

**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS**

In Re:	)	Administrative Hearing
“Make All Votes Count	)	No. 23-007
Act of 2024”	)	Re: Approval of Proposed
	)	Initiative Measure

**MEMORANDUM OPINION AND ORDER**

**Introduction**

On July 18, 2023, the Board of Elections (“the Board”) held a hearing on whether the proposed ballot measure, the “Make All Votes Count Act of 2024” (hereinafter “the Measure”) meets the statutory “proper subject” requirements that apply to voter initiatives. Under D.C. Official Code § 1-1001.16(b)(1) and 3 DCMR §1000.5, the Board must decide whether a proposed initiative meets certain requirements (detailed below) before the initiative can proceed with the next steps to be placed on the ballot.

Chairman Gary Thompson and Board Members Karyn Greenfield and J.C. Boggs presided over the hearing. Also present were Executive Director Monica Holman Evans, the Board’s General Counsel, Terri D. Stroud, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery. The proposer of the Measure, Lisa Rice, appeared before the Board with her counsel, Joseph Sandler, Esq. Several dozen witnesses presented live testimony. In addition, many written comments were submitted to the Board. The Board appreciates these many thoughtful comments.

After deliberating in executive session on July 21, 2023, the Board resumed the hearing and ruled unanimously that the initiative constitutes a proper subject for the ballot. This Memorandum Opinion constitutes the Board’s written findings of fact and conclusions of law.

Following approval of the ballot language in accordance with our procedures, and assuming that the Proposer collects the requisite number of voter signatures, it is the voters who will decide whether to accept the Measure’s proposals for ranked choice voting and opening primaries in D.C. to voters who have not registered with any party. The Board expresses no opinion on the merits or wisdom of that ultimate choice, but rather, here states only its opinion that the Measure is a “proper subject” for the voters to make that ultimate decision.

### **Statement of Facts**

On June 16, 2023, Lisa Rice (the “Proposer”) filed the Measure and related documents with the Board pursuant to D.C. Official Code § 1-1001.16(a). The Measure seeks to implement ranked choice voting (“RCV”) for District elections for President of the United States and all District elected officials in contests with three or more candidates on the ballot. The proposed RCV method would allow voters to rank up to five candidates. If no candidate receives more than half of the first-choice votes, then the candidate with the fewest votes is eliminated, and the voters who selected that candidate as their first choice would have their votes added to the total of the candidate who was their next highest-ranked choice. The process would continue until one candidate has more than half of the votes, and that person would be declared the winner. The Measure also seeks to open party primary elections to voters who have not affiliated with any party by the 21<sup>st</sup> day prior to a primary election (that is, “independent” voters could choose to participate in a primary party election, up to the day of the election).<sup>1</sup>

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<sup>1</sup> The generally recognized types of primaries are “closed, partially closed, partially open, open to unaffiliated voters, open or top two.” See National Conference of State Legislators website at <https://www.ncsl.org/elections-and-campaigns/state-primary-election-types>. In the District, participation in a party’s primary is limited to voters registered as affiliated with that party. Nevertheless, D.C. voters can have their ballots counted in a primary election if they associate their voter registration with the party for the primary in which they seek to vote before the 21<sup>st</sup> day prior to such primary. While the District’s current primary structure is often referred to as “closed,” it arguably satisfies the definition of “partially open.” The Measure’s primary structure falls within the “open to unaffiliated voter” category. For simplicity here, however, we refer to the Measure’s primary structure as “semi-closed”.

By the express terms of the Measure, implementation of RCV and semi-closed primaries would remain contingent upon funding by the D.C. Council through existing budget procedures. If the Measure is passed by the voters, the Council would retain the independent discretion as to whether or not to fund the Measure. The voters might choose to pass the Measure, but the Council then might choose not to fund its implementation.

