SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 17, 2024 1:08 PM
Original Proceeding Pursuant to C.R.S. § 1-40-102(2) Appeal from the Ballot Title Board	
In the Matter of the Ballot Title of Proposed Initiative 2023-2024 #310 **MARK CHILSON,** Petitioner, v. **JASON BERTOLACCI and OWEN ALEXANDER CLOUGH,** and **COLORADO BALLOT TITLE SETTING BOARD**: Theresa Conley, Christy Chase, and Jennifer Sullivan **Respondents**.	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Scott E. Gessler (28944), Geoffrey N. Blue (32684), Gessler Blue LLC 7350 E. Progress Place, Suite 100 Greenwood Village, CO 80111 Tel. (303) 906-1050 or (720) 839-6637	Case Number: 2024SA157

PETITIONER'S ANSWER BRIEF

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).

X It contains 4,757 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.

X 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/Scott E. Gessler
Scott E. Gessler

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I. SUMMARY OF ARGUMENT

The Proponents and Title Board characterize the measure's single subject differently, but both efforts cannot overcome the two disparate subjects. "Expanding voter choice" is impermissibly broad and does not encompass the new primary election system. Adding a second part—that the measure ensures candidates are elected by a will of the majority—simply creates a compound subject, proving that the measure contains two subjects.

The Proponents discuss at length how the measure will be implemented, how it will affect election dynamics (such as a claim that it removes the "spoiler effect"), and why it is a good thing. But these are all public policy arguments that have little relevance to whether there is a necessary and proper connection between the repurposed primary election system and the new general election method for tallying votes.

At its core, the measure eliminates political party rights to control their nominating process, adding to that a new method for counting votes in the general election. Substantial U.S. Supreme Court case law shows that political party rights to nominate candidates are an important issue with constitutional ramifications, and those rights encompass considerations and have consequences separate from how votes are tallied.

Both the Proponents and Title Board speculate about voter attitudes and behavior to try to combine the two new systems into a single subject. The Proponents claim that the new all primary system will cause voters to wonder how the general election works, and that the instant runoff voting method provides a "natural" answer to that "follow-up question." This

purported voter curiosity does not provide a necessary and proper connection between the repurposed primary and the general election vote method. The Title Board argues that logrolling will not exist, speculating that voters who like instant runoff voting will likewise support the all-candidate primary—even though the all-candidate primary retains a first-past-the-post method for counting votes, the deficiencies of which Proponents claim to remedy in the general election.

Lastly, citations to other states decisions miss the mark. Alaska and Nevada use different single subject standards. Colorado would readily reject both states' lax, generalized standards. And the wild variance among single-subject characterizations—in Alaska it was "election reform," in Nevada it was "framework for elections"—shows how malleable single subject descriptions can be. Colorado has wisely rejected broad, general single-subject descriptions, and instead focused on whether a measure's provisions are necessarily and properly connected.

The title is incomplete and misleading because it avoids the very thing the measure creates for the general election: Instant runoff voting. The Proponents themselves use the term repeatedly and overwhelmingly in their *Opening Brief*, because it is the accurate and natural way to describe the measure's changes to the general election voting method. By contrast, "ranked voting" does not accurately describe the measure. A ranked voting method can mean many things, and instant runoff voting is but one form of "ranked voting." Colorado law recognizes that more than one ranked voting method exists, and frequently-

visited sources such as Ballotpedia and Wikipedia forthrightly state there are different ranked voting systems. To be sure, those sources are not impeachable. But voters regularly conduct internet searches to learn about topics, those sources are prominently displayed in search results, and the public frequently consults them. Any voter researching "ranked voting" will *still* be confused about the measure, because ranked voting can mean many things. Ranked voting is a broad term encompassing many systems for counting votes. By contrast, "instant runoff voting" in fact describes what the measure does.

Finally, instant runoff voting is new and complex, and it makes a profound change to the core process by which Coloradans govern themselves. The measure should at a minimum describe the central features of instant runoff voting—such as the elimination of candidates or the heavy reliance on secondary choices—rather than glossing over the subject by referring only to "ranked voting." When confronting weighty issues of how we structure our democratic processes, Colorado voters deserve more.

II. ARGUMENT

A. The proposed initiative's repurposed primary election system is a different subject than the way votes are tallied in the general election.

Standard of Review and Preservation of Issue.

