SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 10, 2024 11:46 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 OPENING 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 5,110 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).

X **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.

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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B. The title refers to the general election system as a "ranked voting process" but never mentions "instant runoff voting" or describes how the instant runoff voting system changes the meaning of voter participation, or the definitions of "vote" or "voter." Does the title fail to describe the central features of the general election instant runoff voting system?

II. NATURE OF THE CASE

This case is an appeal of the Title Board's recent decision to set a title and submission clause for Proposed Ballot Initiative 2023-2024 #310. Petitioner Chilson appeals the Title Board's jurisdiction, arguing that the proposed initiative violates

Colorado's single subject requirement. He also appeals the title and submission clause, because they are incomplete and misleading.

Proponents Bertolacci and Clough (the "Proponents") submitted Proposed Initiative #310 to the General Assembly's Legislative Council Staff and Office of Legislative Legal Services ("OLLS") General Assembly on March 22, 2024.[1] The Legislative Council Staff and OLLS did not hold a review and comment session, but rather on March 27, 2024, issued a letter stating that they had no additional comments.[2]

On April 5, 2024, the Proponents submitted the measure to the Title Board, and on April 18, 2024, the Title Board, by a 2-1 vote, found that the measure contained a single subject and proceeded to set a title and submission clause. Petitioner Chilson filed a *Motion for Rehearing*, challenging both the Board's single subject determination, as well as the accuracy and completeness of the title and submission clause. Petitioner Chilson filed a motion for rehearing before the Title

[1] Proposed Initiative 2023-2024 #310, initial draft. Available at https://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%2523310.pdf. Last accessed May 10, 2024.

[2] Proposed Initiative 2023-2024 #310, filed with Title Board. Available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2023-2024/307-313ReviewCommentWaiverLetter.pdf. Last accessed May 10, 2024.

Board, which reconsidered the measure on April 26, 2024. The Board partially granted the motion for rehearing with respect to the ballot title, but it denied the motion with respect to single subject by a 2-1 vote. It also denied other aspects of Chilson's challenge to the title and submission clause.

At both the Title Board hearing on April 18, 2024, and the rehearing on April 26, 2024, the Proponents also submitted Proposed Initiatives 2023-2024 ##307, 308, and 309. Those initiatives were, in all material respects, identical to Proposed Initiative #310. During the hearing, all parties and the Title Board made extensive argument concerning Proposed Initiative #307, and then mostly incorporated their previous arguments and deliberations during the specific hearing for Proposed Initiative #310. For that reason, this Opening Brief will contain certain citations to argument and deliberation for Proposed Initiative #307, because those comments were explicitly referenced incorporated into the argument and deliberation for Proposed Initiative #310.[3]

Chilson timely appealed on May 2, 2024.

III. SUMMARY OF ARGUMENT

[3] Title Board Hearing, April 26, 2024, at 7:57:44. Available at https://csos.granicus.com/player/clip/458?view_id=1&redirect=true. Last accessed May 10, 2024.

The measure contains two subjects. First, it creates a new primary election process that changes the primary from an election to determine political party nominees to an election that narrows the number of candidates who can participate in the general election. Second, it creates a new instant runoff voting system for the general election. These two elections are not necessarily and properly connected. Each has a different purpose; the new primary election eliminates parties' ability to nominate general election candidates, and instead allows minor party and non-party candidates to compete with party candidates. Meanwhile, the general election creates a new system of voting and counting votes, and it arrives at a winner through multiple rounds of voting. As part of the new process, it redefines voter participation as those voters who not only vote for their preferred candidate, but who also make secondary and tertiary choices in the event their preferred candidate is eliminated.

Further, neither election is an implementing detail of the other. Each election can independently stand on its own, without the other. The instant runoff voting system does not depend on the new all-candidate primary, and vice-versa.

Prior cases demonstrate that the measure contains multiple subjects. The measure reallocates the powers and responsibilities of political parties, by eliminating their ability to nominate candidates for the general election. And it changes who participates in the general election, by excluding voters who fail to chose a second or

third candidate, if their preferred candidate is eliminated. This is a substantive change to political participation, not a procedural change to elections. Finally, it creates new political rights for minor party and non-party candidates by granting them the right to participate in primary elections.