The Measure is a slightly different version of a submission made by the Proposer on May 17, 2023 (“the Initial Measure”). The Initial Measure was reviewed, as required by law, by the District’s Attorney General (“AG”) and the Council’s General Counsel (“CGC”). On June 9, 2023, those reviewers issued statutorily-mandated advisory opinions as to whether the Initial Measure met certain requirements.<sup>2</sup> Most notably, both the AG’s and the CGC’s advisory opinions focused on whether the Initial Measure would, if enacted as written, violate a prohibition on initiatives that would intrude upon the discretion of the Council to appropriate funds.

In light of the advisory opinions, the Proposer withdrew the Initial Measure and submitted the pending Measure, which includes language conditioning its implementation on budgetary procedures.<sup>3</sup>

On June 20, 2023, the Board’s General Counsel requested advisory opinions from the AG and the CGC as to whether the pending revised Measure presents a proper subject.

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<sup>2</sup> D.C. Official Code § 1-1001.16(b)(1A)(b)(i) requires the AG and CGC to provide advice on initiative proposals.

<sup>3</sup> Specifically, the revised Measure provides:

Section 5. Applicability.

- (a) This act shall apply upon the date of inclusion of its fiscal effect in an approved budget and financial plan.
- (b) The Chief Financial Officer shall certify the date of the inclusion of the fiscal effect in an approved budget and financial plan and provide notice to the Budget Director of the Council of the certification.

On or about June 20, 2023, the Board’s General Counsel requested that the Office of Documents and Administrative Issuances publish in the *D.C. Register* a “Notice of a Public Hearing: Receipt and Intent to Review” (“the Notice”) with respect to the Measure. The Notice, published June 30, 2023, advised that there would be a July 18, 2023 public hearing on whether the Measure is a proper subject matter for initiative. *See* 70 DCR 9,151 (6/30/2023).

On July 11, 2023, the CGC provided to the Board an advisory opinion that adopted and attached her earlier opinion regarding the Initial Measure. The CGC maintains that the new language included in the Measure that subjects the implementation of RCV and semi-closed primaries to the budget process fails to cure the Initial Measure’s proper subject matter defect.

On July 12, 2023, the AG submitted an advisory opinion to the Board that concluded the opposite, that the Measure “is a proper subject of initiative.”<sup>4</sup> The AG’s opinion finds that the Measure (1) is “in keeping with the fundamental purpose of the appropriations limitation on the initiative right”; (2) does not violate the Home Rule Act because that Act “does not require first-past-the-post, as opposed to ranked choice, voting [and] does not require closed primaries . . . [and] makes no change to the partisan elections required by the Home Rule Act”; and (3) is not unconstitutional.

At the hearing on July 18, 2023, the Board Chair noted that the AG and CGC had provided advisory opinions regarding whether the Measure met the proper subject matter requirements and that the Board had received numerous written comments from the public on the Measure. In addition to the Proposer and her counsel, numerous members of the public appeared and commented in favor of, or in opposition to, the Measure.<sup>5</sup>

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<sup>4</sup> Op. Atty. Gen. Schwalb at 1 (July 12, 2023).

<sup>5</sup> Comments made at the hearing are included in the transcript of the proceedings that is posted on the Board’s website at <https://www.dboe.org/About-Us/Meetings-and-Hearings/Notice.-Agenda-and-Minutes>. While both the

At the conclusion of the meeting, the Board agreed to keep the record open for written comments until noon on Friday, July 21, 2023. The Board continued the matter to review the comments and to meet in executive session. On July 19, 2023, the Board posted on its website a notice that it would meet at 2:00 pm on July 21, 2023. The Board reconvened on the record on July 21, 2023, as provided in the notice. At that time, the Board announced its finding that the Measure is a proper subject matter for an initiative.

