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To: Secretary of State Deborah Markowitz and Senator Susan Bartlett
From: Daniel Johnson-Weinberger, CVD General Counsel
Date: January 3, 2003
Re: Instant Runoff Voting and the Vermont Constitution

QUESTION PRESENTED

Does the Vermont Constitution prohibit the use of instant runoff voting for elections for Governor, Lieutenant-Governor and Treasurer?

SHORT ANSWER

No. Instant runoff voting, a majority election system that uses preferential ballots, is consistent with the letter and intent of the Vermont Constitution.

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Chapter II, Section 47 of the Vermont Constitution lays out a detailed procedure for determining the winner in elections for Governor, Lieutenant-Governor, and Treasurer. Under this procedure, on election day “[t]he voters of each town shall . . . bring in their votes . . . to the Constable” with the name of the candidates they support “fairly written”; the Constable then “seal[s] the[votes] up,” writes on them whether they are votes for Governor, Lieutenant-Governor, or Treasurer, and “deliver[s] them to the [elected] Representatives.” The final step takes place “at the opening of the General Assembly,” where a committee of Senators and Representatives “shall proceed to receive, sort, and count the votes . . . and declare the person who has the major part of the votes elected.” Section 47 further provides that “[i]f, at any time, there shall be no election” the state Senate and House of Representatives (together the General Assembly) acting by joint ballot shall select the election winner from among the three candidates receiving the greatest number of votes. Chapter II, Section 48, which addresses the election of Secretary of State and Auditor of Accounts, states only that these officers “shall be elected by the voters of the State upon the same ticket with the Governor, Lieutenant-Governor, and Treasurer” and that the state legislature “shall carry this provision into effect by appropriate legislation.”

Instant runoff voting is a preferential voting system used in many jurisdictions around the world, including Ireland, London, Australia, Utah, Louisiana and San Francisco. Voters have the ability to rank candidates (1, 2, 3) and ballots are counted in rounds, just as in a runoff election where the last-place candidate is eliminated and continuing candidates compete to earn a majority of votes and be declared the winner of the election.

The most familiar method of designing a majority voting system is by holding a separate runoff among only the top two candidates¹ if no candidate earns a majority of votes cast in the original round. For purposes of illustration, assume an election with 10,000 votes. The majority threshold is thus 5,001 votes (1 vote more than 50% of 10,000). Any election system that requires a candidate to earn at least 5,001 votes to win is a majority system. A traditional two-round runoff system is a majority system. If no candidate earns 5,001 votes of the 10,000 cast, a runoff is held between the two candidates. Barring a tie, with only two candidates, the winner will earn a majority of the votes cast in the runoff. To illustrate the point, consider this scenario:

Candidate	Original Round	Runoff
A	4,000	6,000
B	3,500	4,000
C	2,500	N/A

Because no candidate earned a majority of the votes in the original round, a runoff between the top two candidates must be held. All voters whose candidates did not make the runoff return to the polls and select from the remaining candidates. Candidate A earned a majority of the votes in a runoff and is the winner.

Instant runoff voting works the same way. In order to win, a candidate would have to earn a majority of the total votes cast: 5,001 votes out of 10,000, for example. Assume there are three candidates running, A, B and C. Assume the following scenario:

Candidate	Original Round	Transfer	Runoff Round
A	4,000	+2,000	6,000
B	3,500	+500	4,000
C	2,500	-2,500	0

Here, no candidate earns the requisite 5,001 votes in the first round of counting, and thus it is not yet known which candidate is the majority choice, so the count continues with an instant runoff. The last place candidate, C, is eliminated, and all runoff votes (i.e., second preferences of those voters whose first preference candidate did not make the runoff) are counted on ballots that gave C their first-choice. In our scenario, 2,000 of the 2,500 votes cast for C indicated A as a runoff-choice candidate, while 500 of the 2,500 votes indicated B as a runoff-choice candidate, the same as in the two-round example above. In the runoff round, A has a total of 6,000 votes, more than the necessary 5,001 votes to earn a majority of the total votes cast. A clear majority of voters prefer A over B, just as in a traditional two-round runoff system. The only legal difference between a traditional, two-round runoff election and instant runoff voting is the timing of when voters of the eliminated candidate express their second preference among the continuing candidates. In a two-round runoff election, voters express their runoff choice in a separate and

