



April 3, 2024

Colorado Title Board
1700 Broadway, Suite 550, Denver, CO 80290

RE: Proposed Initiative 2023-2024 #201

I am writing on behalf of RepresentUs to offer comment on Proposed Initiative 2023-2024 #201 (“Initiative #201” or “#203”), which currently bears the title:

An amendment to the Colorado constitution prohibiting the use of any voting method where voters are allowed to rank candidates or vote for more than one candidate for a single public office in any election or nomination process in Colorado.

RepresentUs is a nonpartisan, nonprofit advocacy organization committed to ending public corruption, strengthening American democracy, and creating a government that better represents the American people. We have supported efforts to adopt ranked choice voting (“RCV”) across the United States, and as a result have deep knowledge of and experience with RCV, which informs our comments here.

Our review of #201 has revealed two primary issues with the proposed amendment and its current title. First, the proposal itself addresses multiple subjects, which is not apparent in its current title. Second, the title does not accurately describe the measure and would mislead voters about its scope and effect.

I. Initiative #201 contains several distinct subjects.

The current title acknowledges one of the areas that #201 would address: the prohibition of a specific subset of voting methods.¹ Initiative #201, however, also makes a significant change in another area of Colorado law, namely home rule and the self-governing authority of many local governments in the state.

Initiative #201 extends the scope of its RCV prohibition to “ANY OFFICE IN TOWN[AND] CITY ... GOVERNMENT WHOSE OCCUPANT OR OCCUPANTS ARE DETERMINED BY ELECTION BY THE ELECTORS OF THE RESPECTIVE POLITICAL JURISDICTION.”

Art. XX, Sec. 6 of the Colorado Constitution, which #201 does *not* purport to amend, vests cities and towns with more than two thousand inhabitants with certain powers of self-governance and full authority over specified issues. Subsection 6(d) gives town and city charters the “power to legislate upon, provide, regulate, conduct and control ... All matters *pertaining to municipal elections* in such city or town, and to electoral votes therein on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, *nomination and election systems*, judges and clerks of election, *the form of ballots...*” (Emphasis added.) Other parts of Section 6 provide those local governments with similar authority over elections for police courts (Sub. 6(b)) and municipal courts (Sub. 6(c)).

¹ As explained in the next section, it would not prohibit *all* ranked voting methods.

Art. XX, Sec. 10, which established the consolidated city and county of Broomfield, states: “The city and county of Broomfield *shall have all powers conferred to home rule municipalities and to home rule counties by the constitution and general laws of the state of Colorado* that are not inconsistent with the constitutional provisions creating the city and county of Broomfield” and “On and after November 15, 2001, the constitutional provisions creating and governing the city and county of Broomfield, *the city and county charter adopted in accordance with these constitutional provisions, and the ordinances existing and adopted from time to time shall govern all local and municipal matters of the city and county of Broomfield.*”² (Emphasis added.)

Initiative #201 would implicitly repeal parts of Art. XX, Sec. 6 and and Art. XX, Sec. 10, effectively inserting the unwritten limitation “...except for certain voting methods” after each grant of authority over local elections in Sec. 6(b), Sec. 6(c), Sec. 6(d), and Sec. 10. This would be a drastic shift in the authority of local government, creating a new limitation on how home rule towns and cities can decide to elect their own governments. This shift, despite its profound impact on local governance, would not be apparent in any of the constitutional articles that set the scope of local home rule and is not reflected anywhere in the current title language.

II. The current title does not accurately describe the measure.

The current title fails to accurately describe several crucial aspects of Initiative #201, which would leave voters with a false impression of what they would be voting for.

A. Repeal of current RCV usage

Initiative #201 does not contain a grandfather clause or any other exception for those jurisdictions within Colorado that have already adopted RCV. Indeed, it establishes that “ANY STATUTE, ORDINANCE, RULE, OR OPERATING PROCEDURE IN CONFLICT WITH THIS PROVISION IS VOID.” As of now, four jurisdictions in Colorado (Basalt, Boulder, Broomfield, and Carbondale) have chosen to adopt RCV for their own local elections.³ This makes Initiative #201 more than simply a *prospective* ban on certain ranked voting methods. It is also a *repeal* of those methods in the Colorado jurisdictions that have adopted them. The title’s current description of a proposal “prohibiting the use of any voting method ...” offers voters no indication that this is more than just a prophylactic measure and that their “yes” votes would override the decisions of voters elsewhere in the state and force several local governments to change how they conduct their elections.