### **Analysis**

#### **A. The Appropriations Issue**

Pursuant to D.C. Official Code § 1-204.101(a), “[t]he term ‘initiative’ means the process by which the electors of the District of Columbia may propose laws (except laws appropriating funds) and present such proposed laws directly to the registered qualified electors of the District of Columbia for their approval or disapproval.”<sup>6</sup> One of the initial steps in that process is the Board’s review of whether the proposed law or measure meets certain “proper subject matter” requirements. As stated in the Board’s regulations:

A measure does not present a proper subject for initiative or referendum, and must be refused by the Board, if:

- (a) The measure presented would violate the Home Rule Act;
- (b) The measure presented seeks to amend the Home Rule Act;

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supporters and opponents of the Measure were advised to keep their comments to the proper subject matter question that was before the Board, the members of the public who spoke at the hearing were not prohibited from commenting on the merits of the Measure. Accordingly, the Board received comments about, for example, the extent to which ranked choice voting might be confusing to voters. Deciding the Measure’s merits is, nevertheless, beyond the jurisdiction of the Board. Should the Measure satisfy the proper subject matter requirements, be properly formulated, and be supported by a numerically sufficient petition, its merits will be for D.C.’s voters to consider. In addition, at least one commenter questioned the formulation of the Measure as misleading or incomplete. That concern falls within the scope of the next step in the ballot access process, which involves formulating the Measure’s language as it will appear on a petition that will need to be signed by a sufficient number of D.C. voters before the Measure is certified for ballot access.

<sup>6</sup> See also D.C. Official Code §1-1001.02(10).

- (c) *The measure presented would appropriate funds;*
- (d) The measure presented would violate the U.S. Constitution;
- (e) The statement of organization and the report(s) of receipts and expenditures have not been filed with the Office of Campaign Finance;
- (f) The form of the measure does not include legislative text, a short title, or a summary statement containing no more than one hundred (100) words;
- (g) The measure authorizes or would have the effect of authorizing discrimination prohibited under the Human Rights Act of 1977 or any subsequent amendments; or
- (h) *The measure would negate or limit an act of the Council enacted pursuant to § 446 of the Home Rule Act [“Enactment of local budget by Council”].*

3 DCMR §1000.5 (emphasis added).<sup>7</sup>

A measure is deemed to appropriate funds if it “would intrude upon the discretion of the Council to allocate District government revenues in the budget process[.]”<sup>8</sup> In order for an initiative measure to pass muster with respect to the prohibition on laws appropriating funds, it cannot mandate unfunded activities or programs.<sup>9</sup> As the AG’s advisory opinion notes, the D.C. Court of Appeals has indicated that an initiative that “condition[ed] . . . compliance with its

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<sup>7</sup> The italicized provisions reflect the definitions of initiative matters at D.C. Official Code §§ 1-204.101(a) and 1-1001.02(10) and D.C. Official Code § 1-1001.16(b)(1)(D), which require that a measure not negate or limit a budgetary measure of the Council enacted under D.C. Official Code § 1-204.46. Our findings and conclusions here with respect to appropriated funds or appropriations apply equally to the prohibition against measures that negate or limit a budget act.

<sup>8</sup> *Hessey v. D.C. Board of Elections and Ethics, et al.*, 601 A.2d 3, 19 (D.C. 1991).

<sup>9</sup> *See D.C. Board of Elections and Ethics et al. v. D.C.*, 866 A.2d 788, 794 (D.C. 2005) (“*Campaign for Treatment*”) (affirming a not-a-proper-subject finding where the initiative was silent as to the funding of its mandatory provisions requiring treatment instead of prison for certain offenders, and declining to adopt a theory that initiatives can be read as implicitly “subject to” appropriated funding by the Council).

dictates upon funding by the Council” would however qualify as a proper subject.<sup>10</sup> Indeed, proposers of previous initiatives have sought to avoid appropriated funding defects by including language that essentially subjected the implementation of their proposals to the Council’s budgetary process.<sup>11</sup>

Here, it cannot reasonably be disputed that the actual implementation of the Measure’s provisions would require the expenditure of appropriated monies beyond that budgeted for status quo Board operations.<sup>12</sup> However, to address its funding needs, the Measure provides on its face that it will not be implemented unless and until its fiscal impact is addressed by an approved financial plan and budget. In other words, the Council would have to approve a budget that covers the costs needed to support the Measure before ranked choice voting and semi-closed primaries can be implemented. Should a budget encompassing the Measure not be adopted by

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<sup>10</sup> *Campaign for Treatment*, 866 A.2d at 799 cited in the AG’s June 11, 2023 Advisory Opinion at 5. There, the AG stated: “At a minimum, then, we read *Campaign for Treatment* to allow an initiative to be a proper subject if it includes an express subject-to-appropriations clause.”