¹ However, rather than eliminating all candidates but the top two, sequential elimination of bottom candidates is also a standard method, which is incorporated into existing Vermont election laws. That is, if no candidate earns a majority of the votes, the last-place candidate is eliminated and a second round of balloting, with one fewer candidate, takes place. If no candidate earns a majority of the vote in that round, the last-place candidate is eliminated, and a third round with one fewer candidate is held. This process continues until one candidate earns a majority of votes cast. Vermont statutes require sequential elimination for the election of municipal officials at traditional town meetings (Title 17 V.S.A. § 2660 (c)), and for the election of nominees by party committees to fill vacancies on the general election ballot (Title 17 V.S.A. § 2384).

subsequent ballot. In an instant runoff voting election, voters express their runoff choice on a single ballot by ranking the candidates. The only other possible legal distinction has to do with the definition of a majority. With a separate runoff election, a majority is defined as more than 50% of the votes cast *in the second election*, which can be less than the majority of votes cast in the first round (as fewer voters may participate in the second election than the first). A majority in an instant runoff could be defined as either a majority of the total valid votes cast (akin to the number of votes cast in the first round in a familiar runoff election), or it could follow the definition of a majority in a runoff election, by using the number of ballots expressing a preference between the final candidates in the last round of counting (akin to the number of votes cast in the second round of a traditional runoff election). Thus it is possible that ‘majority’ for purposes of an instant runoff voting election could be more stringent than a ‘majority’ in a separate runoff election. For detailed rules on how instant runoff voting elections are conducted, *see Robert’s Rules of Order Newly Revised*, Chapter XIII, s. 45, pp 411-414, 10th ed. (Scott Foresman and Co., 2000).

OUTLINE OF LEGAL ANALYSIS

1. The plain language of the Vermont constitution does not prohibit majority, preferential election systems such as instant runoff voting for elections for Governor, Lieutenant-Governor and Treasurer.
 - a. The Constitution prohibits separate runoff elections in which ballots are cast on a subsequent day, but does not prohibit majority voting systems such as instant runoff voting.
 - b. The Constitution can not consistently be read to prohibit a majority voting system, as it imposes one.
 - c. Instant runoff voting does not eliminate the General Assembly’s supplementary role in selecting the governor.
2. Instant runoff voting is consistent with the intent of the framers of Section 47 of the Vermont constitution: to elect a candidate with the broadest amount of support and to invest the electorate with a central role.
 - a. The provisions of Section 47 illuminate the intent of the framers.
 - b. Relative to contemporary state constitutions, the Vermont Constitution reveals an intent to democratize the selection of the governor as much as practical, which instant runoff is consistent with.
 - c. Instant runoff voting is consistent with the framers’ majoritarian values, which are reflected in early state statutes.
3. The Supreme Court’s liberal interpretation of the detailed provisions of Section 47 and its general presumption of statutes’ constitutionality ensure that instant runoff voting will survive any judicial review.
 - a. The Supreme Court’s general presumption of statutes’ constitutionality applies to instant runoff voting.
 - b. Section 47’s detailed provisions are to be interpreted liberally with regard to their spirit, easing the burden on instant runoff voting to comply.
 - c. Another case articulates a hyper-literal interpretation of section 47, but is no longer

good law, and if it were would also invalidate many existing election laws.

