



Colorado Election Reform 2011: A Call for Legislative Action to the Sixty-eighth Colorado General Assembly

**Coloradans for Voting Integrity (CFVI)
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About Coloradans for Voting Integrity (CFVI)

For the past seven years, Coloradans for Voting Integrity (CFVI) has chronicled the trend away from public oversight of elections as well as other threats and vulnerabilities found in Colorado's electoral infrastructure. We publish editorials and letters and maintain a website (www.cfvi.us) containing commentary and a running bibliography on election subjects from around the country with a spotlight on Colorado.

The group aspires to be one set of the public's eyes and ears on election issues throughout Colorado. We attend hearings at the State Capitol as well as public hearings on proposed rule changes at the Secretary of State's office. We serve as an information and education source on weak points in Colorado's election processes, and we offer solutions to strengthen the integrity of our elections.

Many of the changes we have seen in election technology and process have been welcomed primarily because of the promise of lowered costs. However, we cannot assume that all such ideas remain less costly to the tax payer, even though they seem to save money at first blush. When new laws and practices lead to a lower standard of citizen oversight, or even slightly interfere with the quality of a free and fair election, Colorado legislators and citizens should not compromise our democracy to get a better price.

The citizens of Colorado have elected you—our state legislators—through this democratic process to represent them and to protect their access to continued democratic processes.

Coloradans for Voting Integrity (CFVI) is a collection of concerned Colorado citizens dedicated to fair, accessible, and verifiable and verified voting on the state and national level.

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Executive Summary

Recent trends in election management and election equipment have taken both responsibility and access away from citizens and increasingly transferred crucial foundations for democracy to a small number of officials. Consistent pragmatic pressure to lower costs and to increase the convenience of elections has been resisted too rarely and too weakly. The Colorado General Assembly has recently optimized elections primarily for cost and convenience. However, an unintended consequence of the changes has been a failure to achieve the highest quality by adhering to basic principles. *Essentially, effectiveness has been traded for efficiency.* Patchwork responses to well-publicized meltdowns have largely prevented a more patient, all-encompassing approach to election quality. New technology offers opportunities for additional citizen oversight and verification, but Colorado's statutes have yet to recognize some of these potential benefits.

Coloradans for Voting Integrity (CFVI) seeks to work with elected officials and the public to counteract these trends.

On the eve of the Colorado General Assembly we offer the attached overview of selected proposed reforms of Colorado election law and/or rules. This 68th Assembly, with new census data in hand, will reformulate Colorado's legislative districts, as well as determine the strategic direction of Colorado elections.

Legislative momentum propels Coloradans toward an unwieldy mixture of voting methods. On the General Assembly's docket in 2011 may be whether to abruptly scrap the long-valued tradition of precinct polling. Overseas voters may be able to return ballots (lacking security) via the Internet. Those voters surrender the anonymity of their ballot. Vote centers and early voting depend on both Internet access and electronic poll books. On this past Election Day, Internet connectivity with SCORE, the statewide voter file, failed during a critical period.

As if to counteract the inevitable disenfranchisement that results from overly optimistic expectations to reach all eligible voters by mail, an extension of the voter registration period will likely be proposed. Extending the voter registration period and moving toward ending voting at precinct polling places were two key components of a proposed—but withdrawn—late omnibus “Modernization of Elections” bill last spring.

Proposed changes remove the cherished opportunity for most citizens to gather to vote and cast their ballots *anonymously into a ballot box* at their local precinct

polls on Election Day. Voters using mail-in ballots don't benefit from constitutionally guaranteed privacy to protect them from intimidation. Whereas the precinct voter signs the time-tested paper poll book under election judge observation, the mail-in voter might only receive a letter if their signature is deemed not to match.

For a variety of excellent reasons listed here, we strongly recommend retaining paper ballots, paper poll books, and neighborhood precinct polling places. Leave citizens the option to depend on our most time-tested, reliable voting method.

These traditional mechanisms are fundamental to election integrity. They naturally enhance voter verifiability and—through meaningful experiences of verification—confidence. Voters who participate in elections in person at a polling place experience and verify the fact that their ballot is made anonymous when they personally cast that ballot. Ideally they see their ballot actually counted in the precinct. If voters have questions or make a marking mistake, election judges—fellow citizens who are sworn to secrecy—will help. Precinct voters are protected from electioneering and intimidation.