<sup>11</sup> For example, following the Board’s rejection of an initiative for the reason that it impermissibly required the use of appropriated funds (*see In Re: Support for a Public Hospital in the Nation’s Capital of 2004*, BOE No. 04-001 (2/4/2004)), the proposer resubmitted the measure with a new additional section that provided: “This act shall take effect subject to the inclusion of its fiscal effect in an approved budget and financial plan.” *See* 2/6/2004 letter from Jenefer Ellingston to then-BOE General Counsel Kenneth McGhie. Similarly, Initiative 71 (“Legalization of Possession of Minimal Amounts of Marijuana for Personal Use Act of 2014”) was structured to avoid appropriation concerns that could arise from new authority to impose fines by providing: “The amounts of the fines set forth in District of Columbia Code sections 22-3571.01 and 48-1103 shall be adjusted through implementing or amending legislation enacted by the Council ... to the extent necessary to ensure that this Act does not negate or limit any act of the Council ... pursuant to D.C. Code §1-204.46 [*i.e.*, budget legislation].”

<sup>12</sup> Indeed, the issue of funding an RCV counting system has been addressed previously by the Board’s Executive Director at a Council hearing regarding ranked choice voting legislation. *See* Director Evans’ written statement regarding the “Voter Ownership, Integrity, Choice, and Equity Amendment Act” and was designated Council Bill 24-372. is accessible through the Council’s website at [https://lms.dccouncil.gov/downloads/LIMS/47738/Hearing\\_Record/B24-0372-Hearing\\_Record1.pdf?Id=131286](https://lms.dccouncil.gov/downloads/LIMS/47738/Hearing_Record/B24-0372-Hearing_Record1.pdf?Id=131286). The semi-closed primary requirement of the Measure would, at the very least, likely necessitate funding the printing and mailing of tens of thousands of additional primary election ballots than would otherwise be the case and expanding vote center operations and ballot counting for primary elections to accommodate the significant increase in voters eligible to nominate candidates during those elections. While some supporters of the Measure asserted at the hearing that RCV and semi-closed primaries would not require any new appropriations because those activities would merely change the way currently funded operations are carried out, the Measure does not present such a situation of no budget impact.

the Council and approved by Congress, the Measure’s ranked choice voting and semi-closed primary provisions cannot, as the Proposer’s counsel acknowledged at the hearing, come to fruition. Some supporters of the Measure noted during the hearing that there have been instances where the Council has passed legislation with similar subject-to-appropriations language that was subsequently not funded by the Council.<sup>13</sup>

“We are required to construe the right of initiative liberally . . . and may impose on the right only those limitations expressed in the law or clearly and compellingly implied.”<sup>14</sup> In light of that obligation and the Measure’s provision expressly subjecting its implementation to the Council’s independent budgetary process, we cannot say that the Measure interferes with the discretion of the Council over appropriations. The Council will indeed retain that full discretion here as to whether or not to fund the Measure’s proposals (assuming they are adopted by the voters).