LEGAL ANALYSIS

1. THE PLAIN LANGUAGE OF THE VERMONT CONSTITUTION DOES NOT PROHIBIT MAJORITY, PREFERENTIAL ELECTION SYSTEMS SUCH AS INSTANT RUNOFF VOTING FOR ELECTIONS FOR GOVERNOR, LIEUTENANT GOVERNOR AND TREASURER.²

The Vermont Constitution does not exclusively govern elections for Governor, Lieutenant-Governor and Treasurer. Within the general principles articulated in Section 47, the General Assembly determines the voting system and election rules. Ever since the March 8, 1787 “Act Regulating the election of governor, lieutenant governor, treasurer, council, and representative” the General Assembly has taken responsibility to fulfill the intent of Section 47.³ Instant runoff voting is consistent with the General Assembly’s practice, as it fully complies with the language of the constitution.

a. THE CONSTITUTION PROHIBITS SEPARATE RUNOFF ELECTIONS IN WHICH VOTERS CAST BALLOTS ON A SUBSEQUENT DAY BUT DOES NOT PROHIBIT MAJORITY VOTING SYSTEMS SUCH AS INSTANT RUNOFF VOTING

A careful reading of Section 47 of the Constitution reveals that instead of prohibiting any voting system that generates a majority winner for governor, the Constitution only prohibits the use of a separate runoff election. Because a separate runoff election is the most familiar method for generating a majority winner if no candidate earns a majority of the vote, the two concepts are often confused. Section 47 requires all votes for Governor to occur “on the day of election for choosing Representatives to attend the General Assembly.” Because all votes for governor must be cast on the same day, a separate runoff election held weeks later is not permitted. If it were logistically possible to hold a runoff election on the same day as the original election for governor, Section 47’s prohibition of a separate election day for governor would not preclude a same-day runoff. As it is not logistically possible, separate runoff elections are constitutionally prohibited. However, Section 47 does not prohibit the use of a voting system that generates a majority winner but has ballots cast on a single day, such as instant runoff voting.⁴

² For purposes of brevity, any reference to the election for ‘Governor’ in this memo should be understood to refer to elections for Governor, Lieutenant-Governor and Treasurer.

³ In essence the same as Section XVII, Chapter II of the 1777 Constitution, and Section X, Chapter II of the 1786 Constitution, etc. Since the content has remained substantially the same, for simplicity we will simply refer to Section 47.

⁴ Instant runoff voting is considered a majority voting system because it is more likely than a non-preferential voting system to result in one candidate earning a majority of the vote, though there are many occasions when no candidate will earn a majority of the vote in an instant runoff voting election. In a multi-candidate race using a non-preferential voting system, the likelihood of the leading candidate earning less than a majority of the vote is relatively high. In a multi-candidate race using a preferential voting system, the likelihood of the leading candidate earning less than a majority of the total votes cast is significantly lower, because the second-choices of the eliminated candidates are added on to the first choices of the surviving candidates. However, it is not uncommon for the leading candidate in a multi-candidate race using a preferential voting system to end up with less than a majority of the vote, and this can occur in a number of different scenarios. The leading candidates can tie, which would result in no candidate earning a majority (50% + 1 vote) of votes. More commonly, supporters of eliminated candidates can decline to rank any candidate as their second-choice, denying any surviving candidate a majority of the votes cast. These are considered “exhausted ballots.” To illustrate the point, consider the following instant runoff voting

b. THE CONSTITUTION CAN NOT CONSISTENTLY BE READ TO PROHIBIT A MAJORITY VOTING SYSTEM, AS IT IMPOSES ONE

The Constitution can not consistently be read to prohibit a majority voting system as it explicitly imposes a requirement for candidates to earn a majority of the votes cast on election day in order to win the election outright; Section 47 reads, in pertinent part, “the person who has the major part of the votes . . . [shall] be Governor”. Similar language requiring a candidate to earn a majority of the vote in order to win the election outright appears later in Section 47: “[i]f, at any time, there shall be no election,” the General Assembly then selects the governor. The phrase “no election” has been interpreted by the Supreme Court, in another context, to mean when no candidate earns a majority of votes in an election. The Court read “event of no election” as used in statutes to apply where “no candidate received a majority of the votes cast.” *In re Recount of Votes Returned for Attorney General*, 330 A.2d 93, 93 (Vt. 1974) (per curiam). In other words, if whatever voting system the General Assembly selects for the electorate does not generate a majority winner for governor, the General Assembly will select the governor. This explicit majority requirement renders inconsistent any interpretation of Section 47 that would prohibit the use of a majority voting system such as instant runoff voting, as it can not consistently be read to prohibit the use of majority voting systems to select the governor when it is itself imposing a majority requirement.

