

**IN THE SUPREME COURT**

**STATE OF ARIZONA**

APRIL SMITH, et al.,

Plaintiffs/Appellants,

v.

ADRIAN FONTES, et al.,

Defendant/Appellant,

MAKE ELECTIONS FAIR PAC,

Real Party in Interest.

Supreme Court

No. CV-24-0222-AP/EL

Maricopa County Superior Court

Nos. CV2024-019847,

CV2024-019880 (Consolidated)

**(Expedited Election Matter)**

**BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE  
IN SUPPORT OF PLAINTIFFS/APPELLANTS**

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## IDENTITY AND INTEREST OF AMICUS CURIAE

The identity and interest of amicus is set forth in the accompanying Motion for Leave to File Brief Amicus Curiae of Goldwater Institute.

### INTRODUCTION

Although the question before the Court concerns the counting of signatures regarding Prop 140, this brief will provide broader context by describing the “ranked-choice voting” (RCV) scheme that Prop 140 would authorize, and why it raises extraordinary constitutional and legal concerns.

### ARGUMENT

#### **I. Ranked-choice voting disenfranchises voters.**

Prop 140’s RCV system is fundamentally flawed and would lead to disenfranchisement of many—perhaps hundreds of thousands—of voters.

RCV works by requiring voters to rank a group of candidates by order of preference, instead of voting for or against a single candidate. When votes are counted, if no candidate has received a majority, the bottom-most candidate is eliminated, and voters who selected that candidate as their first selection have that choice thrown out. Instead, a second round of counting occurs, and their *second* preference is counted instead. This process continues until some candidate crosses the 50% threshold.

Thus, assume that John Doe is voting in an election between Washington, Adams, Jefferson, Madison, and Monroe. Instead of choosing the one candidate he likes best (say it's Monroe), Doe must rank them. Perhaps he chooses the order: Monroe, Adams, Jefferson, Washington, Madison. But when the votes are counted, no candidate receives a majority, and Monroe comes in last. Under RCV, Monroe is now eliminated, and Doe's vote is changed, so that he's counted as an Adams voter instead.

Perhaps in this second count, there's again no majority winner—and suppose this time, Adams is lowest-ranked. The result is that, since Adams was Doe's second choice, his vote is *again* shifted, and he's now counted as a Jefferson voter. This process continues until someone finally crosses the 50% threshold. That person may very well be Madison, the one Doe disliked the most. Indeed, Madison in this scenario may have been the candidate *no* voter would have preferred: perhaps he was so disliked that he was chosen for the fifth spot by an overwhelming number of voters. Yet he obtains the office for which no voter wanted him, simply because the other four candidates—*each of whom may have received as much as 49% of the vote*—failed to cross the 50% threshold.

It should be clear that this process disenfranchises voters. Not only may the ultimate “winner” be a candidate *no voter* would have chosen, but such an outcome is quite likely, for two reasons. First, voters are likely to feel that they *must* rank

all the candidates on their ballot, no matter how much they may disapprove or even despise them. Doe may feel he's required to check "Madison," at least as his lowest-ranked candidate—and consequently is *forced to vote for* Madison, despite his belief that Madison is uniquely unqualified. The process thus coerces Doe to vote for a candidate against his will. Second, if Doe *refuses* to do that, and leaves the fifth spot blank, the result is that his vote is likely to be discounted *entirely*—because, as the rounds progress, the fact that he ranked only four candidates instead of all five increases the likelihood that his vote will ultimately be deemed "blank" and be discarded. In that sense, RCV disenfranchises Doe either partially—by making him vote for a candidate he loathes—or entirely, by tossing out his vote if he fails to do so.

What's more, the complexity and unfamiliarity of this scheme drastically increases the likelihood of voter confusion and error, which, again, is likely to lead to disenfranchisement as votes are discarded for failure to comply.

There's another, perhaps more disturbing element of the RCV proposal. Prop 140 would empower the Legislature, or, if the Legislature fails to act, the Secretary of State, to "determine the number of candidates for each office who may advance" to the next stage of vote-counting—and even to "prescribe a process" for such a determination. In other words, it would empower government officials to decide whom the voters can select—or even give a *single* official unreviewable

power to do so. Not only is it almost inevitable that those empowered to make such a decision will use that power for self-interested reasons, but such power is irreconcilable with basic democratic principles.

Remarkably enough, advocates of RCV admit that their goal is *not* to make the process more transparent and less error-prone, but to substantively alter the content of political disputes. They claim RCV will “turn rivals into allies, make candidates more electable, and increase civility”; *not* that it will result in greater accuracy in vote-counting, or make it easier for the public to express its will. Peter Clark, [\*Rank-Choice-Phobia Has Infected the AZ GOP\*](#), Ariz. Capitol Times (Sep. 20, 2024). But the voting process should determine the will of the electorate, *not* try to subtly change that will.