Precinct polling places are the heart and soul of our voting experience and also the means to obtain the highest election integrity. **Please vote to protect our democracy's most vital components even while squeezing maximum benefit out of Colorado's ever-tightening budget.** Cost savings are possible without interfering with the fundamental reason to have neighborhood precincts and citizen's control over elections. We are happy to work with you to achieve the legislative goals discussed here.

The positions taken by this organization are guided by high standards for access as well as privacy. We have a very low tolerance for risk of fraud, mistakes, or abuse. Whether or not you agree with our high standards, we hope you will explore these issues with us. The process that implements our democracy should not be changed casually, quickly, or without input from all interested parties. We appeal to you to legislate election law with the utmost integrity. All of us depend on it.

Attentively,

Coloradans for Voting Integrity, Board of Directors

CONTENTS

Introduction: The Move Away from Citizen Control and Citizen Oversight	6
I. Ending Precinct Voting (a Change Mistakenly Referred To As “Vote by Mail”)	6
A. Precinct-Based versus Centralized Elections	6
B. Fewer Polling Booths.....	7
C. Lower Quality Elections.....	7
D. Specious Numbers	8
E. Political Costs	8
F. Intimidation Factor	8
II. Transparency and Disclosure Issues	8
A. Open Records.....	9
B. Open Meetings.....	11
C. Poll Watching	11
III. Elections Clean-Up Bill.....	12
A. Recounts	12
B. Recount Method, Testing, and Audit	12
C. Accuracy of Hand Counting	12
D. Procedures for Recount	13
E. Precinct Polling Places and Voting Service Centers.....	13
F. County Clerk’s Name Twice on Ballot.....	14
G. Vacancies in General Assembly or County Commissioner Offices	14
IV. Mitigating Threats to Voting Integrity	14
A. Internet Voting.....	14
B. Beneficial Intervention in the Conduct of Colorado Elections	15
V. Enforcement and Jurisdiction	15
A. Titles 1 and 31 and Other Statutory Language Concerning Elections	15
B. Enforcement of Rules.....	16
C. Oversight of Multicounty Contests and Secretary of State Certification	16
D. Ranked Choice Voting in Law and Rule	17

Introduction: The Move Away from Citizen Control and Citizen Oversight

The more complicated our voting methods get, the fewer citizens can be involved. The expectation that experts will take care of our elections for us is increasing year by year. The shift from single precinct-polling places to super-precincts, early voting, vote by mail, central counting, and other high-tech elements has drastically affected the opportunity of ordinary citizens to oversee their election process in the course of participating in it.

Key elements of Colorado's electoral process are now privatized. For example, vendors maintain secret, proprietary software and source codes for touch screen voting machines and the statewide voter registration file. The state and county governments are required by statute to maintain open public records, but companies can deny public access in the name of industrial or commercial secrets.

I. Ending Precinct Voting (a Change Mistakenly Referred To As "Vote by Mail")

Results from a 2002 statewide ballot question on the proposed Amendment 28 that would have made Colorado an all-mail-ballot state show that the voters of all counties except one preferred to retain the option of voting in precinct-polling places. Nevertheless, since then, many county clerks have promoted more intensive use of mail ballots. The messages have been "avoid long lines at the polls," "become a permanent absentee voter," "save your clerk time," and "save your county money." Voters were urged to vote by mail forever as if that is the default method of voting.

Many states have more stringent limitations on use of mail ballots. Many still require an affidavit to vote as an absentee. Such laws, already abandoned by Colorado, substantially limit the inherent dangers of vote by mail.

Citizen participation in precincts has served for over 100 years to naturally build confidence through better public awareness and involvement in elections. This traditional, natural citizen oversight is gradually being taken away.

A. Precinct-Based versus Centralized Elections

Precinct-polling places offer more accessible elections than the increasingly centralized, professionalized, high-tech elections promoted by Colorado county clerks and recorders.

1. Precinct polling allows more citizen participation and oversight than mail-in elections. Precinct polling allows for observation of voters signing the poll book.
2. Precinct polling promotes voting as a collaborative public event. This adds an incentive to vote, which is especially important given that nearly half of those who are eligible to vote don't even bother.
3. The available assistance from sworn-to-secrecy election judges helps new voters understand, appreciate, and trust the process. A voter who votes in the precinct will not face the undue burden of being expected to respond to a letter from the clerk warning that a signature is missing or questioned as invalid.
4. Generally speaking, precinct polling reduces burdens to voters.