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<sup>13</sup> Nevertheless, the CGC maintains that the provision that makes the Measure subject to Council budget process is insufficient to overcome the proper subject matter prohibition on initiatives that constitute laws appropriating funds. Claiming that the AG’s suggestion that subject-to-appropriations type language could cure the Measure’s defect is “contrary to past practice”, the CGC cites the Board’s decision rejecting the Elizabeth David Education Equity Pathway Policy Act (“EDEE”), and states that “[n]either OAG’s advisory opinion nor the Board’s decision in that case mentioned the possibility of making the initiative subject to appropriations, and there has been no change in the law following that decision that arguably would warrant a different result here.” CGC July 11, 2023 Advisory Op. at p. 4, n. 14 (citing BOE 21-002 (Sept. 28, 2021)). Putting aside that our prior acceptances of initiatives that contained subject-to-appropriation type language and the court’s guidance in *Campaign for Treatment* shows that acceptance of the Measure here would be in line with past practice, earlier cases that are silent as to a proposer’s option of structuring a measure to avoid appropriation’s concerns do not, as a matter of law and contrary to the CGC’s suggestion, equate to precedent. *Plaut v. Spendthrift*, 514 U.S. 211, 232, n. 6 (1995) (“Of course the unexplained silences of our decisions lack precedential weight.”); *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144-45 (2011) (conclusion overlooked, not raised, or assumed *sub silentio* in prior cases is not precedent). The CGC also argues that allowing initiative proposers to overcome the prohibition on measures that impede the Council’s discretion over appropriations by including in their measures subject-to-appropriation language renders the respective subject matter requirement a “nullity.” History shows otherwise. Following our acceptance of initiatives that included similar subject-to-appropriation language and the DCCA’s guidance in *Campaign for Treatment* indicating that the inclusion of such language could avoid an appropriation-related subject matter defect, several subsequent initiatives have been rejected by our Board because they suffered from subject matter defects regarding appropriations (in five cases, including the EDEE matter, that was the sole sticking point for the measure). The proposers in those cases elected to risk that defect and chose not to cure it, thereby leaving open for consideration whether the requirement can be met with express “subject to” appropriations language.

<sup>14</sup> *Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990), *remanded*, 615 A.2d 562 (D.C. 1994) (citations and quotations omitted).



## B. Other Issues Raised

With regard to other proper subject matter requirements, the Board finds that the ranked choice voting aspect of the Measure is not unconstitutional, does not violate the Home Rule Act, and does not authorize discrimination. While some opponents argue that the Measure’s ranked voting system violates a constitutional “one person, one vote” requirement, that specific contention has been rejected by several courts hearing challenges to ranked choice voting in other jurisdictions.<sup>15</sup> Moreover, the Home Rule Act does not speak to the ranking of candidates. While the Home Rule Act requires that legislative powers be exercised in a constitutional manner,<sup>16</sup> the lack of any constitutional infirmity with the ranked choice voting aspect of the Measure means that it likewise does not run afoul of Home Rule Act.

Certain commenters argued that persons with disabilities and the elderly would be disproportionately confused by ranked choice voting to the point of causing a discriminatory impact that would violate the D.C. Human Rights Act.<sup>17</sup> However, we cannot interfere with the right of initiative based on such speculative concerns, particularly given the lack of evidence of an incurable discriminatory impact and the fact that the Measure is neutral on its face.<sup>18</sup> This

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<sup>15</sup> See *Baber v. Dunlap*, 376 F.Supp.3d 125, 140 (D. Me.), *appeal voluntarily dismissed*, 2018 WL 8583796 (1<sup>st</sup> Cir. 2018) (in upholding Maine’s ranked choice voting system, the court stated that “‘one person, one vote’ does not stand in opposition to ranked balloting, so long as all electors are treated equally at the ballot”); *Dudum v. Arntz*, 640 F.3d 1098, 1112-13, 1117 (9<sup>th</sup> Cir. 2011) (upholding constitutionality of San Francisco’s similar “instant runoff” system).

<sup>16</sup> See D.C. Official Code §1-203.02, stating that “the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States”).

<sup>17</sup> See, e.g., written comments of Ward 5 Democratic Committeewoman Hazel Bland Thomas.

<sup>18</sup> *In re: Entheogenic Plant and Fungus Policy Act of 2020*, BOE Case No. 20-001 at p. 5 (2/14/2020) (quoting AG’s finding that initiative presented no proper subject appropriations defect where “[a]ny impact on the allocation of revenues would be speculative.”); *In re: D.C. Bike Life Access and Use of Non-Traditional Vehicles Act of 2018*, BOE Case No. 18-009 at p. 10 (05/18/2018) (rejecting alleged proper subject appropriations defect where there was no evidence that the Council relied on certain projected revenue in developing its budget).

issue goes to the wisdom of adopting ranked choice voting, which is for the voters to decide, rather than its constitutionality.