The Proponents' articulated subject—to elect candidates according to the majority of the will of the voters—is a broad, general theme that cannot unify the two disparate election systems. Furthermore, that theme does not describe the purpose of the new primary election system, which is to change the primary from a political party nominating election to an election designed to winnow the number of candidates. The Court should reject this theme, just as it has rejected broad themes such as "depoliticizing redistricting," or "recall of government officers," or "liberalizing the process by which initiative and referendum petitions are placed on the ballot."

The proposed measure also forces voters to vote for or against two disparate subjects. Some may staunchly reject the elimination of the right for political parties to nominate candidates at a statewide election, yet nonetheless support instant runoff voting. Likewise, some voters may oppose instant runoff voting, yet support the elimination of political party primary elections.

And the proposed measure also contains many hidden surprises. It redefines the meanings of voter participation, "vote," "voter," as well as the concept of a

majority of votes. And it does this in a way that radically departs from a century and a half of Colorado state election procedures. In short, voters will be greatly surprised to learn about the radical changes hidden in the folds of instant runoff voting. And voters also be surprised to learn that measure changes the very purpose of primary elections, resulting in the loss of political parties' right to nominate their standard-bearers for the general election.

Finally, the title is also misleading. It cryptically uses the term "ranked voting method" to describe the instant runoff voting system in the general election. Not once does it mention "instant runoff voting," and it wholly fails to describe the other central features; that instant runoff voting establishes multiple rounds of voting, and that the system redefines the meaning of voter participation.

IV. STANDARD OF REVIEW AND PRESERVATION OF ISSUES

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.[4] At the same time, this Court's "deference . . . is not absolute; [it has] an obligation to examine the initiative's wording

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

to determine whether it comports with the constitutional requirements."[5] "In conducting this limited inquiry, [this Court] employ[s] the general rules of statutory construction and give words and phrases their plain and ordinary meaning.[6]

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

V. ARGUMENT

A. The measure contains two distinct subjects; revamping Colorado's primary election system and revamping the way votes are counted in Colorado's general elections.

The Title Board's decision holding that the measure contained a single subject was a very close call. At the rehearing on April 26, 2024, one board member (Christy Chase) unreservedly voted to find a single subject, and one board member (Lee Reichert) strongly opposed it. The third board member (Theresa Conley) voted to find a single subject; but even though she thought the measure was an integrated whole that formed a single subject, she nonetheless believed that "I think the

[5] *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).

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

argument that it's not is very strong."[7] Petitioner Chilson agrees that the argument against single subject is "very strong" and submits that a review of the plain language shows that the measure violates Colorado's single subject requirements.

1. The new primary system is not necessarily and properly connected to instant runoff voting in the general election.

In determining whether a measure meets single subject requirements, this Court has repeatedly held that "the subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous,"[8] that "an initiative's provisions must be necessarily and properly connected,"[9] and that "[t]o decide whether an initiative addresses a single subject, we ask if its provisions are necessarily and properly connected rather than disconnected or incongruous."[10] Here, the proposed initiative re-writes Colorado election law and contains the two distinct

[7] Title Board Hearing, April 26, 2024, at 3:47:58. Available at https://csos.granicus.com/player/clip/458?view_id=1&redirect=true. Last accessed May 10, 2024.

[8] *Bentley v. Mason (In re Title Ballot Title & Submission Clause for 2015-2016 #63)*, 2016 CO 34, ¶ 10 (internal citation and quotation omitted).

[9] *Fine v. Ward,* 2022 CO at ¶¶ 13, 23.

[10] *VanWinkle v. Sage (In re Title, Ballot Title & Submission Clause for 2021-2022 #1)*, 2021 CO 55, ¶ 13 (internal quote and citation omitted).

and separate provisions. These two provisions are not "necessarily and properly" connected.

First, the measure completely reworks the primary elections system. To this end, it redefines the very purpose of a primary. For nearly 150 years—ever since Colorado has been a state—primary elections have functioned as a way for political parties to choose a single standard-bearer for the general election. But the proposed measure changes that. It bluntly states that the new primary "does not serve to determine the nominee of a political party or political group but instead serves to narrow the number of candidates whose name [sic] will appear on the ballot at the general election."[11] To this end, the measure eliminates all party primary elections, replacing them with one primary election, on which all party-affiliated candidates and all unaffiliated candidates appear on the same ballot.[12] The measure also allows unaffiliated voters to petition on to the new primary ballot.[13] Finally, the new primary election allows the four candidates receiving the highest numbers of votes to advance

[11] Proposed C.R.S. § 1-4-101.5(2)(a).

