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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #310 ("Concerning the Conduct of Elections") **Petitioner:** Mark Chilson, v. **Respondents:** Jason Bertolacci and Owen Alexander Clough, and **Colorado Ballot Title Setting Board:** Theresa Conley, Christy Chase, and Jennifer Sullivan.	▲ **COURT USE ONLY** ▲
Attorneys for Respondents: Sarah M. Mercer, #39367 David B. Meschke, #47728 Rosa L. Baum, #56652 Reilly E. Meyer, #59495 BROWNSTEIN HYATT FARBER SCHRECK LLP 675 15th St, Suite 2900 Denver, CO 80202 Tel: 303.223.1100 Fax: 303.223.1111 smercer@bhfs.com; dmeschke@bhfs.com; rbaum@bhfs.com; and rmeyer@bhfs.com	Case Number: 2024SA157

RESPONDENTS' 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).

It contains 5,691 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/ David B. Meschke

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Respondents Jason Bertolacci and Owen Clough submit their Answer Brief in this original proceeding brought by Petitioner challenging the Title Board's actions to set a title on Initiative #310.

SUMMARY OF THE ARGUMENT

Petitioner narrows his single-subject argument to posit that Initiative #310 contains just two subjects—its impact on both the primary and general elections. *See* Pet'r's Opening Br., at 4. In trying to separate the all-candidate primary election from instant runoff voting in the general election, Petitioner rewrites Initiative #310's single subject to focus solely on the latter, then argues that the rewritten "single subject" does not encompass the all-candidate primary and thus is an impermissible umbrella topic. He also creates separate "purposes" for the all-candidate primary election and the use of instant runoff voting in the general election to further his point.

Petitioner's argument, however, ignores the symbiotic relationship between the all-candidate primary election—where all voters can vote for any candidate for a certain office to narrow the candidate field to four—and the general election, where voters may rank the advancing

candidates, and the candidate with a majority of the votes is elected. Neither of these elements of Initiative #310's election system can stand independently and achieve Respondent Proponents' common objective to expand voter choice to elect candidates who better represent the will of a majority of the voters. Indeed, instant runoff voting in the general election implements the all-candidate primary by specifying the voting method for electing one of the four advancing candidates, while the all-candidate primary identifies the four candidates with a threshold level of appeal for voters to rank in the general election. The Title Board correctly found that Initiative #310 contains a single subject.

Petitioner also argues that Initiative #310's title should include the phrase "instant runoff voting," as well as inaccurately notes that voters could be disenfranchised. The Title Board properly exercised its discretion in setting a title, and its decision should be affirmed.

ARGUMENT

I. Initiative #310 meets Colorado's single subject requirement.

This Court has plainly articulated that the single subject inquiry is whether the relevant initiative "tends to effect or carry out one

general object or purpose," or, stated differently, has a "unifying or common objective." *Matter of Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1079, 1080 (Colo. 1995). Initiative #310, which would make statutory changes to the election code, does just that.

Respondent Proponents' common objective is not compound—it is not expanding voter choice *and*, separately, electing candidates based on the will of the majority of voters. Rather Initiative #310's common objective is to expand voter choice in a pointed fashion to elect candidates who better represent the will of a majority of the voters. "Electing candidates based on the will of the majority of voters" modifies and, more specifically, narrows "expanding voter choice."

Petitioner overly parses Initiative #310. *See Matter of Title, Ballot Title & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1223 (Colo. 2021) ("Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction." (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998)).

A. Initiative #310's elements are necessarily and properly connected.

According to Petitioner, Initiative #310 contains two subjects because it would: (a) change the primary from an election to determine political party nominees to an election that narrows the number of candidates for the general election; and (2) implement a new instant runoff voting system for the general election. Pet'r's Opening Br., at 4. He then delves into a labyrinth of sub-arguments, including that the two elections have different purposes, are not logically connected, and can be separated and still accomplish what they were designed to achieve. *Id.* at 4, 13.