In reviewing Title Board action, this Court "draw[s]" all legitimate presumptions in favor of the propriety of the Title Board's decision and will only

overturn the Board's decision in a clear case.[1] At the same time, this Court's "deference . . . is not absolute; [it has] an obligation to examine the initiative's wording to determine whether it comports with the constitutional requirements."[2] "In conducting this limited inquiry, [this Court] employ[s] the general rules of statutory construction and give[s] words and phrases their plain and ordinary meaning.[3]

The issue was preserved in Petitioner Chilson's *Motion for Rehearing*.

The Proponents and the Title Board describe the proposed measure's single subject differently. According to the Proponents, the single subject is "[t]o expand voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters."[4] The Title Board adopts the first half of that subject, but not the second. For it, the single subject is "expanding voter choice."[5]

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[1] *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 2017 CO 57, 20.

[2] *Fine v. Ward (In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128)*, 2022 CO 37, ¶ 9 (internal quotations and citations omitted).

[3] *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for 2015-2016 #132)*, 2016 CO 55, ¶ 11.

[4] *Respondents' Opening Brief* at 8.

[5] *The Title Board's Opening Brief* at 9.

"Expanding voter choice" has two major deficiencies. First, it is a vague, general purpose that cannot remedy the two separate subjects contained in the measure. Without substantively repeating prior arguments in the *Opening Brief*, this Court has rejected a general purpose of "liberaliz[ing] the procedure for initiative and referendum petitions,"[6] or "liberalizing the process by which initiative and referendum petitions are placed on the ballot,"[7] or "expanding the retail sale of alcohol beverages."[8] By the same reasoning, "expanding voter choice" is an impermissibly broad and vague general purpose that Proponents and the Title Board improperly cite in an effort to connect separate subjects. The focus should remain on whether the repurposed primary and the new method for tallying general election votes are necessarily and properly connected.

Second, the term "expanding voter choice" logically does not describe the new, instant runoff voting system for the general election. The general election instant runoff voting system is merely a new method for voting and tallying votes. This new

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[6] *Campbell v. Hobbs (In re Title, Ballot Title and Submission Clause for 2003-2004)*, 76 P.3d 460, 462 (Colo. 2003).

[7] *In re Title v. Respondents: Dennis Polhill & Douglas Campbell, Proponents, & Title*, 46 P.3d 438, 444-445 (Colo. 2002).

[8] *Fine v. Ward,* 2022 CO at ¶ 20.

procedure simply does not expand the electorate, it does not expand the number of candidates, and it therefore cannot affect or "expand" voter choices. If "expand voter choice" constitutes the single subject, then the general election instant runoff voting method is not part of it.

In an attempt to remedy this problem, the Proponents add a second part to their single-subject description; to elect candidates for certain federal and state offices who better represent the will of a majority of the voters. This second half of their description is consistent with their representations to the Title Board,[9] but it merely proves that the measure does not have *one* subject. Rather, the Proponents' "single" subject description in fact contains *two* subjects—expanding voter choice, and electing candidates that represent the will of the majority. By creating a compound description, the Proponents attempt to encompass the general election instant runoff system within a single purpose. But a compound cannot be a single purpose or "single subject."

Just as "expanding voter choice" does not include the general election method for tallying votes, the second description (will of majority of voters) cannot logically include the new primary system. By advancing four candidates to the general election, the primary election mathematically guarantees advancement to any candidate who

[9] *Opening Brief* at 20.

gets 25% of the vote plus one. And practically, it allows candidates to advance with well under 25% of the vote (unless there is a four-way tie). This is the antithesis of choosing a winner by majority vote.

Ultimately, the Proponents must include a compound subject description as the only way to join two separate subjects. A compound subject allows the Proponents to argue that the repurposed primary election falls within "expanding voter choice," and that the instant runoff voting system falls within the "majority of the will of voters." As matter of law, this Court should reject compound subjects like the one advanced by Proponents.

Much of the Proponents argument discusses how the proposed measure will work in practice and how measure will solve the many ills Colorado faces in its democratic processes. But one may not "speculate as to the measure's efficacy, or its practical or legal effects."[10]

For example, with respect to the primary election, the Proponents claim that the new *primary* "solves for a dilemma inherent in Colorado's current election system, which incentivizes candidates to appeal to a narrow base of voters to win their

[10] *Blake v. King (In re Title, Ballot Title, & Submission Clause 2007-2008 # 62)*, 184 P.3d 52, 60 (Colo. 2008); *see also Kemper v. Leahy (In re Title, Ballot Title)*, 2014 CO 66, ¶ 24 ("the Title Board may not speculate on the potential effects of the initiative if enacted").

primary elections."[11] This is irrelevant and as a practical matter dead wrong. A top-four contest incentivizes candidates to appeal to slightly more than one quarter of the primary electorate, in order to guarantee advancement. A candidate who gets 26% of the vote advances to the general election in the same way as a candidate who gets 60% of the vote, meaning there is little incentive in the primary election to win a majority. And Colorado's restrictive campaign finance laws create an incentive to husband resources and not expend additional time or money garnering votes that have no practical effect.

