IN THE SUPREME COURT

STATE OF ARIZONA

APRIL SMITH, *et al.*, Plaintiffs/Appellants, v. ADRIAN FONTES, *et al.*, Defendants/Appellees, and MAKE ELECTIONS FAIR PAC, Real Party in Interest.	No. CV-24-0184-AP/EL Maricopa County Superior Court Nos. CV2024-019846 CV2024-019880 (Consolidated)
ARIZONA FREE ENTERPRISE CLUB, *et al.*, Plaintiffs/Appellants, v. STATE OF ARIZONA, *et al.*, Defendants/Appellees, and MAKE ELECTIONS FAIR, Real Party in Interest.	

BRIEF OF *AMICUS CURIAE* HONEST ELECTIONS PROJECT

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The Honest Elections Project respectfully submits this brief as *amicus curiae* in support of the Appellants and to urge a reversal of the trial court's finding that the "Make Elections Fair" initiative (the "Initiative") complies with Article XXI, Section 1 of the Arizona Constitution.

INTRODUCTION

The Initiative amalgamates an array of putative amendments to multiple provisions of the Arizona Constitution into a single proposal. An overhaul of Arizona's century-old partisan primary system—which would be a comprehensive amendment in its own right—is conjoined to a restructuring of the general election and an abrogation of the democratic maxim that the person receiving the greatest number of votes wins an elected public office. Whatever their ostensible respective merits, these disparate policies do not "constitute a consistent and workable whole" that "should stand or fall as a whole." *Ariz. Together v. Brewer*, 214 Ariz. 118, 121, ¶ 5 (2007) (citation omitted). The Initiative accordingly violates Article XXI, Section 1's mandate that "proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately" (the "Separate Amendment Rule").

The trial court's ruling was founded on two consequential errors of law. First, failing to heed this Court's warnings in similar contexts, the trial court defined the Initiative provisions' supposed "topical relatedness" at an impermissibly expansive

level of generality. Second, the trial court imputed to the provisions a "interrelatedness" that finds little traction in the Initiative's text and substance. The Initiative would explicitly change distinct and independent constitutional provisions and necessarily reallocate a portion of the legislative power to an executive branch official. This cacophony of disparate provisions would confront voters with the constitutionally untenable dilemma of "having to adopt measures of which in reality they disapprove, in order to secure the enactment of others they earnestly desire." *Kerby v. Luhrs*, 44 Ariz. 208, 221 (1934). The Court should reverse the judgment.

INTEREST OF THE *AMICUS CURIAE*

The Honest Elections Project is a nonpartisan organization devoted to supporting the right of every lawful voter to participate in free and honest elections. Through public engagement, advocacy, and public-interest litigation, the Project defends the fair, reasonable measures that legislatures put in place to protect the integrity of the voting process. The Project supports commonsense voting rules and opposes efforts to reshape elections for partisan gain. It has a significant interest in this case, which implicates far-reaching potential changes to foundational attributes of Arizona's electoral infrastructure.

ARGUMENT

The Separate Amendment Rule requires the constituent provisions of a proposed constitutional amendment to be "sufficiently related to a common purpose

or principle that the proposal can be said to 'constitute a consistent and workable whole on the general topic embraced,' that, 'logically speaking . . . should stand or fall as a whole.'" *Korte v. Bayless*, 199 Ariz. 173, 177, ¶ 10 (2001). This Court has distilled that general precept into two distinct facets. First, the provisions of a proposed amendment must be "topically related." Second, the provisions also must be "sufficiently interrelated" to each other. *Arizona Together*, 214 Ariz. at 121, ¶ 6. The trial court's analysis faltered at each step.

