OFFICE OF THE ATTORNEY GENERAL
CONNECTICUT

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January 16, 2024

By Email

The Honorable Matthew Ritter
Speaker of the House
Legislative Office Building, Room 4105
Hartford, Connecticut 06106-1591
Matthew.Ritter@cga.ct.gov

Re: *Request for Formal Opinion Regarding Ranked Choice Voting*

Dear Speaker Ritter:

This formal opinion answers your complex and novel question, which no Connecticut court has examined: whether Connecticut's constitution allows ranked choice voting in general elections for the state legislature and the positions of Governor, Lieutenant Governor, Secretary of the State, Treasurer, Comptroller, and Attorney General. General elections for federal and municipal office, and all primary elections, are beyond the scope of this opinion, since different constitutional provisions control those elections.

In ranked choice voting (RCV)—also known as instant runoff voting—each voter submits a ballot ranking candidates in order of preference. A candidate wins outright if she is the first choice of the majority of voters. Otherwise, tabulators eliminate the last-place candidate, whose ballot preferences are reallocated to surviving candidates according to each voter's preference. Successive rounds of elimination and reallocation can follow until a candidate has a majority. Supporters argue that ranked choice voting increases voter choice and promotes representative outcomes.

Whatever RCV's policy merits, though, Connecticut cannot implement it in violation of the state constitution. Our state has never used ranked choice voting; our constitution does not mention it; and I found no evidence that the framers of our constitution intended to authorize it.

But that does not end the inquiry, since the Connecticut constitution is a "living document" and "an instrument of progress . . . intended to stand for a great length of time and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all our citizens." *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 156–57 (2008) (internal quotation marks and citation omitted).[1]

[1] Connecticut courts interpret the constitution according to the demands of modern society and the changing needs and expectations of our residents. *State v. Webb*, 238 Conn. 389, 411 (1996); *State v. Dukes*, 209 Conn. 98, 114–15

So the question here is not whether our constitution explicitly permits RCV. It does not. Instead, the question is whether the constitution leaves the door open for adopting some form of RCV, since the General Assembly has "the power to enact any legislation except as restricted by provisions of the state or federal constitution." *Patterson v. Dempsey*, 152 Conn. 431, 444 (1965).

That question is much closer. And while nothing in our constitution explicitly bars RCV, I have two significant concerns, rooted in our constitution's Plurality Provisions—article third, § 7 and article fourth, § 4—and the Count and Declare Provisions—article third, § 9 and article fourth, § 4.

This formal opinion first explains how RCV works; then analyzes RCV's compliance with the Plurality Provisions and the Count and Declare Provisions; and finally considers, and rejects, other possible constitutional objections.[2] I conclude that RCV would likely not survive a constitutional challenge.

An Overview of Ranked Choice Voting

RCV is perhaps best explained by comparison with more familiar forms of voting: (1) "first-past-the-post" voting; (2) "runoff" voting; and (3) "cumulative voting."

Voters are familiar with Connecticut's current "first-past-the-post" system. A voter makes a single selection for a single candidate, and the candidate that receives a plurality wins. "Runoff" voting is similar. A voter still has only a single choice, but candidates only win by receiving a majority—rather than a plurality—of the votes cast. If no candidate receives a majority, then all but the top candidates (usually, the top two) are eliminated. The jurisdiction then holds a second, "runoff" election between the remaining candidates to determine the winner. Finally, "cumulative voting" is used in elections with more than one open seat. Each voter typically has as many votes as there are seats available, and can allocate those votes to one or multiple candidates.

RCV, as it is usually implemented, borrows from each of these systems. It allows voters to rank multiple candidates in order of preference. In the first round of tabulation, the candidate receiving

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(1988).

[2] I follow Connecticut courts in analyzing RCV's state constitutionality using the multi-factor test from *State v. Geisler*, 222 Conn. 672 (1992); *e.g.*, *Fay v. Merrill*, 338 Conn. 1, 26–53 (2021); *Feehan v. Marcone*, 331 Conn. 436, 449–68 (2019); *see also Honulik v. Greenwich*, 293 Conn. 641, 648 n.9 (2009) (*Geisler* applies when "interpreting language in our constitution that does not have a similar federal counterpart"). The factors include: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) relevant public policies. *Fay*, 338 Conn. at 26. Factors "may be inextricably interwoven" and "[n]ot every *Geisler* factor is relevant in all cases." *Id.* (quotation marks omitted).

the fewest first-choice preferences is eliminated. First-choice preferences for the eliminated candidate are reallocated to each voter's second-choice candidate. The process is repeated until a candidate has a majority.[3]

The Plurality Provisions

The Plurality Provisions award general election victories in General Assembly and statewide office races to candidates who receive the "greatest number of votes." Conn. Const. art. third, § 7 (General Assembly elections); Conn. Const. art. fourth, § 4 (statewide offices).