Proponents also claim that "[a]bsent the all-candidate primary, which allows four candidates to advance to the general election, voters would be stuck with having to choose between two viable candidates—one from each majority political party.[12] This is also irrelevant, and wrong. Minority party, unaffiliated, and write-in candidates all have ready access to the general election ballot, and the Proponents themselves admit that "under Colorado's current system, these candidates can directly access the general election ballot.[13] And all are "viable"—certainly just as viable as they would be in an instant runoff general election.

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[11] *Respondents' Opening Brief* at 8.

[12] *Id.* at 16.

[13] *Id.* at 25.

Separately, the Proponents also speculate about the purported positive effects of instant runoff voting in the general election, for example claiming that absent instant runoff voting, "[w]inning 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.[14] Yet instant runoff voting does produce candidates who win with less than 50 percent "of the vote"—when that phrase is used as commonly and universally understood to mean valid ballots cast by voters. A quick review of literature shows that the Oakland mayor in 2010 was declared the winner of an instant runoff voting election, with 51% of the vote, even though that candidate only won 53,897 votes out of 119,607 valid ballots cast. He was declared the winner after 13,667 voters did not make secondary or tertiary choices, making them non-voters in the new system.[15] Only in the new and often complex world of instant runoff voting would 53,897 out of 119,607 constitute a majority.

And the winning candidate does not necessarily have the broadest support. Indeed, when there are three or more strong candidates, instant runoff voting is

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[14] *Id.* at 14.

[15] RCV Results Report, Alameda County, California (November 19, 2010), https://www.acvote.org/acvote-assets/pdf/elections/2010/11022010/results/rcv/oakland/mayor/november-2-2010-pass-report-oakland-mayor.pdf (last visited May 16, 2024).

subject to the spoiler effect, and that counting method can produce a counterintuitive result where a candidate benefits from receiving *fewer* first-place votes, in order to influence who gets eliminated and how those votes are distributed. In fact, the spoiler effect and this exact dynamic took place in the August 2022 Alaska special election for U.S. House of Representatives.[16]

Petitioner does not intend this discussion to be a forum to show that instant runoff voting presents a bad system, or that Coloradans should vote against the proposed measure. Rather, the Proponents' arguments and applicable counter-arguments vividly demonstrate that the Proponents make multiple public policy arguments in which they predict how the instant runoff voting system will operate. This is no substitute for an analysis of the proposed measure's plain language, to determine whether the various provisions are necessarily and properly connected.

Eliminating political parties' right to control the nomination process for their standard-bearer is an important subject, separate and apart from how votes are tallied in the general election. Indeed, U.S. Supreme Court precedent recognizes the importance of political party rights to nominate candidates. "[A] political party has a

[16] Adam Graham-Squire and David McCune, "Ranked Choice Wackiness in Alaska" Math Horizons (Vol. 31, Issue 1 August 30, 2023), https://www.tandfonline.com/doi/full/10.1080/10724117.2023.2224675 (last visited May 16, 2024).

right to identify the people who constitute the association and to select a standard bearer who best represents the party's ideologies and preferences,"[17] and "[i]n no area is the political association's right to exclude more important than in the process of selecting its nominee."[18] Likewise, the court has recognized that a "direct party primary" constitutes a critical part of the overall election process, and that the state has an interest in protecting that party nomination process.[19] A political party's right to control its nominating process involves different legal, policy, and constitutional considerations than a new method for tallying general election votes. And changing that right has profound ramifications, separate and apart from how votes are tallied in a general election. Consequently, by repurposing primary election, the measure creates a second subject that is not necessarily and properly connected to how votes are counted in the general election.

Petitioner Chilson does not, in this case, argue that Colorado may not eliminate party primary nominations as a matter of federal constitutional law, or that proposed measure suffers from constitutional infirmities. Rather, a political party's right to

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[17] *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 224 (1989)(internal quotations and citations omitted).

[18] *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000).