These arguments ignore that Initiative #310 would create an integrated election system with logically connected elements. Taking out any element creates an entirely different system. Indeed, as described below, the constitutionally permissible system to achieve Respondent Proponents' common objective is one that creates an all-candidate primary election, has more than two candidates advance to the general election, and uses instant runoff voting in the general election.

1. Initiative #310's election system is a constitutionally permissible means to achieve Respondent Proponents' common objective.

Respondent Proponents propose an intentional system to expand voter choice to elect candidates who better represent the will of a majority of the voters. This system, unlike others, does not run afoul of political parties' right of association or create side effects that thwart voter choice.

Current Colorado law limits voter choice. Major political parties hold primary elections to determine their nominees.[1] C.R.S. § 1-4-101(3). While unaffiliated voters may choose in which major political party's primary to participate because of Proposition 108, § 1-4-101(2)(b), voters affiliated with a political party can vote only in that political party's primary election, § 1-4-101(2)(a). Despite reforms, the current system still suffers from problems including low primary voter

[1] Minor political parties may hold primary elections, although typically they nominate candidates by petition or caucus directly onto the general election ballot. C.R.S. §§ 1-4-802(1), 1304(1.5).

turnout and uncompetitive general elections, resulting in candidates elected with support from only a small base of voters.[2]

Respondent Proponents cannot expand Proposition 108 and open political primary elections to all voters. The U.S. Supreme Court has held that such partisan blanket primaries violate political parties' First Amendment right of association by "forc[ing] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Cal. Dem. Party v. Jones*, 530 U.S. 567, 577 (2000). The Court reasoned that state interests, such as producing elected officials who better represent the electorate, were not sufficiently compelling to overcome the high burden on political party rights. *Id.* at 581–85.

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[2] Rebecca Powell, *Why Didn't More Voters Turn Out for the Colorado Primary?*, The Coloradan (July 1, 2022), *available at* https://www.coloradoan.com/story/opinion/2022/07/01/why-colorado-voter-turnout-2022-primary-election-so-low/7784343001/ ("Voter turnout in the June 28 primary election was around 33% of active registered voters in Larimer County, meaning future representation is being shaped by only one-third of all voters.").

The *Jones* Court nevertheless provided guidance that a ***nonpartisan*** blanket primary election would be a narrowly tailored means of furthering these state interests and thus constitutionally permissible. *Id.* at 585–86. This system would allow "[e]ach voter, regardless of party affiliation, [to] vote for any candidate," with a set number of vote-getters advancing to the general election. *Id.* at 585. Specifically, "[t]his system has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee." *Id.* at 585–86 (noting that "[u]nder a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased 'privacy,' and a sense of 'fairness'—all without severely burdening a political party's First Amendment right of association").

After *Jones*, the U.S. Supreme Court rejected a facial challenge to Washington's modified blanket primary system. *Wash. State Grange v. Wash. State Rep. Party*, 552 U.S. 442, 457 (2008). Washington embraced an all-candidate primary where the two candidates receiving the most votes advanced to the general election. *Id.* at 443. Critically, the

initiative "d[id] not, by its terms, choose parties' nominees." *Id.* at 453. *Jones* and *Washington State Grange* thus provide a road map instructing that a nonpartisan blanket primary election, such as Initiative #310's all-candidate primary, passes constitutional muster.

Armed with the knowledge of an all-candidate primary election constitutionality, Respondent Proponents faced the task of implementing it. California and Washington presented one option—a top-two system, whereby only two candidates advance from the nonpartisan blanket primary election. That system, however, can foster candidate gamesmanship, which conflicts with Respondent Proponents' central purpose. For example, as explained at the March 6, 2024 hearing,[3] in California's most recent U.S. Senate primary election Democrat Representative Adam Schiff spent more than $10 million on advertisements attacking Republican Steve Garvey in a calculated way to coalesce Republican support for Garvey so that he would receive the second-most votes, following Schiff, and therefore advance to the

[3] Title Board Hearing at 8:44:50 (Mar. 6, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html. (discussing Initiative #186, which contains the same central features as Initiative #310).

general election. *See* Paul Mitchell, *Garvey Effect: Schiff's Strategy Sunk Down-Ballot Democrats but Could Lead to More GOP Losses*, CalMatters (Apr. 2, 2024), *available at* https://calmatters.org/commentary/2024/04/garvey-schiff-primary-election-democrats/. Garvey, unlike another Democrat, has little-to-no chance of winning a statewide race in California. The top-two system, thus, delivered a meaningless general election choice to voters: Schiff or Garvey.