A voter may not like RCV and may not wish to use it in any election in which he or she participates, be it local, state, or federal. That same voter, however, may not want to force voters in other towns and cities to change the process they are currently using. Voters should not be presumed to know of all the various election practices used by jurisdictions other than their own. By omitting any indication

² On November 2, 2021, the voters of Broomfield chose to exercise this authority and passed Question 2A, amending their charter to adopt ranked choice voting for mayoral and city council elections. *Ranked Choice Voting, City and County of Broomfield - Official website.* <https://broomfield.org/4015/Ranked-Choice-Voting>.

³ *Where is ranked choice voting used?*, FairVote, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#where-is-ranked-choice-voting-used>.

that this proposal would repeal practices already in use, the current title creates a misleading impression of what the effect of Initiative #201 would be.

B. “[V]ote for more than one candidate”

The current title states that Initiative #201 would prohibit “the use of any voting method where voters are allowed to rank candidates *or* vote for more than one candidate for a single public office.” (Emphasis added.) The “or” signifies that the proposal would thus prohibit two types of voting methods: those that rank candidates and those that allow votes for multiple candidates. This is a plainly false description of what Initiative #201 would do.

The new Sec. 13(b)(I)(A) of Art. VII that #201 would enact forbids methods where “VOTERS ARE ALLOWED TO VOTE FOR MORE THAN ONE CANDIDATE FOR EACH POSITION TO BE FILLED,” however that is the criterion in an inclusive list that also requires a voting method include “AT LEAST ONE FURTHER TABULATION IS CONDUCTED IN WHICH VOTES CAST FOR ONE CANDIDATE ARE REASSIGNED TO ANOTHER CANDIDATE UNTIL A MAJORITY IS ACHIEVED,” and “THE CANDIDATE ELECTED OR NOMINATED IS DETERMINED BASED ON ANY TABULATION OF VOTES OTHER THAN THE FIRST TABULATION” in order to be prohibited.

To break it down more clearly, a prohibited voting method involving “vote[s] for more than one candidate” must include: (1) The ability to vote for multiple candidates; (2) a “further tabulation”; (3) a reassignment of votes from one candidate to another; (4) a candidate reaching a majority in order end the process; and (5) a determination of a winner based on anything beyond “the first tabulation” of votes.⁴ The current title only mentions the first of these criteria. There are, however, voting methods that allow voters to vote for more than one candidate but would not meet the full criteria in Initiative #201.

For example, Approval voting is a voting method currently used in local elections in St. Louis, MO, and Fargo, ND, where voters can vote for as many candidates as there are in the race.⁵ Approval voting would allow voters to “vote for more than one candidate” but would not be prohibited by Initiative #201 since, among other things, it does not involve the “reassign[ment of votes] to another candidate” or require any candidate to reach a majority. The current title’s claim that it would prohibit “the use of any voting method where voters are allowed ... vote for more than one candidate for a single public office” is therefore clearly misleading.

C. [A]ny voting method where voters are allowed to rank candidates

So far, I have used “RCV” and “ranked voting method” almost interchangeably, but now I must clarify something. There are many voting methods that involve ranking candidates. More than the handful of specific methods that are typically meant when “ranked choice voting” or “RCV” is discussed, and more than would be prohibited under Initiative #201. Initiative #201 would not, in fact, ban “*any* voting method where voters are allowed to rank candidates.” (Emphasis added.) Like the “vote for one

⁴ What “first tabulation” is supposed to mean is unclear, as discussed further below.

⁵ *Approval voting*, *Ballotpedia*, https://ballotpedia.org/Approval_voting.

candidate” prohibition discussed above, its prohibition is far less inclusive than the current title language conveys.

This is more than a simple question of labels or semantics. The ability to rank candidates is just one feature of these methods. Initiative #201, however, only prohibits voting methods that meet one of three lists of criteria. In addition to the ban on methods allowing votes for more than one candidate discussed in Section II(B) above (I will refer to that as the “multiple votes ban”), it also two other types of voting systems that it would prohibit.