c. INSTANT RUNOFF VOTING DOES NOT ELIMINATE THE GENERAL ASSEMBLY’S SUPPLEMENTARY ROLE IN SELECTING THE GOVERNOR

The General Assembly’s supplementary constitutional role in selecting the governor would not be eliminated if instant runoff voting were to be used. The standards for interpretation of constitutional provisions, “though related, are not the same as for ordinary statutes.” *Peck v. Douglas*, 530 A.2d 551, 554 (1987). Nevertheless, it is instructive that the Supreme Court will not construe a statute in such a way as to render a significant part of the statute meaningless. See *Payea v. Howard Bank*, 663 A.2d 937, 938 (1995). Similarly, any statute that, in effect, amends the state constitution is less likely to be held constitutional. Section 47 requires the General Assembly to select the governor, as a last resort, if no candidate earns a majority of the votes. If a candidate earns a majority of the vote, the General Assembly plays no role in the selection of governor, aside from the administrative responsibility of its appointed canvassing committee (that is no longer practiced): sorting and counting the votes, and ultimately declaring the winner.

election.

Candidate	Original Round	Transfer	Runoff Round
A	4,000	+0	4,000
B	3,500	+0	3,500
C	2,500	-2,500	0

No candidate in the first round of counting earns the necessary 5,001 votes of the 10,000 votes cast to win the election outright, so an instant runoff count proceeds. The last place candidate, C, is eliminated. However, none of C’s supporters indicated a runoff choice candidate at all. No votes are transferred to either A or B, and neither candidate earns the 5,001 votes necessary to earn a majority of all votes cast. These 2,500 C votes are exhausted ballots and are comparable to stay-at-home voters in a two-round runoff. Because no candidate earned a majority of all votes cast, the General Assembly would select the winner. These exhausted ballots are why instant runoff voting, considered a majority voting system, can still result in no candidate earning a majority of votes.

See p. 11, supra (discussing statutes that shift responsibility for counting the votes to local election officials instead of a committee of the General Assembly). Implementing instant runoff voting will result in significantly fewer elections where the leading candidate did not earn a majority of votes, but will not *eliminate* the General Assembly’s role. There can still be elections with instant runoff voting where one candidate does not earn a majority of the votes cast. For an example of elections where, due to “exhausted ballots,” no candidate earns a majority of the vote in an instant runoff voting election, *see fn. 2, supra*. Similarly, elections that result in a tie where no candidate earns a majority of votes will still require the General Assembly to select the governor. The fact that 32 other state constitutions contain a similar provision for election of the governor by the legislature (in the rare case of a tie) shows that, while the frequency with which this provision would be triggered in Vermont would be reduced, that does not make it meaningless. Because instant runoff voting can still result in some elections where there is a tie or no candidate for governor earns a majority of the vote, the General Assembly’s role will not be eliminated and the use of instant runoff voting is constitutional.⁵

The detailed provisions of Section 47 do not pose any barrier to the implementation of instant runoff voting, especially under the liberal standard of interpretation articulated by the Vermont Supreme Court (*see* Section Three for a full discussion of the court’s standard).