To solve for this inherent flaw in a top-two system, and to further their common objective, Respondent Proponents made the policy decision to have four, rather than two, candidates advance and then conduct the general election by instant runoff voting: a final-four system. The decision to advance four candidates, combined with voters' opportunity to rank them, solves for the ills associated with other systems by pointedly expanding voter choice to elect candidates who better represent the majority of the voters. *See also* Resp'ts' Opening Br., at 15 (discussing vote splitting and spoiler candidates).

Initiative #310's unified system would not function as intended if any element were removed. *See* Resp'ts' Opening Br., at 14–16. Absent

the all-candidate primary election, Colorado's elections would revert to the current system. *See Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 499 (Alaska 2020). And without four candidates advancing or instant runoff voting in the general election, candidates, parties, or others could game the system to decrease voter choice. *See* Resp'ts' Opening Br., at 15. Recognizing the interconnection of the primary and general elections, the U.S. Supreme Court mandated that each step of the election process is critical to assuring voter participation. *Smith v. Allwright*, 321 U.S. 649, 660 (1944).

Therefore, Initiative #310's reforms to the whole system work hand in glove within the parameters of the U.S. Constitution to effectuate the Initiative's single subject. Indeed, some of the very cases on which Petitioner relies recognize the integration of the primary-general election system. For example, the U.S. Supreme Court has held that permitting political parties to exclude certain voters based on race from participating in their state-run primary elections would open the door to voting rights violations. *See id.* at 660 ("The fusing by [*United States v. Classic*, 313 U.S. 299 (1941)] of the primary and general

elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries."). Although in a different context, these cases illustrate the interconnectivity of the primary and general elections in states' election systems.

Initiative #310 presents to the voters an integrated election system to further Respondent Proponents' common objective; anything less frustrates the peoples' constitutional initiative power. *See Helton v. Nevada Voters First PAC*, 512 P.3d 309, 315 (Nev. 2022).

2. Petitioner's arguments fall short.

Petitioner uses several tactics to attempt to divorce the all-candidate primary election from instant runoff voting in the general election. None of them overcome the symbiotic relationship among the final-four system's features.

First, Petitioner attempts to cast doubt on the Title Board's consistent recognition that Respondent Proponents propose an

integrated system comprising a single subject.[4] Over the last six months, the Title Board heavily vetted and scrutinized ballot measures that proposed the final-four integrated election system. Chair Conley repeatedly recognized that this has been an iterative process whereby the Title Board expressed single-subject concerns regarding certain components of Respondent Proponents' measures and Respondent Proponents made corresponding changes.[5] *See* Title Board hearing at 2:27:00 (Mar. 20, 2024), *available at* https://www.coloradosos.gov/pubs/info_center/audioBroadcasts.html (recognizing that in Respondent Proponents' iterations of their proposals they "are certainly trying to be

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[4] Petitioner misquotes Chair Conley as stating that Petitioner's arguments are "very strong." *See* Pet'r's Opening Br., at 7–8. Neither at the point indicated in Petitioner's Opening Brief, nor elsewhere in the rehearing on April 26, 2024, can Respondent Proponents find the quote Petitioner attributes to Chair Conley. Indeed, at the time noted in Petitioner's brief, the Title Board is discussing Proposed Initiative #260, which does not concern elections. *See* Title Board Hearing at 3:47:58 (Apr. 26, 2024). And while Chair Conley remarked that there was a "strong" argument against single subject, Petitioner's addition of the adjective "very" is unsupported.