Section 13(2)(b)(II) contains what I will call the “ranking ban.” It prohibits any voting method in which (1) voters⁶ rank candidates in order of preference, (2) ballots are tabulated in multiple rounds after (3) the elimination of a candidate until (4) a candidate is declared nominated or elected. Finally, Sec. 13(2)(b)(III) contains what I will call the “runoffs ban,” which prohibits voting methods in which (1) ballots are counted in rounds that are (2) “said” to simulate a series of runoffs until either (3) two candidates remain or one candidate has more votes than all others combined, and (4) the candidate with the greatest number of votes is nominated or elected.

To begin with, the full scope and application of the “runoffs ban” (Sec. 13(2)(b)(III)) is not immediately apparent. It says, “THE BALLOTS COUNTED IN ROUNDS ARE SAID TO SIMULATE A SERIES OF RUNOFFS,” but it is silent on who must “say” this, or in what capacity, or how. It is also silent whether the ballot counting must actually resemble a runoff election in any objectively ascertainable way or if someone merely needs to say that it does. Much of the language in the runoffs ban appears to be taken from existing Colorado law (Sec. 1-7-1003(3)(a)), and this may simply be intended to repeal that particular statute, but if it becomes part of the Colorado Constitution, it will continue to have the force of law long after that particular section of the code is superseded, and voters should be made aware of it in the title when voting on #201, whatever it might mean.

Initiative #201 would prohibit several voting methods that involve ranking. It would prohibit the single-winner form of ranked choice voting, often called “instant runoff voting,” in which ballots count as a single vote for the highest-ranked candidate still in the race, and if no candidate has a majority, the last-place candidate is eliminated, and votes for that candidate transfer to the ballots’ next-highest ranked candidate. This method exists in Colorado state law (Sec. 1-7-1003(3)) and in the four local jurisdictions in Colorado that use it for municipal elections. It is also used in various state and federal elections in Maine and Alaska, as well as in local elections across the United States.⁷

Several other forms of ranked voting may exist in a gray area under Initiative #201, however, and may or may not be prohibited. For example, the variation of instant runoff voting known as “Bucklin voting” or sometimes “the Grand Junction Method,” in which, instead of eliminating a candidate and transferring to another candidate in the next round, every ballot counts as a vote for its next-highest ranked candidate in addition to its highest ranked candidate in the next round, continuing until a candidate has a majority or until a certain number of rounds had passed, in which case the candidate with the most

⁶ Initiative #201 appears to use both “voters” and “electors” interchangeably. For the sake of simplicity and clarity, I will use only “voter” or “voters” unless directly quoting from its text.

⁷ See generally, FN. 3, *supra*.

votes was elected. While no longer in widespread use, it was used in many municipal elections, including in Denver and Grand Junction, during the early 20th century.⁸

Initiative #201 could potentially prohibit the ranked voting methods known as the supplementary vote and contingent vote. Both methods involve only a single additional round if no candidate has a majority in the first round. In the second and final round, all candidates but the two who received the most votes in the first round are eliminated, and the remaining candidate with the most votes wins. The supplementary vote, which only allows voters to rank two candidates, was until recently used to elect local offices in the United Kingdom, and the contingent vote, which often limits voters to three rankings, is used to elect the President of Sri Lanka.⁹

Another area of uncertainty is whether the “multiple votes ban” would apply to many ranked voting methods at all. With the exception of Bucklin voting, none of the voting methods described so far should be understood to give voters more than one vote. In instant runoff voting, for example, the voter has a single vote, but that vote might transfer to another candidate if the voter’s original choice is eliminated. That single vote may move between several candidates over the course of the voting counting process, but the voter always has only a single vote for the position in question. At no point is any voter considered to be voting for two or more candidates at the same time for a single open position, as could be the case under approval voting.¹⁰

Finally, there are several ranked voting methods that would not be prohibited by Initiative #201 at all. Any ranked voting method that elects more than one candidate would still be permissible under #201. The plain language in each of the three bans in Sec. 13(2)(b) limits their application to voting methods used to elect a single candidate: “*THE CANDIDATE ELECTED OR NOMINATED*” (“multiple votes ban”), “*UNTIL A SINGLE CANDIDATE IS DECLARED NOMINATED OR ELECTED*” (“ranking ban”), and “*THE CANDIDATE HAVING THE GREATEST NUMBER OF VOTES SHALL BE DECLARED TO BE NOMINATED OR ELECTED*” (“runoffs ban”). All clearly and exclusively use the singular when describing the specific process that is prohibited, and none contemplate a situation where a voting method is intended to produce multiple nominees or winners.

