot Title and Submission Clause*,

Summary Clause for 1997-1998 No. 74, 962 P.2d 927, 929 (Colo. 1998). Therefore, this Court has “held repeatedly that where a proposed initiative ‘tends to effect or to carry out one general objective or purpose,’ it presents only one subject.” *Matter of Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1221 (Colo. 2021) (quoting *In re Title, Ballot Title & Submission Clause for 2017–2018 #4*, 395 P.3d 318, 321 (Colo. 2017)).

ARGUMENT

I. Initiative #197 encompasses a single subject.

“[A]n initiative will not be deemed to violate the single subject requirement merely because it spells out details relating to its implementation.” *Id.* (quoting *Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315*, 500 P.3d 363, 367 (Colo. 2020)). Rather, “an initiative’s subject matter must be necessarily and properly connected,” which occurs “[w]hen an initiative tends to effectuate one general objective or purpose.” *In re Title, Ballot Title & Submission Clause for 2015–2016 #73*, 369 P.3d 565, 568 (Colo. 2016). In reviewing whether a measure encompasses more than a single subject, courts

assess whether the initiative presents either of the two “evils” the single subject requirement aims to prevent: logrolling and surprise. *See In re 2021-2022 #16*, 489 P.3d at 1224.

Here, the Respondent Proponents’ choice to have a vacancy filled by an election using a ranked voting method is an implementing aspect that has a necessary or proper connection to their common objective, and neither of the two “evils” are present.

A. Proponents’ selection of a ranked voting method for elections to fill vacancies in the General Assembly is an implementing measure of Initiative #197.

Initiative #197 creates a new process for voters to elect candidates to fill vacancies created by the death or resignation of a General Assembly member. Because such vacancies are currently filled by political party vacancy committees, Colorado statute does not currently have a method for filling these vacancies through an election. Therefore, part of Respondent Proponents’ task in Initiative #197 was to outline the administration of these new elections. Respondent Proponents’ policy decision to select a ranked voting method to conduct these elections is one of these elements. *See In re Title, Ballot Title and Submission Clause*,

and Summary for 1999-00 #256, 12 P.3d 246, 254 (Colo. 2000) (“We have never held that just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it necessarily violates the single-subject requirement. It is enough that the provisions of a proposal are connected.”).

The inclusion of this implementing provision does not frustrate single subject. *See In re Title, Ballot Title and Submission Clause and Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000) (“Implementation details that are ‘directly tied’ to the initiative’s ‘central focus’ do not constitute a separate subject.”). As part and parcel to establishing this new election, Respondent Proponents faced the decision of how the election would be administered: for example, whether it would be by a single choice voting method where candidates who receive a plurality are elected or by a ranked voting method. Indeed, Colorado’s system currently embraces both options. *See, e.g.*, C.R.S. § 1-7-1003 (providing for instant runoff voting in municipal elections). Taken from a different perspective, a logical question from a voter researching Initiative #197 and the new election it establishes would be how election

is to be administered. Proponent Respondents' decision to implement a ranked voting method provides an answer to this natural follow-up question. *See In re 2021–2022 #16*, 489 P.3d at 1223 (identifying as an implementing provision an element that answered a “natural next question” from a hypothetical voter).

Additionally, because the thrust of Initiative #197 is to shift the power of who decides which candidate will fill vacancies in the General Assembly from a small number of political party insiders to the many, Respondent Proponents' selection of a ranked voting method is a directly tied administrative feature for Initiative #197. *See In re 2019-2020 #315*, 500 P.3d at 368 (classifying provisions related to the creation *and administration* of an initiative's single subject as “implementing provisions”). Indeed, the use of a ranked voting method is central to Respondent Proponents' goal of increasing voter participation in elections so that officials are elected pursuant to the will of a majority of those voting. Absent using such a method in the vacancy election, winning candidates could receive less (and potentially significantly less) than 50 percent of the vote, and a different (losing) candidate could have more

broad support from voters. *See* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CALIF. L. REV. 1773, 1781–84 (2021) (explaining the negative qualities of single choice voting, such as vote splitting and spoilers, and how ranked choice voting methods solve those issues). The use of a ranked voting method ensures that the candidate elected to fill the vacancy has support from a majority of votes. *Id.* at 1801, 1818–25.

This Court has recognized that “[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction,” but that is not the appropriate exercise under single subject review. *In re 2021-2022 #16*, 489 P.3d at 1223 (quoting *In re 1997–1998 No. 74*, 962 P.2d at 929). Indeed, Ms. Good’s approach would likely require that Respondent Proponents file three separate measures to implement their single subject: one to do away with the political vacancy committee appointment process, a second to establish elections to fill vacancies, and a third to specify that a ranked voting method be used during those elections. But that would be unworkable. If the first passed without the others, there would be no

method to fill vacancies when they arose. If the second and/or third passed without the first, Colorado would employ various ways of filling vacancies in the general election without specifying which method should be utilized at any given time. And if the first two passed and the latter did not, Colorado statute would not provide how those elections are to be run. Therefore, each of Initiative #197's elements is an important component of the measure and carries out its general objective and purpose. *See In re #16*, 489 P.3d at 1221.

B. Ms. Good's interpretation that the state constitution requires candidates be elected based off a plurality of the vote is both overly narrow and incorrect.

The Colorado Constitution does not require that elections for state legislators be conducted by single choice voting, as Ms. Good appears to argue. Rather, the constitution specifies that the candidate or joint candidates *for state offices* with the "highest number of votes . . . shall be declared duly elected." Colo. Const. art. IV, § 3. Initiative #197 does not contravene this requirement because no state offices are effected.