[12] Proposed C.R.S. § 1-4-101.5(2).

[13] *Id.*

to the general election.[14] The measure retains Colorado's traditional voting method, in which each elector may cast one vote for a candidate.[15]

Separately, the measure creates a new, instant runoff voting system for the general election. Instant runoff voting represents a radical departure from any voting method ever used in Colorado. Specifically, it allows voters to cast a vote for the candidate of their choice, and then rank their votes for other candidates. Each vote is counted, and if no candidate receives a majority of votes, the candidate with the lowest number of votes is eliminated from the ballot. If a voter voted for an eliminated candidate, then that voter's second choice is counted. But if the voter did not make a second choice, then his or her ballot is not counted as a vote.[16]

If no candidate receives a majority after the third round, another candidate is eliminated and voters who voted for an eliminated candidate then have their third choices counted. But if the voter did not make a third choice, then that vote is not counted.

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[14] *Id.*

[15] *Id.*

[16] Proposed C.R.S. § 1-4-207.

Importantly, this system fundamentally differs not only from Colorado's traditional voting system, but also from the measure's proposed primary election system, in which each voter casts one vote.

For the general election, the measure also effectively re-defines "vote," "voter," and the concept of a majority of votes. Currently, a "voter" casts a "vote" when he or she casts a ballot with a choice for a candidate. But if a candidate does not receive a majority on the first round of an instant runoff system, the a "vote" only exists if a person voted for a non-eliminated candidate, or if the person made a second or tertiary choice. If a voter for an eliminated candidate did not make a second or tertiary choice, then their ballot doesn't count as a "vote", and they are not counted as a "voter" for that election.

Indeed, the Proponents were forthright about how the measure treated "votes" and "voter" in a fundamentally different way. As one Proponent testified, if a voter doesn't make a second choice (and their candidate is eliminated) then that voter does not participate in the election: "each time you go through another runoff, which is done, is done instantly in instant runoff voting, you have voters who have participated, and you have voters who haven't participated."[17] And "If they haven't

[17] Title Board Hearing, April 26, 2024, at 7:40:27. Available at https://csos.granicus.com/player/clip/458?view_id=1&redirect=true. Last accessed May 10, 2024.

voted for a candidate, it just means they haven't participated if they get to a point where their candidate is no longer in this election. [18]

Likewise, the measure fundamentally changes the concept of a majority of votes (or voters). Traditionally, if 1,000 people cast a vote, then a majority is 501 or more. But instant runoff voting redefines a majority to only mean people who voted for the winning candidate plus those whose votes were counted only because they made a second (or third) choice. Again, a proponent stated "That's why it is a majority. It is a majority of the votes that have turned out in that round or in that runoff."[19]

Bluntly put, the new general election instant runoff voting system is not necessarily or properly connected with the measure's rework of the primary election process. On one hand, the primary election process is designed to remove nominating authority from parties, allow non-party candidates to participate in the primary, winnow the field of candidates, and force all primary candidates to compete against one another in a single election. On the other hand, the general election instant runoff voting is designed to create a new approach to choosing a candidate, by redefining

[18] *Id.* at 7:41:18.

[19] *Id.*

what a vote is, redefining a voter, and redefining the concept of a majority of votes (or voters).

These two types of elections stand independently of one another. They are not necessarily connected, because one can easily separate the two without changing how each election operates, or what each election is designed to achieve. Nor are they properly connected. An instant runoff voting system in a general election is not logically connected to a primary election process by that removes nominating authority from political parties and instead creates a process of winnowing the number of candidates for a general election. Likewise, how the primary process works is immaterial to the instant runoff election's goal of creating a "majority" that lends legitimacy to the winner of the instant runoff election.

Three cases in particular demonstrate how the changes to the two elections form separate subjects.