B. Fewer Polling Booths

In spite of efforts to eliminate precinct polling, significant percentages of Colorado voters insist on voting in private in a polling booth. Our clerks thus far have been willing to accommodate such voters, but in some cases with as few precinct-polling places or voting service centers as possible.

C. Lower Quality Elections

Granting Colorado clerks and recorders the power to eliminate precinct-polling places in both General and off-year elections would reduce the quality of elections in the state of Colorado over the long run.

1. The citizen oversight inherent in precinct voting is lost.
2. The chain of custody of a mailed ballot is much less secure than the chain of custody of a ballot obtained at the precinct and cast by the voter into a precinct ballot box.
3. Mail-in voters do not have easy access to substitute ballots in case of mistakes.
4. If precinct voting is eliminated, voters who have not requested mail ballots may not be expecting them; thus these ballots may not be treated with the respect they deserve and would receive at a precinct polling place.
5. Mail ballots allow the possibility of individual or group pressure on voters, the coercion of voters, and the creation of false votes.
6. Colorado state law (C.R.S. 1-8-113) allowing middleman delivery of voted ballots increases the risk of fraud.

D. Specious Numbers

1. Higher voter participation cannot be consistently attributed to mail-in voting. Voter participation increases according to what is at stake in an election more than to the effect of any one given method of voting.
2. Cost savings are exaggerated. For information on the voter turn-out question, see “Your Ballot’s in the Mail: Vote by Mail and Absentee Voting,” Policy Brief Number 13, Project Vote, Washington, DC, 2009, http://www.projectvote.org/images/publications/Policy%20Briefs/PB13-Vote_by_Mail.pdf.

E. Political Costs

Although the state funds studies to demonstrate cost savings from reducing options for Colorado voters, political costs go unacknowledged:

1. The elimination of precinct polling places isn’t convenient for anyone other than an election official.
2. Mandatory mail voting discriminates against the 16 to 20 percent of voters who move once a year.
3. Mandatory mail voting disenfranchises the homeless.

F. Intimidation Factor

The Colorado Constitution (Article VII, Section 8) requires “secrecy in voting.” The state cannot offer this protection to voters with mail ballots in their homes. Some voters use the privacy of the precinct polling place for easy escape from intimidation, either overt or imagined. Eliminating precinct polling places ignores those voters who may feel intimidated by their spouse, in-laws, landlord, shop steward, minister, or anyone who might interpret an unusual trip to vote at a “service center” as a form of insubordination.

II. Transparency and Disclosure Issues

Public oversight of government activities is fundamental to our democracy; its facilitation is built into job descriptions of government officials at all levels. Nowhere is public oversight more important than for those government officials involved in election-related policy making, regulation, or implementation.

When, if ever, should government officials be in the business of obstructing public participation and oversight concerning how elections are conducted and how election laws and rules are made?

This question recurred repeatedly during 2010. Our government's actions did not improve election transparency or raise our confidence in election results. And, judging by testimonials of veteran election watchdogs and Colorado legislators alike, Colorado's Open Records and Open Meetings laws deserve improvement.

A. Open Records

1. Ballots should be affirmed as not exempt from the Colorado Open Records Act.

Other states (among them Florida, Michigan, Minnesota, Wisconsin, Idaho, and California) provide citizen-level verification and oversight of ballots and/or ballot images (even via the Internet) for increased transparency and confidence in elections.

- a. The law should require unusually marked ballots (including ballots marked with information that identifies the voter) to be duplicated prior to any publication or machine processing—both for election accuracy and to maintain anonymity. The Colorado constitution requires anonymity for each ballot after it is cast. An amendment to either statute or rule is needed to clarify how anonymity and accuracy are to be obtained by duplication of unusual ballots.
- b. To discourage unconstitutional identifying marks on ballots, statute should require instructions concerning marking the ballot to include “THE COLORADO CONSTITUTION REQUIRES THIS BALLOT TO BECOME ANONYMOUS WHEN THE STUB IS REMOVED. DO NOT SIGN OR MARK THIS BALLOT IN ANY IDENTIFIABLE MANNER.”
- c. The sunshine law would benefit from an amendment to specifically detail election records that are subject to the law—including all nonpersonalized election records and ballots that are required to be rendered anonymous.
- d. C.R.S. 1-1-104 defines the term “ballot.” A legislative declaration in the form of an explanatory paragraph should be added to discourage the common misuse of the term “secret ballot” and replace it with the terms “voting privacy” and “ballot anonymity,” which are more consistent with the constitution (Article VII, Sect. 8).
- e. Ballots must be anonymous and not traceable to the voter through any means including the existing, voter-linked, ballot serial numbers used on some systems in Colorado (e.g., Hart systems).