The "greatest number" of votes means a plurality of the votes cast. That is the text's plain meaning—the place where all interpretation starts. *See Fay v. Merrill*, 338 Conn. 1, 32 (2021); Conn. Gen. Stat. § 1-2z (articulating the general interpretive rule, as applied to statutes); Black's Law Dictionary (11th ed. 2019) (defining "plurality" as "[t]he greatest number (esp. of votes), regardless of whether it is a majority, simple, or absolute"). And the history of Connecticut's constitutional evolution in this area evidences the framers' clear intent to institute a plurality victory threshold.

Since 1818, when Connecticut's first constitution was adopted, General Assembly seats have gone to candidates receiving the "greatest number" of votes in their respective races. But the 1818 constitution required gubernatorial candidates to "have a majority" of the votes cast. If no gubernatorial candidate won a majority, the legislature would decide the winner. Conn. Const., art. fourth, § 2 (1818). In 1832 and 1836, the constitution was amended to require other statewide officers to be elected by a majority of votes.

The legislature regularly had to select election winners under that majority threshold system. Between 1818 and 1900, fourteen gubernatorial elections failed to produce a majority winner.[4] Candidates for other state offices also often failed to secure a majority.[5] At times, elections decided by the legislature generated controversy—and, culminating in the 1890 gubernatorial election, gridlock and threats of violence.[6] That debacle led to the 1901 adoption of Article XXX of the Amendments,

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[3] *See generally Kohlhaas v. Off. of Lieutenant Governor, Div. of Elections*, 518 P.3d 1096, 1102 (Alaska 2022) (discussing mechanics of RCV); Richard H. Pildes & G. Michael Parsons, The Legality of Ranked-Choice Voting, 109 Calif. L. Rev. 1773, 1784 (2021) (same).

[4] The General Assembly resolved the gubernatorial elections of 1833, 1842, 1844, 1846, 1849, 1850, 1851, 1845, 1855, 1856, 1878, 1884, 1886, and 1888. *See* Election Results Archive (last accessed Oct. 30, 2023), https://electionhistory.ct.gov/eng/.

[5] *See id.* (Secretary of the State, eighteen times; Comptroller, fifteen times; Treasurer, fourteen times).

[6] In 1890, the two General Assembly chambers could not agree whether a candidate had won a majority. *See State ex rel. Morris v. Bulkeley*, 61 Conn. 287, 364–65 (1892). As a result, "all legislation . . . ceased" and "an entire collapse in the legislative department . . . ensued." *Id*. at 372.

which eliminated the majority requirement and instead permitted state officers to be elected by "the greatest number of votes." W. Horton, The Connecticut State Constitution 127 (2d Ed. 2012).

To recap, then: each voter only gets to vote once. Conn. Gen. Stat. § 9-360. And, under the Plurality Provisions, a candidate wins as soon as she receives a plurality of the votes cast. But, in RCV, a candidate who receives a plurality (but not a majority) of preferences in the first round of tabulation does not win right away. Instead, election officials eliminate candidates, reallocate preferences, and retabulate until a candidate has a majority of first-place preferences.

The question turns on the meaning of the word "vote" in our constitution. The Plurality Provisions bar RCV in general elections for state office if a voter's ranked preferences under RCV are the same thing as a "vote" under our constitution. If the initial ranked preferences are the voter's "vote," then the Plurality Provisions forbid any further retabulation and reassignment. Whichever candidate gets the greatest number of first-place preferences in the initial tabulation—and thus a plurality—must be the winner. That's it. But if the "vote" is instead the ultimate outcome of the tabulation process, then RCV could be consistent with the Plurality Provisions, since the candidate with the "greatest number" of first-place preferences in the final tabulation will be the winner.