First, in *Johnson v. Curry* the Court struck down a proposed initiative that created a new redistricting commission to redistrict state legislative districts and congressional districts. But that seemingly simple measure contained more than one subject, because: (1) "state legislative redistricting and congressional redistricting [were] distinct processes derived from distinct sources of constitutional authority and

governed by different standards;"[20] (2) by moving congressional redistricting authority from the legislature to a commission the measure "reallocated constitutional power;"[21] and (3) the measure required the Supreme Court Nominating Commission to appoint members to a new redistricting commission, which "fundamentally changed the role and mission" of that commission.[22]

Here, the general election procedures and primary election procedures are contained in two separate statutory provisions. To be sure, the authority is not constitutional. But functionally, the two sections are fundamentally different from one another, have much different statutory frameworks, and govern the critical aspects of choosing governmental leaders and elected representatives on the federal and state levels. Indeed, few topics rise to such importance.

Similar to the single-subject problems identified in *Johnson*, the proposed measure also reallocates the authority of political parties, by wholly eliminating their ability to choose their standard-bearers through an election open to all party members in the state. And the measure certainly changes the political parties' "role and

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[20] *Johnson v. Curry,* 2016 CO at ¶¶ 33, 30.

[21] *Id.* at ¶ 29.

[22] *Id.* at ¶ 25.

mission," by eliminating their ability to nominate candidates to the general election. Political parties are not unimportant entities. Rather, they are quasi-public institutions, heavily regulated by states and inextricably bound to state election processes,[23] that have served the role of building voting coalitions and nominating candidates for a century and a half. Political parties arguably occupy *the* central role in establishing political coalitions and state policy. The new primary process fundamentally alters the parties' role, which is a separate subject from how one establishes a "majority" of votes in the general election.

Second, in *Campbell v. Hobbs*, this Court found that the exclusion of attorneys from the initiative process constituted a second subject, because "exclusion from the political process is a substantive matter, not a procedural change to the petitions process."[24] Here, the new general election instant runoff voting system effectively excludes many voters who do not rank candidates. And it places voters who only like one candidate in an impossible position; they are forced to choose candidates whom they do not support, or else have their vote not counted due to the instant runoff

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[23] *Terry v. Adams*, 345 U.S. 461, 484 (1953); *Smith v. Allwright*, 321 U.S. 649, 663 (1944).

[24] *Campbell v. Hobbs (In re Title, Ballot Title and Submission Clause for 2003-2004)*, 76 P.3d 460, 463 (2003).

rules. As the Proponents admit, the new system treats voters who do not rank candidates (and whose first choice is eliminated) as not participating in the election. By changing what constitutes "participation" in an election, instant runoff voting excludes those voters who voted for a candidate, but who did not make a second or third choice. This change is not merely procedural. It constitutes a fundamental, substantive change to determining election participation.

Third, in *Hayes v. Spalding*, the Court found that extending recall rights to non-elected officials was a second subject, because it "expand[ed] recall to non-elected state and local officers."[25] Here, by creating a new, all-candidate primary, the measure expands the rights of unaffiliated candidates by allowing them to directly compete against party nominees in a single primary election.

2. The Proponents cannot save the measure by claiming a general theme of electing officials that better represent a majority.

Proponents cannot overcome single subject objections by claiming that a proposed initiative has a broad, general purpose. If a measure contains separate and unconnected purposes, it cannot by saved by an attempt "to characterize an initiative

[25] *Hayes v. Spalding (In re Title, Ballot Title, & Submission Clause for 2013-2014 #76)*, 2014 CO 52, ¶ 30.

under some overarching theme"[26] or "grouping the provisions . . . under a broad concept"[27] Similarly, proponents may not unite separate provisions by claiming the fall under "the same general area of the law."[28]

For example, this Court has rejected the following general, broad purposes as establishing a single subject:

1. A general purpose of "depoliticizing redistricting" when the measure created a new redistrict commission for both state legislative and congressional districts.[29]

2. A general purpose of "recall of government officers," when the measure created a new procedure for recalling elected officers as well as a new constitutional right to recall non-elected officers.[30]

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[26] *In re Title v. Respondents: Dennis Polhill & Douglas Campbell, Proponents, & Title*, 46 P.3d 438, 442 (Colo. 2002)

[27] *Court v. Pool (In re Initiative 1996-4)*, 916 P.2d 528, 532 (Colo. 1996); see also *Johnson v. Curry*, 2016 CO at ¶ 16.

[28] *Steadman v. Hindman (In re Ballot Title 1999-2000 #200A)*, 992 P.2d 27, 30 (Colo. 2000).

[29] *Johnson v. Curry*, 2016 CO at ¶ 22.

[30] *Hayes v. Spalding*, 2014 CO at ¶ 10.