Initiative #197 requires that the election to appoint a person to fill a vacancy in the *General Assembly* be conducted using a ranked voting

method. And as stated in the Initiative, “[n]othing in this [measure] shall limit the authority of the general assembly to pass laws regarding suffrage and elections as provided in article VII of the state constitution.” Therefore, the Initiative merely requires that the newly established election be held using any one of the various methods of ranked voting. For example, the relevant Colorado governing bodies could select instant runoff voting, which is a type of ranked voting commonly used when there is a single winner.⁴ But even if the Initiative did affect state offices in the executive department, to which article IV applies, the method chosen

⁴ Under ranked voting methods, voters rank candidates in order of preference as part of their one 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”). Voters do not vote multiple times in potential violation of the fundamental 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”).

would elect the candidate or candidates receiving the highest number of votes in the last round of the tabulation or ranked voting tally.

This Court need look no further than Colorado's own statutory provisions on ranked voting in municipal elections to see that ranked voting does not alter the fundamental concept that the candidate or candidates with the highest number of votes is elected. *See* C.R.S. § 1-7-1003(3)(a) ("The candidate having the greatest number of votes shall be declared the winner."). Thus, Ms. Good's argument here creates a strawman against which to levy a concern. Initiative #197 does not offend the state constitution's requirement that the candidate or candidates for state offices with the highest number of votes is elected.

C. Initiative #197's components will not surprise Colorado voters.

Initiative #197 does not risk impermissibly surprising voters, as Ms. Good suggests. As shown above, each of the Initiative's elements "relates to the same subject" of filling vacancies in the state legislature by voters through an election. *In re 2013–2014 #89*, 328 P.3d at 178. Additionally, its "plain language" unambiguously proposes" the establishment of an election by a ranked voting method to fill vacancies,

and “the proposal is not particularly lengthy or complex.” *In re 2021–2022 #16*, 489 P.3d at 1224 (quoting *Id.*). Indeed, as observed by the Title Board, Initiative #197 is “simple.” See Title Board Hearing at 6:05:50 (March 6, 2024), available at https://csos.granicus.com/player/clip/434?view_id=1&redirect=true. There is no reason to believe that voters would be confused by the policy Initiative #197 proposes.

Moreover, Initiative #197’s title, as set by the Title Board, describes the Initiative’s operative provisions that replace the current process of using vacancy committees with an election using a ranked voting method. As more fully analyzed below, voters will not be surprised by the contents of Initiative #197 because the Title Board drafted a clear and concise title that alerts any voter to Initiative #197’s contents. Thus, whether a voter looks to the title or the Initiative itself, they will not be confused nor surprised at the Initiative’s impact because of the simplicity and clarity with which both are written.

II. Title Board set a clear and concise title that accurately describes Initiative #197.

Initiative #197's title clearly expresses the measure's single subject.

See Colo. Const. art. V, § 1(5.5). The Title Board affixed the following submission clause and title to Initiative #197:

Shall there be a change to the Colorado Revised Statutes concerning filling a vacancy in the Colorado legislature through a vacancy election instead of a political party vacancy committee appointment, and, in connection therewith, requiring the vacancy election to be held as soon as possible after the vacancy has occurred or during a November even-year election and to be conducted by ranked voting; requiring that the candidates for the vacant position be members of the same political party as the vacating legislator and allowing any eligible voter to participate in the vacancy election; and requiring the Colorado secretary of state to develop rules on how candidates petition onto the vacancy election ballot?

Whether or not a voter is familiar with Colorado's electoral process, that voter will be able "to determine intelligently whether to support or oppose [Initiative #197]." *In re 2015-2016 #73*, 369 P.3d at 568.

First, the title plainly states Respondent Proponents' single subject to establish an election to fill a General Assembly vacancy and indicates the change from the prior system. Therefore, in this opening provision, a voter learns what would result from passage of the Initiative and how that changes the current process.

The second clause spells out the timing of the election and its administration: by a ranked voting method. In other words, once the voter understands that Initiative #197 would establish an election to fill a vacancy in the General Assembly, the title alerts them to the method in which that election would be conducted.

Third, the measure alerts a voter to the restrictions on who is eligible to fill that seat, as prescribed by the state constitution. *See* Colo. const. art. V, § 2(3).

And finally, the title informs a voter that the Secretary of State shall be responsible for promulgating rules on candidate access to the ballot. In setting this title, the Title Board avoided any construction or language “for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear.” C.R.S. § 1-40-106 (3)(b).

In learning what Initiative #197 seeks to do, Respondent Proponents anticipate that some voters—potentially including Ms. Good—may dislike the Initiative’s proposal or a portion thereof. But that criticism is distinct from whether the measure advances a single subject and whether a voter will know what a vote for or against the measure

means. Initiative #197's title clearly, correctly, and fairly expresses the intent and meaning of the measure. *See In re 2015-2016 #73*, 369 P.3d at 568.

CONCLUSION

Respondent Proponents respectfully ask this Court to affirm the Title Board's determination on jurisdiction to set title.

Respectfully submitted April 10, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2024, I electronically filed a true and correct copy of the foregoing **RESPONDENTS OPENING BRIEF** via the Colorado Courts E-Filing system which will send notification of such filing and service upon counsel of record and the foregoing was served via electronic mail to the *pro se Petitioner*:

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