

required to publish the samples once a week for four weeks preceding the election in newspapers in every county in the state. The estimated cost per constitutional amendment is \$150 thousand to \$200 thousand depending on the size and number of ballots and if additional ballot stations are needed. That estimate appears in the Operating Budget Impact Table.

In the event this resolution passes the Legislature and is approved by the voters, amendments and revisions to the Election Code will be necessary. Those changes could lead to additional costs, although no estimates can be prepared until those revisions are enacted into law.

SIGNIFICANT ISSUES

Under SJR7, in a primary, all candidates for a particular office--regardless of party affiliation or lack of affiliation—appear on a single primary ballot. An eligible voter, regardless of political party affiliation or lack thereof is allowed to vote. Candidates for governor and lieutenant governor are joint candidates and listed together as a single ticket (“ticket”). The five candidates or tickets receiving the most votes cast for a partisan office in the primary are the only names that shall appear on the general election ballot for that office.

In the general election for partisan offices, voters may rank each candidate for each office or ticket from first to last (fifth) choice. If in tabulating first choice votes, if one candidate or ticket receives a majority of the vote, that candidate or ticket is declared the winner. If no candidate or ticket receives a majority, however, the candidate or ticket with the fewest first-choice votes is eliminated and another round of tabulation occurs. In that round, each ballot counts as a vote for its highest-ranked candidate or ticket who has not been eliminated. Rounds of tabulation continues until a candidate or ticket receives a majority of votes and is declared a winner.

NMAG advises that:

The establishment of ranked-choice instant runoff voting in the New Mexico Constitution could be susceptible to challenges under the U.S. Constitution or federal statutes. Ranked-choice voting is a fairly novel idea across the United States. At present, two states—Alaska and Maine—have implemented the procedure for statewide and federal elections. *See* Congressional Research Service, *Ranked-Choice Voting: Legal Challenges and Considerations for Congress*, at 1 (Oct. 12, 2022). Additionally, approximately 50 jurisdictions (political subdivisions of states) have implemented ranked-choice voting. *See id.* Presently, only two federal courts have held rulings on the issue. *See Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Baber v. Dunlap*, 376 F. Supp. 3d 125 (D. Maine 2018). When challenged under the federal constitution and statutes, opponents of ranked-choice voting have asserted that ranked-choice voting violates the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment, along with the Voting Rights Act. Both the Ninth Circuit and U.S. District Court for the District of Maine upheld ranked-choice voting as constitutional and as not violating the Voting Rights Act. However, it is a legitimate possibility that other federal courts—possibly including the U.S. District Court for the District of New Mexico and the Tenth Circuit—hold differently. For additional analysis on the potential constitutional challenge to ranked-choice voting under the Equal Protection Clause, *see* Brandon Bryer, *One Vote, Two Votes, Three Votes, Four: How Ranked Choice Voting Burdens Voting Rights and More*, 90 U. Cin. L. Rev. 711 (2021).

SOS adds to this discussion by reporting:

The state of Alaska successfully defended a constitutional challenge to a similar law. Alaska became the first state to adopt top-four primaries for state executive, state legislative, and congressional offices. Under Ballot Measure 2, candidates run in a single primary election, regardless of a candidate's party affiliation. The four candidates that receive the most votes advance to the general election and then the candidates are subject to ranked choice voting at the general election. The Alaska Supreme Court upheld the election system stating that these election changes did not unconstitutionally burden the rights of political parties and voters. A full opinion will soon follow as the Court just ruled on Wednesday January 1, 2022. *Kohlhaas et. al. v. State of Alaska et. al.*, S-18210.

NMAG raises issues as to the specific provisions of SJR7. First, it identifies the offices to which the ranked-choice voting applies to be “partisan offices.” *See* SJR 7, Sec. 2 (E). However, neither SJR7 nor other provisions in the New Mexico Constitution specifically define what constitutes “partisan office.” NMAG suggests that SJR7 define that term.

In addition, NMAG calls attention to an existing constitutional provision that controls how judicial elections are conducted:

At present, the New Mexico Constitution provides,

“Each justice of the supreme court, judge of the court of appeals, district judge or metropolitan court judge shall have been elected to that position in a partisan election prior to being eligible for a nonpartisan retention election. Thereafter, each such justice or judge shall be subject to retention or rejection on a nonpartisan ballot. Retention of the judicial office shall require at least fifty-seven percent of the vote cast on the question of retention or rejection.”

N.M. Const., Art. VI, § 33(A).

As NMAG notes, SJR7 contemplates which positions are subject to ranked-choice voting based upon whether the *office* is partisan, rather than whether the election itself is partisan. Without a clarifying definition of what constitutes partisan office, the nature of judicial elections is unclear. Justices and judges must run in partisan elections, but should theoretically behave as dispassionate nonpartisans on the bench. Further, justices and judges are subject to both partisan election and nonpartisan retention, making the application of SJR7 unclear.

SOS raises a question concerning candidates for governor and lieutenant governor. It notes that in the current primary election process, the candidates for governor and lieutenant governor are elected separately for each party and then joined as a “ticket” to appear together on the general election ballot. However, the proposed language in SJR7 requires candidates for governor and lieutenant governor to be “joint candidates” and listed “as a ticket” for the primary election. In the case of multiple candidates for these offices, it is unclear how the candidates would be paired up to become “joint candidates” for the primary election.

Both SOS and NMAG note that significant portions of the Election Code are structured around partisan primaries. *See, e.g.*, Sections 1-8-1 to -66 NMSA 1978. Ratification of this amendment would require legislation that re-structures the Election Code to reflect the change from partisan

primaries to nonpartisan blanket primaries.

CONFLICT

NMAG reports that multiple bills have been introduced this legislative session to allow for open primaries (in which any voter may request the primary ballot of any party) or semi-open primaries (in which only independent, declined-to-state, or minor party-affiliated voters may request the primary ballot of a participating party) among the different political parties. SJR7 seeks to eliminate partisan primaries altogether and create one large primary in which all candidates participate. These bills conflict with SJR7:

HB54 – Creating semi-open primaries.

SB73 – Creating semi-open primaries.

SB175 – Creating open primaries.

MD/rl/ne/al