⁸ *Comparing Bucklin Voting to Ranked Choice Voting and Approval Voting: An Analysis for the City and County of Denver, Ranked Choice Voting for Colorado*, <https://rcvforcolorado.org/wp-content/uploads/2021/01/Comparing-Bucklin-Voting-to-other-Voting-Methods.pdf>. While Bucklin would not be prohibited under the “ranking ban” or the “runoffs ban,” since it does not involve eliminating candidates, it could run afoul of the multiple votes ban, since each ballot end up containing votes for more than one candidate. This is not certain, however, since #201’s multiple votes ban requires the voting method produce a majority winner, and while Bucklin voting would elect the majority winner if one existed, it typically had procedures to elect a plurality winner if there was no majority.

⁹ *Supplementary Vote*, Electoral Reform Society, <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/supplementary-vote/>; Levy, M. *Alternative vote (AV)*, *Encyclopedia Britannica*, <https://www.britannica.com/topic/alternative-vote#ref1108471>. It is not certain that these methods would be prohibited by Initiative #201, since the language of the “ranking” and “runoffs” bans arguably require more than one round of tabulation *after* the first round (*i.e.*, “*BALLOTS CAST ARE TABULATED IN MULTIPLE ROUNDS FOLLOWING THE ELIMINATION OF AT LEAST ONE CANDIDATE*” and “*SAID TO SIMULATE A SERIES OF RUNOFFS*”). (Emphasis added.)

¹⁰ The same is true for the supplementary and contingent voting methods.

There are many ranked voting methods that elect multiple candidates in an at-large or multi-member district context. The single transferable vote, also known as “proportional ranked choice voting,” is currently a part of Colorado law (Sec. 1-7-1003(4)) and has been adopted domestically in jurisdictions like Portland, OR, and Cambridge, MA, and used internationally in countries like Australia and Ireland.¹¹ Not only would Initiative #201 not prohibit “any voting method where voters are allowed to rank candidates,” it would not even prohibit all the ranked voting methods currently on the books in Colorado.

Other multi-winner ranked voting methods that Initiative #203 would not prohibit include sequential RCV, sometimes called “preferential block voting,” which is used in some municipal general elections in Utah,¹² and “bottoms-up RCV,” which is used in some municipal primary elections in Utah,¹³ as well as multi-winner variants of Bucklin voting.

There are also single-winner ranked voting methods that would not meet Initiative #201’s definition of “ranked choice voting.” Borda count is a ranked voting method in which each ranking has a different point value, and the candidate (or candidates in multi-winner variations) with the most points wins.¹⁴ Several Condorcet voting methods use rankings to determine which candidate, if any, would defeat the other candidates in a head-to-head matchup.¹⁵ None of these methods involve more than one round of counting, vote transfers, or necessarily require a majority to determine a winner, and therefore, would not fall within any of the three bans contained in Initiative #201.

This is not an exhaustive list of all voting methods involving rankings, nor is it meant to be a substantive analysis of which specific voting methods would or would not be prohibited by Initiative #201. It is simply to show that, contrary to what the current title language would tell voters, Initiative #201 would not prohibit “the use of any voting method where voters are allowed to rank candidates.” Far from it. Initiative #201 uses complicated language to create a relatively narrow prohibition, while the current title uses simple language to incorrectly indicate a broad prohibition. The inevitable result of the current title language is confusion and misinformed voters.