⁵ Do note that any argument that only the first-preferences of an instant runoff voting election should be considered a ‘vote’ to determine if any candidate earned the requisite majority of the votes is nonsensical. No court has ever interpreted a vote in a preferential ballot to mean only some of the preferences expressed by the voter. There is no authority for an interpretation of a preferential ballot that defines a majority of the vote as a majority of only the first-preferences of the votes. The logic of counting the second preferences of eliminated candidates to see if there is a majority winner is sound. Otherwise, if a court defined a first-preference as a “vote” for purposes of determining a majority winner, the court would then be transforming second-preferences into second votes, which raises other constitutional concerns, as some voters will choose not to cast a second-preference in their vote. If a preferential ballot is constitutionally permissible, then a court can not interpret a majority of votes cast to be defined by only the first-preferences on ballots. A majority winner is found – or not found – after the instant runoff voting process has completed and lower-preferences are tabulated.

The Vermont Supreme Court’s definition of a “vote” includes the concept of a preferential ballot: “A vote is the formal expression of a will, preference, wish or choice in regard to any measure proposed.” *Sawyer Stores, Inc. v. Mitchell*, 62 P.2d 342, 348 (1936) (internal citations omitted). Black’s Law Dictionary defines a “vote” as “the expression of one’s will, preference, or choice” Black’s Law Dictionary, 1576 (6th ed. 1990).

The federal Voting Rights Act’s definition of vote is instructive (and to some degree controlling). “The terms ‘vote’ or ‘voting’ shall include all action necessary to make a vote effective in any primary, special or general election” 42 U.S.C. s.19731(c)(1). In order to make a preferential vote effective, lower-ranked preferences can’t simply be ignored, while only the first-preference is considered a “vote” for purposes of determining a majority winner. The full ballot with all rankings is a “vote” in order to make a vote effective.

Although there is no controlling case law on this point, there is persuasive authority that recognizes the constitutionality of instant runoff voting. An unpublished Michigan Circuit Court approved the City of Ann Arbor’s use of instant runoff voting. *Stephenson v. Ann Arbor*, File No. 75-10166 AW (Jackson County, 1975). A Massachusetts court approved the City of Cambridge’s use of a preferential ballot to elect the city council and school board. *Andrew Moore vs. Election Commissioners of Cambridge*, 309 Mass. 303, 35 N.E.2d 222 (1941) And in dicta, a United States Supreme Court concurring opinion recognized the value (and constitutionality) of instant runoff voting. *Williams v. Rhodes*, 393 U.S. 23, 47 fn. 8 (1968) (J. HARLAN, concurring).

2. INSTANT RUNOFF VOTING IS CONSISTENT WITH THE INTENT OF THE FRAMERS OF SECTION 47 OF THE VERMONT CONSTITUTION: TO ELECT A CANDIDATE WITH THE BROADEST AMOUNT OF SUPPORT AND TO INVEST THE ELECTORATE WITH A CENTRAL ROLE.

The framers of Section 47 crafted a voting system under the logistical constraints of the 18th century that did not permit the use of a separate runoff election. Within those constraints, the framers created an election system that invested the electorate with the most decision-making authority and used the General Assembly as a back-up in case no candidate earned a majority of the vote.

The role of intent in construing the Constitution is described in *Baker v. State*, 744 A.2d 864 (1999):

We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials. The Vermont Constitution was adopted with little recorded debate and has undergone remarkably little revision in its 200-year history. . . . The responsibility of the Court, however, is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot alone resolve them. As we observed in *State v. Kirchoff*, 156 Vt. 1, 6, 587 A.2d 988, 992 (1991), "our duty is to discover the core value that gave life to Article [7]." Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.

Baker v. State, 744 A.2d 864, (1999) (internal citations omitted)

We must infer the motivating ideal of the framers from the document itself as well as from contemporary documents such as other state constitutions and early Vermont statutes passed in the first General Assembly by many of the framers.

a. THE PROVISIONS OF SECTION 47 ILLUMINATE THE INTENT OF THE FRAMERS

The provisions of Section 47 illuminate the intent of the framers. The framers clearly intended that the selected governor have a broad amount of support, which is why they allowed a candidate to win outright if he earned a majority of the vote or put the choice in the hands of the General Assembly, which itself used the majority standard in case there was a problem in the election for governor.