[5] Respondent Proponents, for example, abandoned provisions in prior iterations of these reforms that Title Board found to be a second subject. These provisions would have effectively eliminated a political party's ability to place a candidate on the all-candidate primary election ballot through a caucus and, instead, would have required all candidates petition onto the primary ballot.

responsive to the Board"). But the Title Board never once found that the reforms to the primary and general elections themselves constitute multiple subjects. *See, e.g.,* Title Board Hearing at 1:27:20 (Mar. 20, 2024) (noting agreement that the reforms to the primary and general elections reflect an "integrated system"); *see also* Title Board Hearing at 6:36:00 (Apr. 26, 2024) (acknowledging that Title Board has evaluated these reforms and has found that they are "connected," characterizing them as a "collective change").

Second, perhaps hoping to avoid this repeated result, Petitioner crafts his own "single subject" or "general theme" for Initiative #310—"to elect candidates according to the majority of the will of the voters"—to make the unfounded assertion that the Initiative's elements are not necessarily and properly connected.[6] Petitioner's argument is a self-fulfilling prophecy. After reinventing the Initiative's common "theme,"

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[6] *Compare* Pet'r's Opening Br., at 5, *with* Resp'ts' Opening Br., at 8 ("Initiative #310 has one 'unifying or common objective': To expand voter choice to elect candidates for certain federal and state office who better represent the will of a majority of the voters."); *see also* Title Board Hearing at 6:20:20 (Apr. 18, 2024) (stating Initiative #310's single subject is "an election process to expand voter choice to elect candidates for certain federal and state offices who better represent the will of a majority of the voters.").

he argues that the all-candidate primary election and its alleged distinct "purpose" is divorced from electing candidates based on the will of the majority of voters. *See* Pet'r's Opening Br., at 5.

Petitioner's recasting is flawed. To further Initiative #310's actual single subject, the measure necessarily would create a blanket primary. Although the measure still requires party labels for candidates on the ballot, this all-candidate primary cannot serve to nominate political party candidates in light of *Jones*. Petitioner's assigned "purpose" of the all-candidate primary is simply an effect of the measure that has no bearing on whether it has a single subject. *Matter of Title, Ballot Title & Submission Clause, & Summary Pertaining to Lottery Funds*, 834 P.2d 261, 265 (Colo. 1992) (noting that it is not proper for the Title Board, or the Court, "to consider the practical effects of a proposed initiative"). And, even if Petitioner's crafted "single subject" was operative, the all-candidate primary election does, in fact, support his "single subject" by allowing more voters to participate, ensuring that the four advancing candidates have at least a threshold amount of support from all voters.

Indeed, the will of the majority is furthered if all voters can vote for any eligible candidate at every election stage.

Third, Petitioner uses his crafted "single subject" to claim that it is too general of a theme to save the measure and does not encompass the "purposes" underlying the all-candidate primary election. *See* Pet'r's Opening Br., at 16–21. Naturally, though, by recharacterizing the measure's focus to more directly address the use of instant runoff voting in the general election, Petitioner's "single subject" would be less likely to encompass the all-candidate primary (and its effects). "Electing candidates by majority," as Petitioner further confines the single subject, *see id.* at 20, ignores that Respondent Proponents' central goal is to expand voter choice to elect candidates who reflect the will of a majority of voters. This is a narrow single subject. The unifying and common objective is not, for example, the "general and too broad" subject of "water," or even "elections." *See Waters II*, 898 P.2d at 1080.

Fourth, Petitioner analyzes Initiative #310's central features in a vacuum to argue that the measure presents a logrolling risk. Voters, though, will understand that Initiative #310 proposes a system.

Tashjian v. Repub. Party of Connecticut, 479 U.S. 208, 220 (1986) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 797 (1983)) (noting "[o]ur cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues"). If a voter prefers that the state adopt instant runoff voting under the current election system, that voter would reject the measure's proposed system rather than stomaching the all-candidate primary. Likewise, a voter opposed to instant runoff voting but who likes the all-candidate primary would likely vote against the Initiative because that voter prefers a different system—likely a top-two system.