2. Accessibility of Open Records

It is against the public interest that most public records are never published and only fall into the hands of a few private parties who know those records exist and request them. In some cases, cost is a prohibitive obstacle to the production of public records. Some additional attention ought to be paid to the unregulated costs and procedures that become obstacles to government employees' fulfillment of CORA requests.

- a. Statute should promote the actual publication of public records in easily accessible form via a government website in instances where this is reasonable.
- b. All items that have been provided in response to each Open Record request should be described on at least one government website. The description of each such item should indicate the requestor, the list of documents provided, and the location where members of the public may access the same documents, if not on the website itself.

3. Election Legislation

History reveals that election legislation is frequently discussed and written in private. Election legislation is also often introduced late in the session, perhaps encouraging or even necessitating unamended passage. These practices shut out public input and severely reduce the chances of thoughtful consideration of the bills' merits.

- a. To combat this historical pattern, the work-in-progress exception (C.R.S. 24-72-204 (2)(a)(III) and 24-72-204 (3) (a)(XIII)) should be lifted for bills concerning Title 1 and election portions of Title 31 to allow the public access to drafts of documents produced by governmental departments or Legislative Services.
- b. Election bills involving Title 1, Title 31 (Articles 10 and 11), and Title 32 (Article 1) should be required to be introduced at least 60 days prior to final passage. Furthermore, passage upon third reading in the first house should have to occur at least 30 days prior to final passage. This would guarantee at least 30 days of consideration by each body.
- c. To ensure easier access by the public to potentially public documents, the nature of any delegation of responsibility or authority for documents required either by statute or by rule ought to be regularly and prominently published on the pertinent authority's website.

B. Open Meetings

1. The Colorado Open Meetings law (C.R.S. 24-6-402(1)(d)) should be amended to require meetings to be open to the public that involve formal and informal groups of more than two elected officials attending as part of their official role. Although some such groups—for example, the Colorado County Clerks Association (CCCA)—may not theoretically constitute a decision-making body, in practice they do meet at taxpayer expense, acting in their official roles, in part for the purpose of affecting policy. These groups must be required to disclose sources and amounts of contributions.
2. Acceptance of contributions, whether monetary or in kind, by groups of election officials from entities whose commercial products have been or might be purchased should be prohibited as a potential conflict of interest

C. Poll Watching

1. Watchers and authorized observers must not be subject to a six-foot limit during the following steps in the election process except when voters' personal information is present:
 - logic and accuracy testing
 - mail ballot processing
 - post-casting processing of ballots voted in a polling place, vote center, or service center
 - hand counting
 - auditing
 - canvass board activities
2. The six-foot limit properly applies to the watcher and observers only while a voter is actually voting, so that the voter may have privacy while marking the ballot. It is an inappropriate interpretation of the six-foot rule to apply it to any activity beyond the casting of the vote. After an anonymous vote has been cast, and the voter's personal information—e.g., mail or provisional ballot envelope—has been removed, watchers should be able to view the ballots at a comfortable reading distance. Statute should provide accredited observers with all visual and auditory access required to properly oversee the activities that lead to the election outcome.
3. Allow and encourage volunteer election judges and poll-workers (to save money on judges' and poll-workers' wages).

4. Create appropriate opportunities for unaffiliated candidates and minority parties to be represented by authorized watchers, election judges, and canvass board members. Control of election processing should not rest solely with two major parties, especially in a state such as Colorado that has a large proportion of the electorate registered without party affiliation.

III. Elections Clean-Up Bill

A. Recounts

The threshold calculation that determines whether the winning margin is small enough to require a recount (1-10.5-102) needs a clarification so that Colorado's election results are as likely to be recounted as those of other states. Neither a high incidence of under-voting nor the additional votes cast in races where there are more than two candidates should arbitrarily make a recount less likely.