I. **<u>"Reforming Candidate Elections" Is Not a Cognizable "Topic"</u>**

The Initiative's provisions do not bear a common relationship to a sufficiently discrete "topic." The trial court's declaration that the "general topic is reforming candidate elections," Ruling at 4, adopts a mode of reasoning that this Court has repudiated. Recognizing the risk that a "topic" could be definitionally retrofitted to accommodate the provisions of virtually any initiative, the Court has cautioned that "[t]aken to a sufficient degree of generality, nearly any group of provisions could claim some relationship." *Korte*, 199 Ariz. at 178, ¶ 15. Accordingly, the "topicality" rubric requires the existence of a narrow and self-contained principle that is common to each provision. *See, e.g.*, *id.* (denominating the relevant "topic" as "state trust lands" would too "amorphous"); *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 246, ¶ 20 (2004) (provision that would end public funding of statewide and legislative campaigns lacked any "common purpose or principle"

with provision that would sweep Clean Elections Commission funds into the general fund);[1] *Taxpayer Protection All. v. Arizonans Against Unfair Taxation*, 199 Ariz. 180, 182, ¶ 6 (2001) (elimination of state income tax was facially unrelated to candidate pledges to support elimination of federal income tax).[2]

Here, the Court already has defined the governing "topic." Considering a prior initiative that would have replaced partisan primary elections with a "jungle" system similar to that proposed by this Initiative, this Court denoted the relevant "general principle" as the notion that "the state should not favor political parties or party-affiliated voters in election-related matters." *Save Our Vote, Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 150, ¶ 14 (2013).

Applying this same topicality standard to the current Initiative reveals its insufficiency. A conversion from a first-past-the-post general election to (at least in some races) a ranked-choice method of selection bears no discernible relationship to favoring or disfavoring political parties; all candidates competing in such a general

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[1] The Court subsequently repudiated *Clean Elections*' partial reliance on its conception of how a "reasonable voter" would evaluate the provisions of the measure, but other aspects of the case remain good law.

[2] Although the Court in *McLaughlin v. Bennett*, 225 Ariz. 351 (2010), found that an initiative affecting both public and labor union elections satisfied the "topicality" requirement, it—importantly—defined the applicable "topic" as "secret ballots." *Id.* at 354, ¶ 9. The import of *McLaughlin* is that while a specific facet of the election process may constitute a "topic," a freewheeling "reform" of "candidate elections" writ large does not.

election structure—irrespective of their party affiliation or non-affiliation—would be similarly impacted. Rather, the Initiative's ranked-choice provision affects only the weight and efficacy of each individual voter's ballot.

In redefining the controlling topic as instead "reforming candidate elections," the trial court embraced the fallacy that this Court has resisted. It adopted an endogenous conception of "topicality"—*i.e.*, retrospectively fashioning a putative "topic" tailored to the initiative's contours—instead of applying it as an extrinsic constraint on the Initiative's constitutionally permissible scope. The "topicality" inquiry entails crystallizing the concrete "principle" at the core of ***each*** substantive provision and then determining whether it is common to ***every*** provision—not, as the trial court did, assessing the provisions as a whole and then formulating some generic label that ostensibly links them. This Court should correct that consequential error.

II. <u>The Initiative's Provisions Are Not Interrelated</u>

The Initiative's provisions are not "interrelated" along any of the four dimensions that this Court has identified.

First, Section 5 of the Initiative, which prescribes a new "jungle primary" system, is facially unrelated to Sections 4 and 6, which pertain to the use of ranked-choice voting methods in general elections. Although the latter provisions include incidental references to the primary election, they are largely conceptually

independent of each other. The elimination of partisan primaries can be effectuated without the implementation of ranked-choice voting in the general election, and *vice versa*. *See McLauglin*, 225 Ariz. at 354, ¶ 11 (public elections are not facially related to labor union elections); *Kerby*, 44 Ariz. at 222 (provisions relating to copper mine taxation, public utility taxation, and formation of a tax commission were not interrelated). The Initiative overlays another facially independent provision by transplanting a portion of the legislative power to the judiciary. Determining when and under what circumstances ranked-choice methodologies should be employed is presumptively a legislative function. *See generally Wennerstrom v. City of Mesa*, 169 Ariz. 485, 489 (1991) ("[A]n act or resolution constituting a declaration of public purpose and making provision for ways and means of its accomplishment is generally legislative."). The Initiative, however, provides that if the Legislature does not exercise this prerogative by a specific date, it is re-vested in the executive branch—a reallocation of constitutional powers that has no facial relationship to the logically and functionally independent policy issue of partisan primaries.