D. “First tabulation”

Section 13(2)(b)(I) (the “multiple votes ban”) uses its definition of RCV the terms “first tabulation” and “further tabulation.” For example, Sec. 13(2)(b)(I)(C) states, “THE CANDIDATE ELECTED OR NOMINATED IS DETERMINED BASED ON ANY TABULATION OF VOTES OTHER THAN THE FIRST TABULATION.” The meaning of tabulation is ambiguous in this case. Vote counting, or “tabulation,” under RCV is a holistic process, sometimes involving multiple rounds before identifying a winner or winners. *Some* ballots end up being tabulated more than once, as their higher-ranked candidates are eliminated and their votes transfer to other candidates, but this is not true of all ballots.

¹¹ *Where is proportional RCV used*, *FairVote*, <https://fairvote.org/our-reforms/proportional-ranked-choice-voting-information/#where-is-proportional-rcv-used>; *Single Transferable Vote*, *Electoral Reform Society*, <https://www.electoral-reform.org.uk/voting-systems/types-of-voting-system/single-transferable-vote/>.

¹² Utah Code Sec. 20A-4-603(7).

¹³ Utah Code Sec. 20A-4-603(9).

¹⁴ *Borda Count (BC)*, *ACE Encyclopedia*, <https://aceproject.org/ace-en/topics/es/esd/esd04/esd04c/>.

¹⁵ *Condorcet Voting*, *OpaVote*, <https://www.opavote.com/methods/condorcet-voting>.

It is possible that Sec. 13(2)(b)(I) is referring to the successive rounds of tabulation that some ballots may go through in an election to determine a winner, but if so, why does it not explicitly use the term “multiple rounds” as the next subparagraph, Sec. 13(2)(b)(II), does?

Regardless of whether “first tabulation” and “further tabulation” mean “rounds” in some parts of Initiative #201, there are some situations that unambiguously involve more than one tabulation of election results in order to determine which candidate is elected or nominated: recounts and audits. Colorado law establishes recount procedures in Art. 10.5 of Title 1, and requires risk-limiting audits in Sec. 1-7-515. Recounts necessarily involve the counting (or “tabulating”) every vote again, and risk-limiting audits begin with a sample of all ballots but can scale up to include more ballots and potentially lead to a full recount. Whatever else it might mean, Sec. 13(2)(b)(I)(C) clearly applies to recounts and risk-limiting audits that are used to “determine[]” which “candidate is elected or nominated.” In effect, a recount or risk-limiting audit would be a factor in determining whether a voting method or particular election is prohibited by Initiative #201.¹⁶ Despite this, neither recounts nor risk-limiting audits are mentioned in the current title.

- *Party nominations and the First Amendment*

Finally, Initiative #201 prohibits the use of RCV in “ANY NOMINATION OR ELECTION PROCESS FOR ANY PUBLIC OFFICE IN THE STATE OF COLORADO.” Not all nominations are necessarily publicly run elections, however. Colorado law allows parties to nominate candidates outside of public primary elections. The broadly-drafted language of Initiative #201 does not make exceptions for nominations that are the result of purely internal party processes. In fact, it appears to contemplate overriding candidate selection processes that are not necessarily governed by statute in Sec. 13(4): “ANY STATUTE, ORDINANCE, RULE, OR *OPERATING PROCEDURE* IN CONFLICT WITH THIS PROVISION IS VOID.” (Emphasis added.) Again, no exception is made for private entities like political parties. The current title does not make clear that this proposed initiative would potentially restrict private actors. Nor does it inform voters of the serious First Amendment concerns that #201 creates, as restricting how a political party can make purely internal decisions implicates fundamental rights of free association.

III. Conclusion

The current title language for Initiative #201 does not adequately or fairly convey the substance and effect of the proposal. The initiative process is a cornerstone of our democracy, and it is vital that voters are fully informed when voting on profound matters such as amending a state constitution. Thank you for your consideration.

Sincerely,

David O’Brien
Policy Director

¹⁶ This could be an issue for Sec. 13(2)(b)(I)(B) as well. A recount that determines that some ballots had been incorrectly marked as a vote for one candidate in the original tabulation and accordingly counts them for the correct candidate in the updated results would arguably be a situation “IN WHICH VOTES CAST FOR ONE CANDIDATE ARE REASSIGNED TO ANOTHER CANDIDATE” in a “FURTHER TABULATION.”