B. The all-candidate primary is a critical element of Respondent Proponents' common objective.

In an effort to draw parallels to this Court's decisions finding single subject violations where measures proposed unnecessary shifts of power among governmental bodies, Petitioner misrepresents that the all-candidate primary election wrestles power away from the major political parties, "fundamentally" altering Colorado's primary process in a supposedly unnecessary manner. *See* Pet'r's Opening Br., at 9, 14–15. But Petitioner's arguments contain factual errors, misconstrue the all-

candidate primary election, and ignore Colorado's history of amending its primary process.

Nothing in Initiative #310 restricts a political party from selecting its nominee. *Cf.* Pet'r's Opening Br., at 14 (claiming that Initiative #310 "wholly eliminat[es political parties'] ability to choose their standard bearers"). Petitioner conflates primary elections with the process of selecting a political party's nominee. Under Initiative #310, a political party may nominate a candidate to the all-candidate primary though other means. *See, e.g.*, Initiative #310, Sec. 15, § 1-4-702.5(1), Certificate Packet at 19 ("Political parties may choose to nominate candidates by assembly or convention to the all-candidate primary election for covered offices."). Instead, by specifying that the all-candidate primary is the only means of advancing, political party nominees would no longer automatically reach the general election ballot.

Further, Petitioner misrepresents the nature of primary elections in arguing that the Initiative would impact political parties' rights in a manner that creates a second subject. Primary elections are creatures of

state law. Political parties, which are absent from the U.S. Constitution, do not have the right to their own primary election or to have their nominee be placed on the general election ballot. In fact, as the U.S. Supreme Court explained,

> [t]he major parties have no inherent right to decide who may appear on the [general election] ballot. That is a privilege conferred by [state] law, not natural law. If [a major political party] chooses to avail itself of this delegated power over the electoral process, it necessarily becomes subject to the regulation.

Morse v. Repub. Party of Virginia, 517 U.S. 186, 198 (1996). Therefore, Initiative #310 does not take away a right or shift power, and certainly not from a governmental body. The power to determine access to the general election ballot is well understood to rest with the states. *See e.g., id.* at 197 ("It is uncontested that Virginia has sole authority to set the qualifications for ballot access.").

Indeed, as charted above, Respondent Proponents drafted the all-candidate primary in precisely the manner that the U.S. Supreme Court dictated. *See* supra § I(A)(1). Had Initiative #310 maintained the practice of nominating political party standard bearers during the all-

candidate primary election, a court would likely strike the effort as unconstitutional.

Additionally, that Initiative #310 would alter primary elections and who participates in them is not foreign in Colorado. Colorado's primary elections have not been static for 150 years, as Petitioner represents. Indeed, Colorado has not always utilized primary elections, just as Colorado has not always permitted participation of voters of every race or sex. Throughout the nineteenth century, Colorado predominantly used caucuses and conventions to nominate candidates to general election.[7] Discontent with this system's dominance by "party bosses" led to the rise of direct primary elections.[8] And then, most recently, in 2016, Proposition 108 opened Colorado's major political party primaries to unaffiliated voters. Respondent Proponents do not hide from the magnitude of the shift their integrated system would create. But that is not the question presented to this Court. Rather,

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[7] Alan Ware, *The American Direct Primary: Party Institutionalization and Transformation in the North* (Cambridge, UK: Cambridge University Press, 2002); *see also* Election Results Archives, Colorado Secretary of State (last accessed May 16, 2024), *available at* https://www.sos.state.co.us/pubs/elections/Results/archive1900.html.

[8] Ware, *The American Direct Primary*.

each of the elements contained within Initiative #310 is necessarily and properly connected to the Initiative's common objective.