The provision shows that the framers were grappling with the problem of ‘split votes’

that can cause a minority of voters to select the winner. If the framers didn't see that as a problem, then they could have simply used a plurality voting system that was used in every other state at the time. Further, if the General Assembly simply ratified the plurality winner as a matter of practice, then the General Assembly's role is rather meaningless. The only logical reason why the General Assembly is called upon to select the governor if no candidate earned a majority of the vote is in case the winner of the election clearly is the 'wrong' candidate and that the majority of voters split their votes among two or more similar candidates. Thus, the motivating ideal of the framers in investing the General Assembly with the power to choose the governor if no candidate earned a majority of the vote was to solve the problem of two or more candidates splitting the vote and not to automatically elevate a top vote-getter with less than half the votes to the status of "winner."

b. RELATIVE TO CONTEMPORARY STATE CONSTITUTIONS, THE VERMONT CONSTITUTION REVEALS AN INTENT TO DEMOCRATIZE THE SELECTION OF THE GOVERNOR AS MUCH AS PRACTICAL, WHICH INSTANT RUNOFF IS CONSISTENT WITH

The Vermont Constitution, relative to other state constitutions in place at the same time, reveals the framers' intent to democratize the selection of governor as much as practical. Vermont was the only state before 1780 to require a majority to elect its top officials, and of the first 14 states only one of five to recognize popular election of a governor at all. *See And If There Be No Choice Made, A Mediation on Section 47 of the Vermont Constitution*, D. Gregory Sanford and Paul Gillies (forthcoming, Vermont Law Review). This implies that the Vermont framers' intent was to put the electorate in the center of the gubernatorial selection, keeping the General Assembly in a merely supplementary role. This interpretation of the framers' intent strengthens the view that there is no constitutional need to design a voting system that is likely to involve the General Assembly in the selection of the governor as the framers preferred that the electorate hold the central role in selecting the governor. As instant runoff voting tends to increase the role of the electorate vis-à-vis the General Assembly, as there will be fewer candidates who do not earn a majority of votes under instant runoff voting, it is consistent with the intent of the framers of Section 47 to democratize the selection process as much as practical.

c. INSTANT RUNOFF VOTING IS CONSISTENT WITH THE FRAMERS' MAJORITARIAN VALUES, WHICH ARE REFLECTED IN EARLY STATE STATUTES

Instant runoff voting, as a majority, preferential voting system, is consistent with the framers firmly-held majoritarian values. The framers' motivating ideal was that majority election systems were superior to plurality voting systems. This motivating ideal can be seen as the Vermont Constitution was the first state constitution in the nation to impose a majority requirement *Id.*, and by seeing the statutes passed by the early Vermont General Assemblies that imposed a majority requirement. Many of the framers of the Vermont Constitution served in the first Vermont General Assembly.⁶ A review of election-related statutes passed by the first General Assembly will shed light on the intent of the framers in crafting Section 47, as it is

⁶ The following constitutional delegates served in the legislature: Joseph Bowker (served as speaker), Alexander Harvey, Nathan Clark (served as speaker), Benjamin Baldwin, William Gage, Benjamin Carpenter. Email from State Archivist Gregory Sanford dated December 9, 2002.

extremely unlikely that their values dramatically changed over the few years between the drafting of the Constitution and the first sessions of the General Assembly. Many of the earliest election statutes passed by the Vermont General Assembly required candidates for state and federal office to earn a majority of the vote, showing the majority-inducing values of the framers. A majority requirement for candidates for town representatives was implied in 1787 and made explicit in 1797.⁷ Rejection of first-round plurality “winners” persisted until 1939, and Federal Representatives were elected by majority vote until 1812, and majority elections persisted in some form for U. S. Representative until 1915.⁸ Thus, the intent of the framers of Section 47, as illuminated by their values and decisions in crafting statutory election rules as members of the General Assembly, was to require a candidate for governor to earn majority support. Instant runoff voting is entirely consistent with the framers’ majoritarian values and is constitutional.

