

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Mark Chilson,
Objector,

v.

Jason Bertolacci and Owen Alexander Clough,
Designated Representatives of Initiative 2023-2024 #219

**MOTION FOR REHEARING ON
PROPOSED INITIATIVE 2023-2024 #219**

Mark Chilson, a Colorado registered elector, seeks a rehearing on Proposed Initiative 2023-2024 #219, on two grounds. First, the Title Board has no jurisdiction to det a title, because the measure contains two separate subjects. Second, the title and submission clause is incomplete and misleading, because it does not describe the measure's second subject.

The proposed measure contains two provisions, each of which constitutes a separate subject. The measure first implements ranked-choice voting (also referred to as instant runoff voting), for legislative special elections, by adding subsection 1-12-203(1.5)(a) as follows:

(1.5) (a) ANY LEGISLATIVE ELECTION TO FILL A VACANT
GENERAL ASSEMBLY SEAT SHALL BE CONDUCTED USING A
RANKED VOTING METHOD.

But the proposed initiative also contains a second, critically important subject. It establishes a new timeline for holding a vacancy election, by modifying subsection 1-12-203(1)(a) as follows:

THE GOVERNOR SHALL SET A DAY TO HOLD A LEGISLATIVE ELECTION TO ELECT A PERSON TO FILL ANY SUCH VACANCY AS SOON AS PRACTICABLE AFTER THE VACANCY OCCURS.

Connectedly, it adds a new subsection (b), which states:

(b) LIMITED TO THE EVENT THAT THE GOVERNOR REASONABLY DETERMINES THAT EITHER THERE IS NOT MEANINGFUL TIME TO CONDUCT AN ELECTION PRIOR TO A REGULARLY SCHEDULED GENERAL ELECTION OR THE GENERAL ASSEMBLY SEAT WILL REMAIN VACANT ONLY WHEN THE GENERAL ASSEMBLY IS NOT IN SESSION, THE GOVERNOR MAY DECIDE NOT TO CALL A LEGISLATIVE ELECTION TO FILL THE VACANCY, AND THE VACANCY SHALL BE FILLED AT THE NEXT, REGULARLY SCHEDULED GENERAL ELECTION.

When reviewing the language of a proposed initiative, courts “employ the general rules of statutory construction, giving words and phrases their plain and ordinary meanings.”¹ Under this approach, the plain language of the initiative makes it possible – indeed, likely – that the residents of a legislative district in which a vacancy occurs will go without representation in the general assembly for months or *years*. Specifically, if the governor decides that there is not “meaningful” time to conduct an election prior to a regularly scheduled election, then “the vacancy *shall* be filled at the next, regularly scheduled *general* election.” (emphasis supplied).

Two concrete examples suffice to show how the vacancy announcement works. First, if a state senate vacancy occurs in September of 2016, there will be inadequate, “meaningful” time to identify nominees and print ballots that must be sent out in late September (or 45

¹ *VanWinkle v. Sage (In re Title, Ballot Title & Submission Clause for 2021-2022 #1)*, 2021 CO 55, ¶ 10.

days before the general election) to military and overseas voters. In this instance, according to the terms of the initiative the vacancy election “shall” be held at the 2028 general election. That means approximately 165,000 Colorado residents² will be denied representation in the Colorado Senate for over two years.

Second, if a senate vacancy occurs in June of 2026, when the General Assembly is not in session, and the governor decides not to call a vacancy, then the vacancy election “shall” be held at the 2028 general election. Again, this means approximately 165,000 residents will not have representation for over one and a half years.

The provision that determines when to schedule a vacancy election violates the single subject requirements in three ways. First, voters will be surprised to learn that a new, ranked choice voting method in a vacancy election also brings with it the strong possibility that Coloradans will lose their representation in the General Assembly for months, and possibly years. This is, by definition, a “surreptitious measure[]” which will cause “surprise and fraud [to be] practiced upon voters.”³

²https://redistricting.colorado.gov/rails/active_storage/disk/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaDdDRG9JYTJWNVNTSWZhZbUZtZFdveGIycHdObUpuWVdob2JqbHhpOamh6YkhNM05ESjRid1k2QmtWVU9oQmthWE53YjNOcGRHbHZia2tpV1dsdWJHbHVhVHNnWm1sc1pXNWwhiV1U5SWxCdmNIVnNZWFJwYjI0Z1UzVnRiV0Z5ZVM1d1pHWWIPeUJtYVd4bGJtRnRaU285VIZSR0xUZ25KMUJ2Y0hWc1lYUnBiMjRsTWpCVGRXMXRZWEo1TG5Ca1pnWTdCbFE2RVdOdmJuUmxiblJmZEhsd1pVa2lGR0Z3Y0d4cFkyRjBhVzI1TDNCa1pnWTdCbFE9IiwiZXhwIjoiaWoiMjAyNC0wMy0yM1QxOTowOTozM041OTRaIiwicHVyIjoiaWxvYi9rZXkifX0=-c9cc42091bf1d3ee5f0b468ad7e473711e3b13cd/Population%20Summary.pdf?content_type=application%2Fpdf&disposition=inline%3B+filename%3D%22Population+Summary.pdf%22%3B+filename%2A%3DUTF-8%27%27Population%2520Summary.pdf

³ C.R.S. § 1-40-106.5(1)(e)(II).

Second, the method for scheduling an election (in some instances over two years following the vacancy) is not “necessarily *and* properly connected” to the ranked choice voting method, but “rather [] disconnected or incongruous.”⁴ A ballot initiative can certainly enact ranked choice voting for a legislative vacancy election, without giving the governor discretion to prevent an election from taking place for over two years.

Third, the gubernatorial declaration provision violates “the anti-logrolling and anti-fraud purposes of the single-subject requirement.”⁵ Here, it is possible – and certainly likely – that voters who approve of ranked choice voting will nonetheless reject a measure that creates a mechanism that results in eliminating democratic representation in the General Assembly for tens of thousands of Coloradans, for months or years.

Lastly, a general, broad title of “vacancy elections” cannot save the measure. The Colorado Supreme Court rejected a subject of “recall of government officers” as far too broad.⁶ That provision created “a new constitutional right to recall non-elected officers, in addition to elected officers.”⁷ Under the same reasoning, the broad subject of “vacancy elections” does not rescue the measure from its serious single-subject violations.

⁴ *VanWinkle v. Sage (In re Title, Ballot Title & Submission Clause for 2021-2022 #1)*, 2021 CO 55, ¶ 13.

⁵ *Id.* at ¶ 16.

⁶ *Hayes v. Spalding (In re Title, Ballot Title, & Submission Clause for 2013-2014 #76)*, 2014 CO 52, ¶ 10.

⁷ *Id.* at ¶ 9.