Regardless, Petitioner's identified diminution of political parties' power, if it even exists, is a necessary effect of Respondent Proponents' means to achieve their common objective.[9] This is not a "hidden" change, as Petitioner suggests. *Id.* at 6. By creating an all-candidate primary election, the Initiative would give voters the power to determine who will advance from the primary to the general election. Respondent Proponents make no effort to conceal that Initiative #310's election system would have the effect of reducing the influence that political party insiders have in selecting candidates for office—a practice that has proved to limit voters' choices.

C. Instant runoff voting is a necessary feature.

Petitioner also mischaracterizes instant runoff voting to allege a second subject where none exists. His approach appears to be that by

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[9] While Respondent Proponents maintain that Initiative #310's effects do not threaten its single subject, the "effects [of a proposed initiative] are not relevant to whether the proposed initiative contains a single subject." *Matter of Title, Ballot Title and Submission Clause for 2019-2020 #315*, 500 P.3d 363, 367 (Colo. 2020); *see also* Resp'ts' Opening Br., at 12.

describing the process of instant runoff voting—albeit incorrectly—he shows it is unconnected to the all-candidate primary. Petitioner also bends his false description of instant runoff voting to, again, parallel this Court's prior decisions.

As a threshold matter, contrary to Petitioner's representation, instant runoff voting is not novel to Colorado. *Cf.* Pet'r's Opening Br., at 10 ("Instant runoff voting represents a radical departure from any voting method ever used in Colorado."). Ranked voting, which was first implemented in Colorado as early as 1909, is currently used in several municipalities' elections. *See* C.R.S. § 1-7-1003; Alejandro Hernandez, *Denver's Experiment in Ranked-Choice Voting*, Denver Public Library (July 7, 2020) *available at* https://history.denverlibrary.org/news/denver/denvers-experiment-ranked-choice-voting.

Moreover, contrary to Petitioner's unfounded accusations, Initiative #310 does not impermissibly "redefine[]" the terms "vote" and "voter" or the concept of "majority votes," nor does it disenfranchise voters. *See* Pet'r's Opening Br., at 11–12; 22. That the Initiative incorporates multiple ideas does not frustrate single subject. *See In re*

2021-2022 #16, 489 P.3d at 1223. In other words, that an initiative includes various changes does not mean it does not achieve a single subject. *Id*. Each of the changes Petitioner lists, to the extent they are not factually incorrect as described below, are necessarily and properly connected. The Initiative does not offend single subject because, for example, a voter ranks candidates rather than selecting only one. This is necessarily and properly connected to advancing Initiative #310's single subject. *See* Resp'ts' Opening Br., at 15–16 (describing why ranking is required to avoid unrepresentative outcomes).

And critically, instant runoff voting does not inherently disenfranchise voters. *Cf.* Pet'r's Opening Br., at 22 (claiming instant runoff voting has "disenfranchisement aspects"). Rather, it maintains the fundamental requirement of "equality of voting power," the bedrock of the well-established concept of "one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 374, 381 (1963). As courts have recognized, "'one person, one vote' does not stand in opposition to ranked balloting, so long as all electors are treated equally at the ballot." *Baber v. Dunlap*, 376 F. Supp. 3d 125, 140 (D. Maine 2018); *see also* Congressional

Research Service, *Ranked-Choice Voting: Legal Challenges and Considerations for Congress* 1 (Oct. 12, 2022) ("instant-runoff voting [has] been uniformly upheld in federal courts as a lawful policy choice").

A voter's ranking is their single vote. *See Dudum v. Arntz,* 640 F.3d 1098, 1107 (9th Cir. 2011). Their decision to not rank candidates does not hinder their vote. Instead, if a voter decides to not rank candidates on their general election ballot beyond their first choice that voter has, in effect, abstained from choosing among the remaining candidates, should their first choice not make it to the final round, and delegated that decision to other voters. *See* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Calif. L. Rev. 1773, 1801, 1818–19 (2021). It is not the case that if a voter refrains from ranking lower preference candidates that their vote is "not counted." Pet'r's Opening Br., at 10. That voter's ranking of one candidate still factors into the ranked voting tally. *See Dudum*, 640 F.3d at 1110 ("In essence, a more complete explication of the tabulation process demonstrates that 'exhausted' ballots are counted in the election, they are simply counted as votes for losing candidates, just

as if a voter had selected a losing candidate in a plurality or runoff election."). Instant runoff voting does not "exclude[]" any voter. *Cf.* Pet'r's Opening Br., at 15 (relying on *Campbell v. Hobbs* for an inapposite proposition).