B. Recount Method, Testing, and Audit

1. Existing statute offers several alternative routes to avoid using a hand count in a recount. The current approach illogically allows a recount to use the same scanners or other counting machines as used in the election.
2. However, because hand counting in the presence of watchers representing any interested parties is the most transparent and verifiable approach, recounts should be performed primarily by hand with limited but appropriate use of calculators and spreadsheets for tabulation, and with full visual and auditory access for authorized watchers and observers.
3. Recounts, whether or not performed by machine, require a post-count audit.

C. Accuracy of Hand Counting

Accurate hand counting is required to conduct audits and pre- and post-election tests of voting systems, as well as for recounts where highest accuracy is required.

1. The C.R.S. 1-1-104 definition of "manual count" needs a correction. Definition 22.7 states that "Manual count" means a count conducted by hand or by scanning a bar code." For the purposes of election transparency, "or by scanning a bar code" should be deleted.
2. The SOS should conduct an evaluation of accurate hand-count methods and provide education and training materials for the most accurate and efficient hand-count methods.

D. Procedures for Recount

1. Hand counting should be the default method for a recount because it can be demonstrated that no existing machine in conjunction with a resolution board can accurately count every allowable expression of voter intent on a ballot. A classic example is the voter who marks by mistake the wrong candidate choice, then marks over the target with an X to negate that choice, and then circles the chosen candidate name without actually marking the target for that candidate. This type of vote—increasingly common because replacements for spoiled ballots are not available at home—cannot be correctly counted by any existing implementation of optical scan counting, with or without extra attention to “undervotes.” This example alone proves that machine counting can never be more “accurate” than hand counting.
2. Statute does not specify the accuracy of the pre-recount logic and accuracy test that is currently required to be performed before enabling use of a machine voting system in place of hand counting in a recount. To test a maximum of only 50 ballots before central recounting, as mandated by current rules, is embarrassingly inadequate.
3. Statute should require that any system used for a recount (C.R.S. 1-10.5-102) should have sufficient accuracy to produce a credible election outcome with a one-vote victory margin. The exception for “voter error” embedded in current statute (C.R.S. 1-10.5-102(3)(b)) should be removed. This exception allows a machine recount to fail to reflect voter intent in certain cases, thus potentially producing an incorrect outcome even after a recount.
4. Furthermore, there cannot be meaningful recounts or audits with the unauditible machines still in use in some counties. Statute should provide an incentive for all counties to buy voting systems based on paper ballots that allow for recounts and audits and encourage the purchase of ballot-marking devices to satisfy HAVA requirements.
5. Detailed procedures for recounts, including projected costs, should be established by the Secretary of State at least 30 days prior to Election Day.

E. Precinct Polling Places and Voting Service Centers

Statute should specify the minimum required number of precinct polling places, drop-off locations, and vote service centers in consideration of the total number of active and inactive voters in a given area, as well as the geography of the area.

F. County Clerk's Name Twice on Ballot

Colorado has a law (C.R.S. 1-5-403(4)) limiting the appearance of a candidate's name to only one place on the ballot. The law also requires the designated election official's signature on the ballot (C.R.S. 1-5-407(1)). This is an inconsistency. Some county clerks are in the habit of violating state law by including not only their names twice on the ballot when running for election but sometimes three times—the third instance as a printed name followed by their title (prohibited by C.R.S. 1-5-407(4)). Either remove the requirement for the official's signature on the ballot or include an exception within the law to permit the signature, but not the printed name. It is probably best to just require the county seal at the top of the ballot without the clerk's name or signature to achieve fairness.

G. Vacancies in General Assembly or County Commissioner Offices

Existing statutes (C.R.S. 1-3-103(1)(d), C.R.S. 1-12-203, and C.R.S. 1-12-206) are somewhat vague about how vacancy committees are formed and operate.

1. The makeup and minimum size of a vacancy committee should be specified—e.g., a minimum of 10 electors registered within the district, affiliated for a minimum of 6 months in the manner of the member to be replaced.
2. The notice of the vacancy committee meeting currently has to be sent only to the committee members although statute requires the meeting to be “open to the public.” Advance public notice of any meetings ought to be required.
3. Candidates are required to be of the same political party as the most recent affiliation of the previous member, but there should be a length-of-affiliation requirement, e.g., one year.
4. The vacancy committee to replace an unaffiliated member is the one specified on the original petition for nomination of the member to be replaced, i.e., such a vacancy committee is likely to include only close friends of that member. Recent events in HD61 give rise to concerns about vacancies of unaffiliated members of the General Assembly.