[19] *Storer v. Brown*, 415 U.S. 724, 735 (1974).

nominate its standard bearer carries such importance that changing this right has constitutional ramifications involving the right of association, making it a separate subject.

In addition to arguing about effects of the new measure, the Proponents and Title Board rely upon unsubstantiated speculation about how voters will view the proposed measure. The Proponents speculate that an all-candidate primary somehow spurs voters to expect an instant runoff voting system. They argue that instant runoff voting is connected to the all-candidate primary because the all-candidate primary causes voters to "question" how a final candidate would be chosen, and instant runoff voting "provides an answer to this natural follow-up question."[20] A purported prediction about voter attitudes does not create a logical connection between the primary and general election. Put another way, speculation that voters would wonder about a general election does not create a necessary and proper connection between the new primary and the instant runoff voting system in the general election.

The Title Board also engages in similar unsubstantiated and illogical speculation. It argues that logrolling is unlikely to occur because "supporters of increasing voter choice through a ranked choice voting general election would be

[20] *Respondents' Opening Brief* at 18.

unlikely to want to maintain a first past-the-post partisan primary election."[21] They provide no supporting argument and no evidence for this sweeping claim. And this argument should not be taken seriously. The measure's new all-candidate primary in fact retains a first-past-the-post election, which the Proponents seek to eliminate and replace with the purportedly superior instant runoff voting system. Thus, people who support instant runoff voting would be skeptical of retaining a first-past-the-post primary system.

Finally, the Proponents seek support from other state courts that have held similar primary and instant runoff systems to be a single subject. But those courts have used much different standards and identified (and approved of) different "single subjects."

First is Alaska. In *Meyer v. Alaskans for Better Elections*,[22] the court confronted a ballot issue that created a new all-candidate primary, implemented instant runoff voting in the general election, and created new campaign finance disclosure and disclaimer requirements.[23] The court reasoned that all three topics fell under "election

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[21] *The Title Board's Opening Brief* at 9.

[22] *Meyer v. Alaskans for Better Elections*, 465 P.3d 477 (Alaska 2020).

[23] *Id.* at 498.

reform" because "[t]hey all relate[d] to the elections process and share[d] the common thread of reforming current election laws."[24] Setting aside the primary and general election provisions, it is unlikely that Colorado would ever follow Alaska's lead by treating campaign finance laws as part of the same subject that included primary and general election administration. Nor would Colorado accept "election reform" as a single subject. In short, Alaska's single subject standards are so lax, that anything involving elections may be combined under the subject of "election reform," provided it changes election law. Colorado's single-subject jurisprudence, developed through decades of experience, differs greatly from Alaska's. Accordingly, that state's lax standards have no precedential value in Colorado.

The same applies to Nevada. In *Helton v. Nevada Voters First PAC*[25] the court articulated the single subject as "the *framework* by which specified officeholders are presented to voters and elected," as opposed to the "*mechanics* of how voters vote."[26] This is a strange and artificial distinction. And according to the court, "this subject is not excessively broad given that the initiative's proposals only apply to the framework

[24] *Id.* at 499.

[25] *Helton v. Nevada Voters First PAC*, 512 P.3d 309 (Nev. 2022).

[26] *Id.* at 314 (emphasis in original).

of the election of partisan officeholders as defined in the initiative petition."[27] Again Colorado would likely reject the broad subject of "the framework of elections." And whereas Nevada looks to whether a proposed measure's provisions are "functionally related and germane to each other and the initiative's purpose or subject," Colorado instead uses looks to a necessary and proper connection. "Functionally related" can be exceedingly broad, since one need only define some plausible relation. And "germane" is likewise a broad term – far broader than "necessary" and "proper." Like Alaska, Nevada has very lenient single-subject standards that would not hold in Colorado.

Alaska and Nevada's initiatives also highlight Colorado's wisdom in its skeptical approach to broad, general subjects. Single subject descriptions are notoriously malleable. In Alaska, the subject was "election reform." In Nevada it was "the framework of elections." And in Colorado it is "expanding voter choice" so candidates "better represent the will of a majority of the voters." Three *very* similar initiatives, yet three much different subjects.

Petitioner Chilson submits that these sharp differences reveal a fundamental weakness flaw in Alaska and Nevada's approach. Those states accept exceedingly broad single-subjects at face value, which impermissibly all proponents to combine

[27] *Id.*

disparate subjects. Were the initiatives truly a single subject, the single subject could be easily articulated and focused. But instead, across three states the various proponents have landed upon generalized, yet wildly diverse, subjects. Fundamentally, these are attempts to make a connection where none logically exists. Colorado properly prohibits proponents from using broadly worded subjects to artificially manufacture a new single subject. Here, the new primary election system—particularly its elimination of the party nominating process—is not necessarily and properly connected to how votes are tallied in the general election.