D. Petitioner's cited case law is distinguishable.

After twisting Initiative #310's features, Petitioner then leans on three cases he believes analogous. These cases, though, are readily distinguishable.

Petitioner first cites to *Johnson v. Curry*[10] to analogize to Initiative #310's purported shifting of power away from political parties. In *Johnson*, the petitioners sought to amend the Colorado Constitution to alter the Colorado Reapportionment Commission's process and structure and to require the Supreme Court Nominating Commission to select finalists to serve as minor party or unaffiliated members of the reconfigured redistricting commission. But this Court found that the initiative's involvement of the Supreme Court Nominative Commission "reache[d] beyond changes to the Reapportionment Commission to

[10] This case is also cited as: *In Matter of Title, Ballot Title & Submission Clause for 2015–2016 #132*, 374 P.3d 460 (Colo. 2016).

fundamentally alter the role and object of an unrelated constitutional commission." *Id.* at 466. The Court reasoned that the Nominating Commission was a "separate and independent commission that currently has no role whatsoever in the legislative process of redistricting." *Id.* at 467.

Johnson is distinguishable for at least four reasons. First, Initiative #310 does not redelegate constitutional power or shift a governing body's power under the guise of a process change. Elections have always been in the hands of voters, and Initiative #310 further empowers voters by giving voters more choice. *See Classic*, 313 U.S. at 318 ("Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary, is likewise included in the right protected by Article I, § 2."); *Morse*, 517 U.S. at 198 (observing that political parties do not have an inherent right to decide who appears on the election ballot).

Second, and relatedly, Petitioner's attempt to draw an equivalence between political parties and constitutionally established commissions

falls flat. The very case law Petitioner cites does not equate political parties to governmental bodies, but rather establishes that "when a State prescribes an election process that gives a special role to political parties," the parties' discriminatory action becomes state action under the Fifteenth Amendment." *Jones*, 530 U.S. at 567 (interpreting *Allwright*, 321 U.S. at 664).

Third, elections are derived from the same statutory authority under Title 1 of the Colorado Revised Statutes. Contrary to Petitioner's characterization, the primary and general elections are not derived from distinct sources of authority in the way that concerned the *Johnson* court.

And fourth, this shift in political party influence is a necessary effect of Initiative #310 to achieve Respondent Proponents' common objective and assure that the measure is constitutional. Thus, the concerns in *Johnson* are not present here. *See* 374 P.3d at 466 (recognizing numerous changes to the redistricting process still would fall within a single subject).

Petitioner's comparison to *Campbell v. Hobbs*,[11] is premised on his misrepresentations of instant runoff voting. He attempts to analogize to the initiatives in *Campbell*, which excluded attorneys from serving on the Title Board in addition to liberalizing procedures for initiative and referendum petitions. *Id.* at 462. The Court in *Campbell* held that limiting the substantive rights of all attorneys was a second subject unrelated to procedural changes to the petitions process. *Id.* In contrast, and as outlined above, instant runoff voting does not serve to exclude any voter from the election. Voters are provided full agency to determine whether they wish to rank candidates in order of preference. *See* Initiative #310, Sec. 8, § 1-4-207(2)(b) ("The general election ballots shall be designed so that the voter *may* rank candidates in order of preference.") (Emphasis added).

And finally, Petitioner's reliance on *Hayes v. Spalding*,[12] is similarly unavailing. In *Hayes*, the relevant initiative proposed changes to the manner in which state and local recall elections would have been

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[11] Also cited as *In re Title, Ballot Title & Submission Clause for 2003–2004 No. 32 & 33*, 76 P.3d 460 (Colo. 2003).