As the framers of Section 47 of the Vermont Constitution intended to democratize the selection process and comply with their majoritarian values, instant runoff voting as a majoritarian election system is entirely consistent with the motivating ideal of the framers of the Vermont Constitution.

3. THE SUPREME COURT’S LIBERAL INTERPRETATION OF THE DETAILED PROVISIONS OF SECTION 47 AND ITS GENERAL PRESUMPTION OF STATUTES’ CONSTITUTIONALITY ENSURE THAT INSTANT RUNOFF VOTING WILL SURVIVE ANY JUDICIAL REVIEW

a. THE SUPREME COURT’S GENERAL PRESUMPTION OF STATUTES’ CONSTITUTIONALITY APPLIES TO INSTANT RUNOFF VOTING

The Vermont Supreme Court grants a wide degree of latitude to statutes when assessing their constitutionality and “accord[s] statutes a presumption of constitutionality.” *State v. Reed*, 680 A.2d 944 (1996). Statutes are presumed to be constitutional, and must meet a high burden to be unconstitutional, as stated in a controlling 1937 opinion: “a statute. . . is not to be adjudged unconstitutional without clear and irrefragable evidence that it infringes the paramount law.” *Gross v. Gates*, 194 A. 465, 469 (1937). Thus, any statutes passed by the General Assembly implementing instant runoff voting will be presumed constitutional, and the Supreme Court will have to find “clear and irrefragable evidence” in order to declare it unconstitutional. *Id.* There is no such clear evidence regarding instant runoff voting. Given that instant runoff voting is consistent with both the letter and intent of Section 47 of the Constitution, the Supreme Court can not find instant runoff voting to be unconstitutional under this standard.

⁷ “An act for regulating the election of governor, lieutenant governor, council, treasurer, and representatives,” (March 8, 1787), XIII STATE PAPERS OF VERMONT 247-250; LAWS OF THE STATE OF VERMONT (Revision of 1798), 546.

⁸ See *And If There Be No Choice Made, A Mediation on Section 47 of the Vermont Constitution*, D. Gregory Sanford and Paul Gillies (forthcoming, Vermont Law Review).

b. SECTION 47’S DETAILED PROVISIONS ARE TO BE INTERPRETED LIBERALLY WITH REGARD TO THEIR SPIRIT, EASING THE BURDEN ON INSTANT RUNOFF VOTING TO COMPLY

The Supreme Court’s interpretation of the detailed provision of Section 47 is liberal, not literal, and follows the spirit of the section, not just the letter. A judicial challenge to the use of printed ballots arose in 1852, based on one of the provisions of Section 47 that calls for names of the candidate voted for to be “fairly written” on the ballot. The case is *Temple v. Mead*, 4 Vt. 535 (1852). In *Temple*, the Court ruled that printed ballots satisfied Section 47’s provision, holding that “writing” includes “printing” so a ballot with a printed name of a candidate is constitutionally equivalent to a ballot with a candidate’s name “fairly written” on it. The court wrote:

“We ought not to believe that it was intended that voting for those officers should always continue in the same particular manner, or that the votes should be of the same materials, or in the same way which was then in use, without any regard to the changes which might take place, or the improvements which might be made. This limited view of the constitution would wholly destroy the statute passed in 1815 [a statute permitting votes to be sorted and counted at the town level rather than by a legislative committee], under which our elections are now made.”

Temple v. Mead, at 540.