3. A general purpose of "government revenue changes," when the measure contained procedures for adopting future initiative, as well as a $40 tax credit.[31]

4. A general purpose of "the qualifications of persons for judicial office," when the measure changed judicial qualifications and also, *inter alia*, set the permissible number of judges in each district and changed Denver's ability to appoint county judges.[32]

5. A general purpose to "liberalize the procedure for initiative and referendum petitions" when the measure contained various procedures for petitions, but also barred attorneys from participating in the processes.[33]

6. A general purpose of "time limits for taxes" when the measure contained both tax and debt provisions.[34]

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[31] *In re Title*, 900 P.2d 121, 125 (Colo. 1995).

[32] *Aisenberg v. Campbell*, 960 P.2d 1192, 1197, (Colo. 1998).

[33] *Campbell v. Hobbs,* 76 P.3d at 462.

[34] *Ausfahl v. Caldara (In re Title for 2005-2006 #74)*, 136 P.3d 237, 242 (Colo. 2006)

7. A general purpose of "Limiting government spending" when the measure addressed spending and revenue limits, elections, local responsibility for state mandated programs, and emergency reserves.[35]

8. A general purpose of "environmental conservation or "conservation stewardship" when the measure created an environmental conservation department, along with a public trust standard for environmental decision making.[36]

9. A general purpose of "liberalizing the process by which initiative and referendum petitions are placed on the ballot," when the measure eliminated the single subject requirement, prohibited repeal of a constitutional provision through a single initiative, and prohibited referendum petitions that reduced property rights.[37]

10. A general purpose of "expanding the retail sale of alcohol beverages," when the measure allowed licensed retailers to sell beer and simultaneously allowed the home delivery of alcohol by third-party delivery services.[38]

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[35] *Court v. Pool*, 916 P.2d at 533.

[36] *Kemper v. Hamilton (In re Title)*, 172 P.3d 871, 875-876 (Colo. 2007).

[37] *In re Title,* 46 P.3d at 444-445.

[38] *Fine v. Ward,* 2022 CO at ¶ 20.

11. A general purpose "to protect and preserve the waters of this state," when the measure changed legislative authority to tax beverages, while directing funds to interbasin water roundtables with expanded powers.[39]

12. A general purpose of "animal cruelty," when the measure not only removed the livestock exception from animal cruelty statutes, but also redefined "sexual act with an animal," which addressed all animals, not merely livestock.[40]

Here, the proponents state that their general purpose is "to create an election process that better ensures that candidates are elected with the majority of the will of the voters,"[41] or "to create an election process that ensures candidates are elected by a majority of support from voters."[42] This articulated purpose fails for two reasons.

First, the broad theme of "electing candidates by majority" is a general theme that cannot provide a single subject for the two disparate types of elections. Merely claiming that the goal is a majority vote cannot unite a radically new instant runoff

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[39] *Howes v. Brown*, 235 P.3d 1071, 1080 (Colo. 2010).

[40] *VanWinkle v. Sage,* 2021 CO at ¶ 2.

[41] Title Board Hearing April 26, 2024, at 6:39:19. Available at https://csos.granicus.com/player/clip/458?view_id=1&redirect=true. Last accessed May 10, 2024.

[42] *Id.* at 6:41:50.

voting system with a new primary process that changes political party authority, changes unaffiliated candidate participation, and mandates exactly four candidates for a general election. And second, the Proponents' articulated purpose simply does not encompass the various primary processes that have no connection to how candidates are selected in a general election. Like many general purposes articulated by other unsuccessful proponents, here the general theme does not describe an integrated measure with a single purpose supported by implementing measures and details. Rather, it seeks to provide a thematic umbrella to separate subjects.

3. The many new primary and general provisions create both logrolling and surprise.

The single subject requirement also serves two general, public purposes. First, "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 interest."[43] Second, "it helps avoid voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative."[44] Thus, "given the anti-logrolling and anti-fraud purposes of the

[43] *Fine v. Ward,* 2022 CO at ¶ 23 (internal quotes and citations omitted); *see also Court v. Pool,* 916 P.2d at 531; *Bentley v. Mason*, 2016 CO at ¶ 11.