[12] Also cited as *Matter of Title, Ballot Title, & Submission Clause for 2013–2014 #76*, 333 P.3d 76 (Colo. 2014).

triggered and conducted, and expanded the pool of state and local officials subject to recall elections. As the Court reasoned:

> Voters would be surprised to learn that, in voting for the new article XXI's revamped procedures for recall petitions and elections, they are also authorizing the recall firing, at any time, of—for example—the appointed heads of Colorado's state executive departments, their appointed city or county manager, or the appointed head of their local library.

Hayes, 333 P.3d 76, 85. A key issue in *Hayes* was voter surprise. Initiative #310 does not pose the same risk. The all-candidate primary plainly establishes that it serves as a funnel for all candidates—whether affiliated with a major political party, a minor political party, or unaffiliated with any political party—seeking to reach the general election. *See* Initiative #310, Sec. 4, § 1-4-101.5(2)(a). Additionally, while Petitioner attempts to analogize to *Hayes* on the basis that Initiative #310 would expand the rights of unaffiliated candidates by allowing them to directly compete with major political party candidates in a single primary election, *see* Pet'r's Opening Br., at 16, the expansion of the elected officers subject to recall was not necessary to effectuate the reforms to the recall process. Comparatively, competition

among all candidates at the all-candidate primary is a necessary feature of Initiative #310. Moreover, *Hayes* supports the Title Board's ruling by recognizing that a collection of "changes to the manner in which recall elections are triggered and conducted constitute a single subject." 333 P.3d at 83.

II. Initiative #310's title clearly and comprehensively summarizes the Initiative's central features.

Petitioner mischaracterizes the title as incomplete and misleading. Perhaps that is because Petitioner bases his argument on the title set at the initial hearing which was altered at the rehearing. In fact, the Title Board made changes to address Petitioner's concerns that the last sentence of the title set at the initial hearing was void of meaning and did not sufficiently address instant runoff voting. The language originally read:

> . . . 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.

However, the Title Board made the following changes at the rehearing to describe the instant runoff voting process:

> . . . in the general election, allowing voters to rank candidates for each office on their ballot, adopting a process for how the ranked votes are tallied, and determining the winner to be the candidate with the highest number of votes in the final tally.

Therefore, although the title does not contain the phrase "instant runoff voting," the Title Board endeavored to make this feature more readily apparent.[13] The Board exercised its discretion to reject a term deemed overly technical and instead describe it in plain language. *See Matter of Title, Ballot Title & Submission Clause for 2013–2014 #90*, 328 P.3d 155, 159 (Colo. 2014) (noting that Title Board has discretion to balance competing needs for brevity and comprehensiveness). The Court does "not consider whether the Title Board set the best possible title," but instead "will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading." *Id*. at 162, 159. Here, the title set on rehearing accurately and adequately describes Initiative #310's central

[13] Petitioner is correct that Respondent Proponents argued for the term "instant runoff voting" in the title. However, the Title Board exercised its discretion and decided unanimously that the term is overly technical. *See* Title Board Hearing at 5:38:20 (April 18, 2024); Title Board Hearing at 7:07:00 (April 26, 2024). Instead of using the term, the Board resolved that concern by changing the title to better describe how "instant runoff voting" works.

features, including how the measure would use instant runoff voting to determine the winner.

Petitioner's additional argument on title is equally without merit. He regurgitates his inaccurate single-subject argument that Initiative #310 "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,'" Pet'r's Opening Br., at 25, and claims voters must be alerted to these changes. This mischaracterizes how instant runoff voting works, *see* supra § I(C), and the title set at rehearing nevertheless alerts voters to how the instant runoff voting process would work in the title set at rehearing.

CONCLUSION

For the reasons stated above, Respondents respectfully request the Court affirm the Title Board.

Respectfully submitted on May 17, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, I electronically filed a true and correct copy of the foregoing **RESPONDENTS ANSWER BRIEF** with the clerk of Court via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

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