B. "Instant Runoff Voting" is the name of the general election voting method. The title must use it. And describe it.

Standard of Review and Preservation of Issue.

The standard for setting a title is well established. The Title Board must "set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation . . . [but] the titles need not spell out every detail of a proposal."[28]

The issue was preserved in Petitioner Chilson's *Motion for Rehearing*.

The title and submission clause describes the general election as "election, allowing voters to rank candidates and adopting a ranked voting process . . ." It does

[28] *Bentley v. Mason*, 2016 CO 34 at ¶ 23.

not contain any more information for voters. This short phrase not accurately describe the initiative, and in fact is incomplete and misleading.

As noted in Petitioner's *Opening Brief*, one of the proponents forthrightly stated that use of the term "instant runoff voting" would make it far easier for voters to identify and look up the method of voting. This is consistent with the Proponents' actual behavior in their *Opening Brief*. There, they overwhelmingly use the phrase "instant runoff voting" to identify the new general election method. They use the phrase "instant runoff voting" 24 times, including an argument heading that refers to "instant runoff voting."[29] By comparison, they only use the phrase "ranked voting" six times, and "ranked choice voting" three times (plus two citations). In short, the Proponents themselves naturally (and accurately) use the term "instant runoff voting. They infrequently use "ranked voting," and to add to the confusion they sometimes refer to it as "ranked choice voting."

The Proponents argue that the "title explains how instant runoff voting works in easily understandable and succinct language." This is wrong. The title does *not* explain how instant runoff voting works. On the contrary the title's use of the phrase "ranked voting" is incomplete and misleading. Ranked voting refers to several types

[29] *Respondents' Opening Brief* at 16.

of voting systems. Colorado law itself defines "instant runoff voting" as "a ranked voting method used to select a single winter in a race,"[30] and the statutory provision regulating "ranked voting" refers to "ranked voting methods" in the plural.[31] Likewise, Colorado statute authorizes municipalities to "use a ranked voting method,"[32] and municipalities may choose a "procedure for counting ballots."[33] This approach recognizes that municipalities may choose one of several types of "ranked voting methods," of which instant runoff voting is but one. If a voter referred to Colorado statute to better understand "ranked voting," he or she would have no idea "how instant runoff voting works." Nor would that voter even know that ranked voting includes instant runoff voting.

An internet search for "ranked voting" would result in even more confusion. Frequently-used online resources forthrightly state that "[t]there are multiple forms of ranked-choice voting"[34] and that "[r]anked voting systems vary based on the ballot

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[30] C.R.S. § 1-1-104(19.7).

[31] C.R.S. § 1-7-1003.

[32] C.R.S. § 1-13.5-617(1).

[33] C.R.S. § 1-13.5-617(2).

[34] "Ranked-choice voting (RCV)," Ballotpedia, https://ballotpedia.org/Ranked-choice_voting_(RCV) (last visited May 16, 2024).

marking process, how preferences are tabulated and counted, . . . and whether voters are allowed to rank candidates equally."[35] And although instant runoff voting "is commonly referred to as "ranked-choice voting" in the United States . . . this can be slightly misleading since there are other forms of ranked voting."[36]

To be sure, online sources like Ballotpedia and Wikipedia can contain inaccuracies, but as a practical matter voters frequently use internet searches to research new or complex concepts. The current ballot title uses the term "ranked voting." Many Colorado voters will reasonably conduct an internet search on that term and then read the thorough, straightforward, and prominently displayed descriptions in Ballotpedia or Wikipedia. And those descriptions contain multiple types of ranked choice voting. Still, voters will have no idea that the measure implements instant runoff voting, or how that system even works.

Instead, confused voters who look into the matter more closely will learn about ranked voting methods different than instant runoff voting. The Borda Count method also allows voters to rank candidates. This voting tally adds up the total rankings for

[35] "Ranked voting" Wikipedia, https://en.wikipedia.org/wiki/Ranked_voting (last visited May 16, 2024).