Instead of viewing Section 47’s detailed provisions as mandatory, “we are to regard its spirit, and endeavor to give effect to its provisions, without regarding too strictly the literal meaning of the terms made use of.” *Id.*

Applying *Temple*’s interpretation to instant runoff voting yields similar results: the correct interpretation of the detailed provisions of Section 47 is to regard its spirit, not the limited, literal view of the details of the provisions, to find that an improvement to voting for officers using instant runoff voting complies with Section 47.

c. ANOTHER CASE ARTICULATES A HYPER-LITERAL INTERPRETATION OF SECTION 47, BUT IS NO LONGER GOOD LAW

There is an 1864 case that takes a literal interpretation of the detailed provisions of the election of the governor in Section 47 of the Vermont Constitution. This case, however, is almost certainly no longer good law, as its holding has been ignored by the General Assembly and its reasoning has been overturned by more recent decision of the court. In *Opinion of the Judges of the Supreme Court on the Constitutionality of “An Act Providing for Soldiers Voting” (Advisory Opinion)* 37 Vt. 665 (1864), the Vermont Supreme Court laid down a literal interpretation of the detailed provisions of Section 47 when rejecting a proposed statute that would have permitted soldiers fighting in the Civil War to cast an absentee ballot. Because Section 47 required voters to “bring in” their votes for Governor, Lieutenant-Governor, or Treasurer, absentee votes were not permitted: “[i]f the constitution declared that a thing shall be done in a particular manner or way,

it is implied necessarily that it shall not be done in any other.” *Id.* at 672.⁹

Advisory Opinion's hyper-literal interpretation of Section 47 could make it more difficult to implement instant runoff voting and faithfully comply with every detailed provision of Section 47. Even though instant runoff voting does, in fact, comply with the language of Section 47, see page 4, *supra*, *Advisory Opinion*'s literal approach puts a heavier burden on the argument. Fortunately, *Advisory Opinion* is almost certainly no longer good law. In blatant defiance of the *Advisory Opinion*'s holding, the General Assembly has permitted absentee votes since 1896. See Vt. Stat. Ann. tit. 17, Section 2531-2550. Furthermore, the General Assembly has consistently rejected *Advisory Opinion*'s literal interpretation of Section 47 by significantly deviating from the detailed provisions of electing the governor. Voters do not “bring in their votes . . . to the Constable[,]” instead voters use preprinted ballots; the Constable does not “seal them up . . . and deliver them to the Representatives,” instead local election officials count the ballots, prepare an election summary and submit a form to the Secretary of State; the General Assembly does appoint a canvassing committee “at the opening of the General Assembly” but they no longer “receive, sort, and count the votes[,]” instead the Secretary of State presents to the committee of General Assembly the results from the local election officials as summarized by a statewide canvassing committee, and a draft certificate. See Vt. Stat. Ann. tit. 17, Sec. 2565, 2567, 2581-92. If a court attempted to justify a review of the compliance of an instant runoff voting statute with the specific provisions of Section 47 using *Advisory Opinion*'s literal interpretation, it would have to apply that same review to all the open and notorious statutory deviations of Section 47 practiced for decades, indeed for two centuries, especially the widespread use of absentee ballots in clear contradiction to *Advisory Opinion*'s holding. Two centuries of liberal practice has eviscerated *Advisory Opinion*'s literal interpretation of Section 47. *Advisory Opinion* is no longer good law and its literal interpretation of Section 47 is no impediment to the constitutionality of instant runoff voting.

Thus, *Temple* governs the interpretation of Section 47's detailed provisions for electing a governor, and under this liberal standard, instant runoff voting safely complies with Section 47. Further, instant runoff voting falls under the general presumption of constitutionality that all statutes enjoy under the Supreme Court's standard articulated in *State v. Reed*. Since a well-crafted IRV statute would comply with both the letter and intent of Section 47, a plaintiff could not meet the high standard of “clear and irrefragable evidence that it infringes the paramount law” *Gross v. Gates*, 194 A. 465, 469 (1937), and the statute would be upheld by the Court.

⁹ The decision itself suggests a lack of Court clarity by stating “The examination of the subject has been attended with great embarrassment, as we have not had the advantage of argument by counsel, to present either side of the question; and the official engagements of the several members of the court have been such, that it has not been possible for them to be all present together at any time to discuss the subject, and compare views and reasons.” *Advisory Opinion*. Appendix pages 678-679.