[44] *Bentley v. Mason*, 2016 CO at ¶ 11; *see also Fine v. Ward,* 2022 CO at ¶ 12.

single-subject requirement, our application of the necessarily-and-properly-related test has often taken into account whether voters might favor only part of an initiative and the potential for voter surprise."[45]

This measure creates a classic logrolling problem. Some voters (particularly those belonging to the Democrat or Republican parties) may support an instant runoff voting system, yet strongly oppose removing party nomination authority and allowing non-party candidates to compete in a single primary. Likewise, there are likely many voters who do not like the disenfranchisement aspects and complexity of instant runoff voting, yet nonetheless support opening up the primary election process to non-party candidates and curtailing the role of political parties. But the proposed measure combines the two concepts, forcing voters to accept or reject both provisions.

Next, there are several areas that will cause voter surprise. First and foremost is the instant runoff voting system's redefinition of "vote," "voter," and "majority," in a way that fundamentally departs from the uniform, consistent, current and historical use of the terms. An instant runoff voting system redefines "participation" in an election, and voters would be greatly surprised to learn that their votes might not count, simply because they failed to make a second or third choice. And voters would

[45] *VanWinkle v. Sage,* 2021 CO at ¶ 16.

be further surprised and upset to learn that they did not "participate" in an election by not making a secondary or tertiary choice for office.

On the other hand, voters would also be surprised to learn that the measure alters the very meaning of "primary election." Political parties have their ability to choose their own standard bearer; non-party candidates can compete in primaries; and the primary mandates four contestants—and only four—in the general election.

The fact is, the proposed measure radically alters Colorado's primary and general elections, and it alters them in very, very different ways. In doing so, the measure contains multiple surprises. It redefines bedrock election concepts in a way that eliminates political party participation and frankly disenfranchises voters who do not thoroughly understand the implications of failing to rank candidates on a ballot. And the measure makes these changes against a backdrop of 150 years of consistent historical usage and voter understanding.

B. The title fails to appraise voters of the central features of the general election system, by not even mentioning "instant runoff voting" and failing to convey that the measure redefines "participation" or "vote."

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."[46]

But under this standard, the title set by the Title Board fails, because it does not explain the central features of how the initiative works. With respect to the general election instant runoff voting system, the title states in full:

> In the general election, allowing voters to rank candidates for these offices and adopting a ranked voting process for how the votes are tallied and a winner is determined.[47]

Never once does the title mention "instant runoff voting," and even one of the Proponents believed that the title should explain to voters that the proposed measure implements an "instant runoff voting" system. Specifically, at the rehearing one Proponent argued:

> Instant runoff voting, which I understand is not a term you want to put in the title, though I think it would simplify a lot of this because voters could simply look up instant runoff voting and see how the process works."[48]

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

[47] Title, Proposed Initiative 2023-2024 #310.

[48] Title Board Hearing, April 26, 2024, at 7:39:50. Available at https://csos.granicus.com/player/clip/458?view_id=1&redirect=true. Last accessed May 10, 2024.

"Instant runoff voting" is not a mere detail. Rather, it is *the* central feature of the measure. Thus, including the simple phrase "instant runoff voting" would allow voters to quickly find a description in order to learn how this new, complex system works.

In addition, the title fails to indicate that the measure fundamentally changes how the general election system determines participation, or how it defines a vote, or how a winner can be determined by less than a majority of "voters" as those terms are traditionally understood. Indeed, the measure redefines "vote" and "voter," but one would never understand these radical changes by reading the title.

To be sure, a title is not required to list every detail; it must only contain the central features of a proposed measure. Here, the title should explain two central features of the new, general election voting system. First, that the measure creates an instant runoff voting system in the general election. Second, that the measure changes how one measures voter participation in different rounds of voting (or alternatively how it defines a "vote" or "voter") for purposes of determining a winner. Instead, the title cryptically refers to "a ranked voting process" and contains the non-descriptive, general language "for how the votes are tallied and a winner is determined." This description does nothing to explain the central features of the new, instant runoff voting system.

VI. CONCLUSION

This Court should determine that the Title Board had no jurisdiction to set a title and submission clause, because Proposed Initiative 2023-2024 #188 contains more than one subject. Even if the Court accepts the Title Board's single subject determination, it should return the measure to the Title Board to set a title that accurately and completely describes the central features of the proposed measure.

Respectfully submitted this 10th day of May 2024,

GESSLER BLUE LLC

s/ Scott E. Gessler
Scott E. Gessler

CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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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