[36] "Instant Runoff Voting" MIT Election Data Science Lab, https://electionlab.mit.edu/research/instant-runoff-voting (last visited May 16, 2024).

each candidate, and the candidate with the lowest (or highest, depending on the ranking method) overall score is the winner.[37] This method is used to select the Heisman Trophy winner[38] (perhaps a better-known election than any state governmental election), two legislative seats in Slovenia,[39] and elections in many universities.[40]

The Condorcet voting method also uses a ranked voting system, but this system pairs candidates' rankings against one another. The winner is the sole candidate who wins in every paired comparison. In fact, a bill defining, identifying, and authorizing this type of voting was introduced in the Vermont Legislature last year.[41]

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[37] *See, e.g.*, Tomas McIntee, "The Borda count" Medium (October 30, 2021), https://medium.com/basic-voting-theory/the-borda-count-9d4f15b4d20e, (last accessed May 16, 2024).

[38] Chris Huston, "Heisman Balloting: How it Works" (November 11, 2018), https://www.heisman.com/articles/heisman-balloting-how-it-works/ (last visited May 15, 2024).

[39] Dylan Difford, "How do elections in Slovenia work," Electoral Reform Society (April 21, 2022), https://www.electoral-reform.org.uk/how-do-elections-work-in-slovenia/ (last visited May 15, 2024).

[40] *See, e.g.*, "Ranked voting" Wikipedia, https://en.wikipedia.org/wiki/Ranked_voting (last visited May 16, 2024).

[41] Vermont House of Representatives, H.424, February 28, 2023, https://legislature.vermont.gov/bill/status/2024/H.424;

Ultimately, the *only* way a voter could understand that the ballot initiative implements "instant runoff voting" would be to wade through the proposed statutory language. In other words, the title fails to describe *the* central feature of the new, general-election voting system.

The Proponents claim that instant runoff voting is not a radically new system, citing Colorado statute.[42] But Colorado statute does not even mention "instant runoff voting." More importantly, actual voters in Colorado have almost no experience with instant runoff voting. The small towns of Telluride and Basalt have used instant runoff voting in a few municipal elections.[43] Boulder, for the first time, instituted instant runoff voting for the 2023 mayoral election. Aspen voters experimented with instant runoff voting in the 2009 mayoral election, but they overwhelmingly voted to discontinue it the next year.[44] In short, only a tiny fraction of Colorado voters have

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https://legislature.vermont.gov/Documents/2024/Docs/BILLS/H-0424/H-0424%20As%20Introduced.pdf (last visited May 15, 2024).

[42] *Respondents' Opening Brief* at 29.

[43] Mary Slosson, "Mayoral election to use instant runoff voting," Telluride Daily Planet (September 29, 2015).

[44] Aaron Hedge, "Aspen voters vote to ditch IRV," Aspen Times (November 3, 2010.)

even been exposed to instant runoff voting. This demonstrates that instant runoff voting is a new—and controversial—system.

This is why it is so important to have a ballot title that properly identifies the actual voting method proposed for future general elections. And it is important to describe the central features of the new general election voting system. When an initiative "adopts a legal standard that is new and likely to be controversial," the title should include "the new standard which will be of significance to all concerned with the issues surrounding the subject."[45]

The central features of instant runoff include the elimination of candidates and the critical importance of ranking all candidates (to avoid loss of a vote). The Proponents repeatedly discuss how their proposed measure is designed to obtain a candidate elected by a "majority," and to that end they repeatedly refer to the general election's new instant runoff voting system.[46] A central feature therefore includes how the new measure calculates votes, or voter participation. To be sure, the title need not articulate the entire complex implementation of instant runoff voting.[47] But this is a

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[45] *Matter of Proposed Initiative On Parental Notification of Abortions For Minors*, 794 P.2d 238, 241 (Colo. 1990).

[46] *See, e.g.*, *Respondents' Opening Brief* at 8.

[47] *See, e.g., In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000).

complex, new, and very consequential change in how Coloradans choose leaders and representatives. It goes to the very core of our democratic processes.

At a minimum, the title should describe the central features of instant runoff voting, so Colorado voters have at least a basic outline of what they are getting. As it stands now, the title refers only to the ability to "rank" votes and a "ranked voting" method. This does not identify instant runoff voting. It fails describe *any* feature of the profound and consequential change to the voting system. How votes are tallied is critical to determining who leads the state, and when confronted with such a new, far-reaching change in our fundamental election processes, Colorado voters deserve more.

Respectfully submitted this 17th day of May 2024,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, I electronically filed the foregoing with the Clerk of the Court using the CCES system, which notified all parties and their counsel of record.

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