Second, the facial distinction between the primary and general elections corresponds to a parallel textual differentiation. The Initiative's creation of a jungle primary amends Section 10 of Article VII, which is confined solely to the subject matter of the primary election. The Initiative's ranked-choice voting mandate, by contrast, entails changing two independent provisions of Article VII—namely,

Section 7 (governing how to determine the winner of an election) and Section 11 (governing the conduct of the general election). *Contrast Save Our Vote*, 231 Ariz. at 151, ¶ 19 (noting that "all [provisions] concern Article 7, Section 10").

Third, as the Appellants have pointed out, amendments to Section 10 (direct primaries) historically have not been agglomerated into amendments to Section 11 (general election) or Section 7 (determining election winners). In finding that "[t]here are examples of [primary and general elections]being treated . . . together," the trial court cited statutes enacted in 1979 and 1996. But as this Court has emphasized, the historical treatment factor pivots on constitutional—not statutory—lineages. *Ariz. Together*, 214 Ariz. at 123, ¶ 15. That, of course, makes sense. Provisions of a statutory enactment need only "fall under some one general idea, be so connected with or related to each other, either logically or in popular understanding, as to be parts of, or germane to, one general subject." *Ariz. Sch. Bds. Ass'n. v. State*, 252 Ariz. 219, 227, ¶ 34 (2022). But the Separate Amendment Rule "establishes a stricter test" than this "single-subject" criterion. *Clean Elections Institute*, 209 Ariz. at 244, ¶ 6; *see also Hoffman v. Reagan*, 245 Ariz. 313, 316, ¶ 16 (2018) (statutory provisions "need only be reasonably related" to satisfy the "single subject" rule). Thus, that the Legislature could and did occasionally address certain aspects of both primary and general elections in a given *statutory* measure is

not particularly probative of whether these independent elections were historically regarded as interrelated for *constitutional* purposes.

Fourth, the Initiative's provisions are not "qualitatively similar" to each other in their effect on substantive law. The primary election is conceptually, legally, and functionally distinct from the general election. *See Kyle v. Daniels*, 198 Ariz. 304, 306, ¶ 10 (2000) (explaining that "the primary election serves a different function [from the general election] in our system."). In the same vein, the Initiative couples a mandated top-two primary with a qualitatively different curtailment of the Legislature's ability to determine the method of selecting election winners. *See McLaughlin*, 225 Ariz. at 355, ¶¶ 15–16 (provision mandating secret ballot in employee elections was not qualitatively related to limitations on Legislature's power to determine voting methods in public elections). Particular components of an overall election regime are not, merely by virtue of pertaining to the electoral process, qualitatively similar to each other. *Cf. City of Tucson v. State*, 229 Ariz. 172, 178, ¶ 35 (2012) (holding that "election dates, [and] other administrative aspects of elections . . . all involve matters qualitatively different from determining how" to select the ultimate winners elected to hold office). By intermixing changes to these largely freestanding segments of the electoral structure in a single amendment, the Initiative changes different substantive laws in disparate ways.

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In sum, the "topic" denoted by the Initiative's jungle primary requirement—to wit, "whether political parties and their candidates should be afforded favored treatment," *Save Our Vote*, 231 Ariz. at 150, ¶ 13—is unrelated to its adoption of ranked-choice voting methods in the general elections for certain public offices. These provisions likewise share no discernible facial, textual, historical, or qualitative interrelatedness with each other.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court's judgment and find that the Initiative violates the Separate Amendment Rule.

RESPECTFULLY SUBMITTED this 14th day of August, 2024.

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[3] In the interests of transparency per ARCAP 16(a), the undersigned law firm discloses that it advises Appellant Arizona Free Enterprise Club in various matters but does not represent it in this appeal.