It’s doubtful whether RCV will have this moderating effect, anyway. The opposite appears to be true: more extreme candidates are given an advantage, because more moderate candidates are most likely to receive a plurality, and thus be eliminated. For example, in a race between Washington, Madison, and Monroe, in which Washington is the more moderate candidate, voters for both Madison and Monroe are likely to select Washington as their *second*-place choice—which increases the likelihood that he will be eliminated entirely, since he will be ranked at the bottom during the first round of tabulation—and that in the second round, voters will be left to pick Madison or Monroe instead.

That’s essentially what happened in recent Alaska congressional elections, where, as Professors Nathan Atkinson and Scott Ganz observe, the more extreme candidate was declared the winner even though the moderate candidate was actually preferred by more voters. Nathan Atkinson & Scott Ganz, [\*The Flaw in Ranked-Choice Voting: Rewarding Extremists\*](#), The Hill (Oct. 30, 2022). Actually, the situation was much worse than that. The results were as follows: incumbent Democratic Congresswoman Mary Peltola received 50.9%; Republican Nick Begich received 26.6%; Republican Nancy Dahlstrom received 19.9%; Republican Matthew Salisbury received 0.6%. Dahlstrom and Salisbury then quit the race, with the result that Independence Party member John Howe moved up in the rank, as did Democrat Eric Hafner, neither of whom received more than 700 votes. Hafner is currently incarcerated in federal prison in New York for making bomb threats to government offices. The Democratic Party sued to block him from appearing on the ballot as a Democrat—*on the grounds that it would confuse voters*—but two weeks ago, the court refused. See [\*A Ranked-Choice Voting Farce in Alaska\*](#), Wall St. J. (Sep. 11, 2024); [\*Alaska Democratic Party v. Beecher\*](#), S-19231 (Alaska, Sept. 12, 2024).

These are not just pragmatic problems; they raise serious constitutional questions under the Fourteenth Amendment. An RCV system is, in practice, a *group* of elections held simultaneously—meaning it’s really a *series* of elections, in

rapid succession. (This is why it's sometimes called "instant runoff voting.") But in the process of the multiple tabulations, the rejection of some votes that's built into the system inherently weighs some votes more than others, in violation of the Fourteenth Amendment's "one person, one vote" rule. As one scholar observes, "[i]t is illogical to suggest that the twenty-seven percent of voters who had their ballots exhausted by the last round were afforded an 'equal chance' to impact the outcome of the election—they did not even have a vote to exercise in the later elections." Brandon Bryer, Note: [\*One Vote, Two Votes, Three Votes, Four: How Ranked Choice Voting Burdens Voting Rights and More\*](#), 90 U. Cin. L. Rev. 711, 724 (2021).

Because RCV is essentially a group of elections that take place in a series of rapid iterations, in each step of which votes are discarded, and voters' "second" or "third" or "fourth" choice counted instead—and in which voters are ignored entirely if they failed to fill in these down-ballot choices—RCV violates the "one-person, one-vote" rule.

## **II. Ranked-choice voting is confusing, likely to lead to delays in filling offices, and harms legitimacy.**

One of the most important goals of any rule of selection is that a choice be clearly and swiftly made, to avoid delays and confusion. Delay in filling offices leads to many problems, some obvious and some subtle. Obviously, having no official winner leaves offices vacant that should be filled in order to implement

public policy and ensure the orderly enforcement of the law. Less obviously, delays in deciding elections can affect public opinion in unpredictable ways. Voters might change their minds about a would-be officeholder at any time, due to some change in circumstances or priorities. The candidate's own circumstances might also change during a lengthy verification process. And rumors or paranoia regarding the results can fester during long periods of limbo.

The consequences can be extreme—and Arizona should know. The disputed 1916 gubernatorial election between George Hunt and Thomas Campbell is a prime example. Both candidates declared victory, took the oath of office, and insisted they were the legitimate governor of the state. At Campbell's inauguration, in January 1917, “there were many dangerous gunmen known to the police in the gathering,” and “the prospect of war between [members of a socialist organization] on Hunt's side and a pack of cowboys loyal to Campbell.” David Berman, [\*George Hunt: Arizona's Crusading Seven-Term Governor\*](#) 109 (2015). It took nearly a year for this Court to resolve the dispute, in [\*Hunt v. Campbell\*](#), 19 Ariz. 254 (1917), by which time “dramatic developments on the labor front had rocked the state and drawn national attention.” [Berman](#), *supra* at 111. Of course, if a purported officeholder appoints subordinates, or signs legislation, or issues regulations in the interim, great confusion is caused by a subsequent ruling that holds that he never properly held office in the first place.