As to the Measure's semi-closed primary provision, there is some facial appeal to opponents' claims, as expressed via written and oral testimony at the hearing, that the Measure's semi-closed primary provision violates the Home Rule Act's requirement that certain offices be "elected on a partisan basis."<sup>19</sup> The Measure's provisions, however, apply to the nomination of candidates and would not alter the party-affiliation designation of candidates in the general election. The Measure does not, as the AG noted, do away with partisan primaries. Rather, it essentially changes timing conditions that apply to voter affiliation with a party and allows independent voters to affiliate with a party through the act of participating in a party primary election, rather than requiring voters to make that affiliation twenty-one days prior to that election. Therefore, we cannot conclude that the Measure means that government officials will not be elected on a "partisan" basis in violation of the D.C. Charter. There would still be a general election with only one nominee per political party, maintaining its essential "partisan" election nature.

Along these lines, one or more opponents asserted that the Measure's semi-closed primary provision violates the constitutional right to freedom of association. In support of this position, opponents cited *California Democratic Party v. Jones*, 530 U.S. 567 (2000).<sup>20</sup> *Jones* considered California's switch from a closed primary where only a political party's declared members could vote on its nominees, to a blanket (or "jungle") primary, in which each voter's ballot lists every candidate regardless of party affiliation. The U.S. Supreme Court found that

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<sup>19</sup> See D.C. Official Code §1-204.01(b)(1) (Council members) and D.C. Official Code §1-204.21(b) (Mayor). See also D.C. Official Code §1-204.35(a) (AG).

<sup>20</sup> See, e.g., comments by DC Democratic State Committeewoman Renee Bowser.

such a blanket party primary system interfered with political party constitutional associational interests. *Id.* at 570. However, the Court distinguished this system from a primary in which “even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to ‘crossover,’” and vote in another party’s primary, “at least he must formally become a member of the party; and once he does so, he is limited to voting for candidates of that party.” *Id.* at 577.

A Court plurality subsequently upheld a semi-closed primary system in which “[i]n general, ‘anyone can ‘join’ a political party merely by asking for the appropriate ballot at the appropriate time or (at most) registering within a state-defined reasonable period of time before an election.” *Clingman v. Beaver*, 544 U.S. 581, 590 (2005) (a plurality of the Supreme Court found constitutional a similar semi-closed primary system in Oklahoma that allowed independent voters to participate in the party primaries); *see id.* at 600-01 (O’Connor, J., concurring in this respect).

Here, the Measure does nothing to change the organization of primary ballots by party and does not allow nonparty members to vote for party officials. It simply allows voters who have not affiliated themselves with a party to vote on the ballot for one party’s primary for government officials. Accordingly, this case is unlike *Jones* and more like *Clingman* and other open primaries approved by courts.<sup>21</sup>

Finally, there is no allegation that semi-closed primaries would authorize discrimination.

In sum, neither the ranked choice voting nor the semi-closed primary aspects of the Measure presents a proper subject matter concern. In addition, the Measure meets all technical

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<sup>21</sup> *See Democratic Party of Haw v. Nago*, 833 F.3d 1119, 1124 (9<sup>th</sup> Cir. 2016) (rejecting a similar “freedom of association” challenge to Hawaii’s open primary system); *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022) (rejecting a *Jones* challenge to the adoption of semi-open primaries where the organization of ballots by party was preserved).

filing requirements: it was submitted in the proper form, and its Proposer timely filed the supporting verified statement of contributions.

**Conclusion**

For the foregoing reasons, the Board finds that the Measure presents a proper subject for an initiative in accordance with District law. The Board will next consider the language of the Measure and what the voters will see on the signature petitions and ballot.

Accordingly, it is hereby:

**ORDERED** that the Measure entitled, the “Make All Votes Count Act of 2024” is **ACCEPTED** pursuant to D.C. Code §1-1001.16(b)(1).

The Board issues this written order today, which is consistent with its oral ruling rendered on July 21, 2023.



Date: July 25, 2023

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Gary Thompson  
Chair  
Board of Elections