IV. Mitigating Threats to Voting Integrity

A. Internet Voting

1. Eminent computer security scientists at organizations like NIST (see www.cfvi.us for Essential Election Integrity Documents) say that the present Internet's architecture cannot be made secure for public elections, despite

claims to the contrary. The appearance of the University of Michigan Fight Song on Washington DC's 2010 mock Internet election website, resulting from a successful invited white-hat hack of that website, demonstrates this frailty.

2. Testing for "security" in anything involving electronics should involve red-team testing methods. Red teams are the good guys, sometimes called "white hat" hackers, who are hired to break the security of a system so that weaknesses can be fixed before the bad guys can exploit them.
3. State legislators should eliminate the existing provisions allowing voted ballots to be returned via the Internet. Note that, in addition to the security issues, this practice generally leads to a loss of anonymity of the ballot, contrary to the Colorado constitution (Article VII, Sect. 8).
4. State legislators should also adopt a resolution urging other states to resist allowing voted ballots to be returned via the Internet.

B. Beneficial Intervention in the Conduct of Colorado Elections

1. The Colorado State Legislative Audit Committee should call for a county-by-county performance audit of election system and supply contracts with private vendors. Consider saving state and county funds by renegotiating or cancelling contracts. Be sure to identify subcontractors. This evaluation needs to be applied especially to vendors involved in election equipment and processes.
2. We need a statutory guarantee that any money saved as a result of new election law stays in escrow to cover future election problems and unforeseen costs. Coloradans should not have to choose between road and bridge repair and fair and free elections.

V. Enforcement and Jurisdiction

A. Titles 1 and 31 and Other Statutory Language Concerning Elections

1. Statutory language concerning elections should be reconciled with particular attention to issues of transparency, security, and verifiability.
2. Title 31 (Municipal) elections must be subject to the oversight of the Colorado Department of State (CDOS) Elections Division. Today the CDOS claims to have no oversight or enforcement authority or responsibility for municipal elections. This situation leaves the locally elected officials in charge of enforcement of rules that led to their own election.

3. Title 31 elections should require the same standards for certified election equipment that is required for Title 1 elections. Today, the CDOS claims that no certification of equipment is required and all municipalities are free to use any equipment whether tested or not.
4. Titles 1 and 31 differ in the handling of provisional ballots, absentee ballots, and mail-in elections and other topics.
 - a. These differences need to be reconciled. Consistent approaches for all elections would greatly benefit the public as well as election officials. Voters are frustrated by differing rules and remedies for different elections, leading to outcries and disenfranchisement, as well as a general distrust.
 - b. The legislature should study the need for any divergence of municipal elections from county-run elections and then limit the text of Title 31, Articles 10 and 11, exclusively to references to appropriate portions of Title 1, with specific treatment of the necessary differences.

B. Enforcement of Rules

1. The statutory language needs to clarify that the DA has enforcement authority for elections in all home rule cities and statutory municipalities. (The 9th Judicial District DA claims to have no authority over home rule charter cities for enforcement of election violations. Therefore, no one other than a municipal court has authority. Municipal courts are not always independent of local elected officials.)
2. The 9th Judicial District Attorney claims that the rules are not enforceable because they are merely “rules.” Obviously, much of what ought to be enforced is contained in the rules. Stronger statutory language is needed to require Secretary of State rules to be enforceable by a DA in practice.
3. The State of Connecticut has an independent enforcement authority only for elections violations (www.ct.gov/seec). The Colorado General Assembly should study this model for possible future adoption and implementation.

C. Oversight of Multicounty Contests and Secretary of State Certification

1. Many states have statewide canvass boards or boards of election to implement citizen oversight over election functions that necessitate coordination among counties and county canvass boards, such as certification and audit and recount of multicounty contests.

2. Currently the Colorado Department of State Division of Elections performs these functions without much transparency or any oversight. Public awareness of the importance of audits and recounts and the process of certification has now reached the point where it is no longer appropriate to run an election without a citizen oversight function at the state level.

D. Ranked Choice Voting in Law and Rule

Ranked Choice Voting (RCV) is offered for Title 31 elections with no definition or requirements or constraints on voting rules. The Secretary of State recognizes no authority over municipal elections even after a recent statute required the Secretary of State to promulgate rules concerning RCV, something the Secretary of State has declined to do. As a result, the creation of rules is left entirely to municipalities with virtually no conditions other than the constraints within the state and U.S. constitutions. RCV needs additional rules and regulations.