RCV has already led to confusion and delays in places where it's been implemented. In New York City's 2021 mayoral election, it took nearly a month for election officials to declare a winner of the Democratic primary. See Emma Fitzsimmons, [\*Why We May Not Know Who Won the Mayoral Primary for Weeks\*](#), N.Y. Times (July 2, 2021). In 2022, an experiment with RCV in Alameda County, California, led to errors in tabulation and delays in declaring a winner. See J.R. Stone, [\*Alameda Co. Finds Error in Ranked-Choice Voting System, Investigating Oakland School Board Race\*](#), ABC7news.com (Dec. 29, 2022).

Delays and confusion can lead voters to doubt the legitimacy both of elections specifically and government generally. One of the most important advantages of the *lex majoris partis* is that it's swiftly ascertainable and objectively verifiable. This principle—deeply rooted in this nation's history and tradition—is simple to apply with a minimum of expense or delay, and consequently, a minimum of opportunities for manipulation or human error. But it also offers the best protections for minority groups, precisely because an electoral majority is inherently unstable and subject to persuasion or change. See Anthony McGann, [\*The Tyranny of the Super-Majority: How Majority Rule Protects Minorities\*](#), (Center for the Study of Democracy, CSD Working Paper 2002).

Under an RCV system, however, candidates who are less-preferred—perhaps because they represent a marginal but intensely concentrated interest

group—have a greater chance of taking and remaining in positions of power, and have less need *or incentive* to appeal to the broader public. This is one reason the Center for Election Confidence has argued that RCV weakens the electoral influence of members of minorities. See Nolan McCarty, [\*Minority Electorates and Ranked Choice Voting\*](#) (Jan. 10, 2024).

As Dr. McCarty explains, the great advantage minorities have in a *lex majoris partis* system is that if the majority fails to coalesce around a single candidate, which often happens, a candidate the minority supports has a chance of success—which, in turn, creates an incentive for major candidates to negotiate with minority groups to prevent “spoiler” candidates. RCV lessens that incentive, and, because members of minority groups are more likely to fail to rank the majority-backed candidates on their ballots in an RCV system, such voters “may actually lose influence in the case of a majority-versus-majority second round.” *Id.* at 3.

Suppose, e.g., a race between Washington, Adams, and Jefferson, in which Washington and Adams are members of the largest “majority” population in the community, and Jefferson is supported by the minority. Suppose Washington is supported by 48%, Adams by 10%, and Jefferson by 42%. In a normal election, if Washington fails to rally his supporters to show up at the polls, Jefferson, the minority-backed candidate, could win. But under RCV, Washington would fail to obtain the majority, and Adams would be eliminated—meaning the election would

depend on Adams’s supporters—i.e., whom they allocate their second-choice vote to. Since Adams’s supporters are members of the same majority group as Washington’s, they’re more likely to back Washington—and Jefferson, who otherwise would have won, will lose. *See id.* at 5.

Or, suppose the breakdown is: Washington 48%, Adams 42%, Jefferson 10%. Since Jefferson’s supporters cannot select their candidate, their only hope for influence is to cut a deal with Washington or Adams for support. But if Jefferson’s voters, due to the confusion or “voter exhaustion” inherent in RCV, fail or refuse to specify Adams or Washington as their second-rank choice, they lose that opportunity. Thus, under RCV, minorities “have less influence if their exhaustion rates are high.” *Id.*

That not only weakens the influence minorities will have—whether they be racial, religious, ideological, or whatever—but also reduces public confidence in the legitimacy of elections. It renders it less likely that voters will see the voting system as conferring any kind of mandate, and therefore it’s likely to encourage a public attitude that government doesn’t truly represent or speak for them.

That risk is worsened by Prop 104’s proposal to empower the Legislature or the Secretary of State to decide how many candidates in an RCV election can proceed to the next stage—a critical “bottleneck” in the process that empowers government officials to limit voters’ choices in ways that, at a minimum, would

cause understandable doubts about the legitimacy of both elections and government itself.

Political legitimacy rests on two factors: (1) whether the state genuinely respects the rights of individuals while pursuing the common good, broadly defined, and (2) whether it is *perceived* as doing so. When the latter is weakened, the result is political cynicism, which weakens the public's willingness to accept government authority or the rule of law itself. See Pippa Norris, [\*Why Electoral Integrity Matters\*](#) 114–15 (2014).

## CONCLUSION

Prop 140 contains constitutional and practical flaws that risk undermining the electoral process, harming minorities, causing electoral confusion and the radicalization of candidates, and ultimately undermining public confidence in the electoral process specifically and government generally.

**Respectfully submitted this 26th day of September 2024 by:**

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