So what does "vote" mean, in our constitution? Is it only the voter's initial ranked preferences, or can it be the outcome of the tabulation process? To answer that question, I look to the language itself; to history that helps clarify the framers' intent; and to precedent from Connecticut, the federal courts, and other states.[7]

Plain meaning and historical indicia of intent. RCV appears to have been unknown in 1818, when the framers of Connecticut's first constitution wrote our first Plurality Provision. And contemporary dictionary definitions from around 1818 and 1901—when the relevant constitutional amendments were adopted—do not suggest that the framers' understanding of "vote" extended to RCV. *See Fay*, 338 Conn. at 34 (looking to contemporaneous dictionary definitions). Those dictionaries defined "vote" as "a voice," "the expression of a wish or opinion," or "expressed will," but did not speak to whether that voice or expression, in the electoral context, could occur in multiple rounds.[8]

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[7] The Connecticut Supreme Court, in *Geisler*, also looked to policy considerations as a factor in state constitutional interpretation. But here, the General Assembly—our state's elected policymaking body—has not yet collected policy input and articulated relevant state policies.

[8] *E.g.*, N. Webster, Compendious Dictionary of the English Language (1806) ("a voice"); B. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence (1879) ("The will of a member of a body, formally manifested towards the decision of a question by the body as a whole"); Bouvier's Law Dictionary (1883) ("the voice of an individual in making a choice by many"); The American Dictionary of the English Language (1897) ("expression of a wish or opinion, as to a matter in which one has interest: that by which a choice is expressed as a ballot"); Dictionary of Words and Phrases Used in Ancient and Modern Law (1899) ("To express one's opinion by casting a

By the late 1800s, RCV and other alternatives to first-past-the-post elections were increasingly "well-recognized" by scholars and policy advocates.[9] Contemporaneous dictionaries began to mention voting systems, including RCV, that allowed voters to express preferences for multiple candidates. But these alternative voting systems remained the exception. Dictionaries tended to distinguish between a "preferential vote" or "cumulative voting," used in specific contexts like minority representation, from "voting" in the traditional sense.[10] So the word "vote," standing on its own, largely retained its earlier connotation: a single vote for a single candidate, without rounds of tabulation and reallocation of preferences.

This distinction found its way into other states' legislation too. In the early 1900s, some states and municipalities began to implement RCV-type systems. Washington, Idaho, and North Dakota passed laws implementing RCV systems for statewide primaries.[11] Wisconsin first proposed using RCV in 1906, and then used an RCV system for elections of U.S. senators some years later.[12] Some

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ballot. The expressed will of the voter."); The Cyclopedic Dictionary of Law (1901) ("Suffrage; the voice of an individual in making a choice by many.").

[9] *Maynard v. Bd. of Dist. Canvassers*, 84 Mich. 228, 232 (1890); *see also, e.g.*, S. Dutcher, Minority or Proportional Representation 110–36 (1872); S. Stetson, The People's Power or How to Wield the Ballot 21–25 (1883); W. Gove, The Proportional Representation Review 20–23, 108–15 (Sept. 1893); H. Sidgwick, The Elements of Politics 398–99 (1897); J. Commons, Representative Democracy 48 (1900); J. Verplanck, A Problem of Primaries 442–52 (1906); M. Schaffner, Notes on Current Legislation, 3 Am. Pol. Sci. Rev. 552, 563–65 (1909); Code of the People's Rule, Compilation of Various Statutes, etc. 96–100 (1910); R.M. Hull, Preferential Voting and How It Works, 1 Nat'l Mun. Rev. 386 (1912).

[10] *E.g.*, The American Annual Cyclopedia (1872) (discussing RCV or the "preferential vote" as a system to alleviate problems with disproportionate representation); Zell's Popular Encyclopedia: A Complete Dictionary of the English Language (1882) (same); Bouvier's Law Dictionary (1897) ("In cumulative voting the voter must put opposite the name of the candidate on who he intends to cumulate something to indicate the number of votes he intends to cast for him, in default of which he will be taken to have cast but a single vote . . . ."); The Century Dictionary and Cyclopedia (1911) ("[I]n elections, that system by which each voter has the same number, or within one of the same number, of votes as there are persons to be elected to a given office, and can give them all to one candidate or distribute them, as he pleases.").

[11] *State ex rel. Zent v. Nichols*, 50 Wn. 508, 527–28 (1908) (affirming constitutionality of system that required voters to make both a "first choice" and "second choice" in primary elections for open state office seats); *Adams v. Lansdon*, 18 Idaho 483, 489–91 (1910) (affirming constitutionality of system similar to Washington's); *State ex rel. Shaw v. Harmon*, 23 N.D. 513, 516 (1912) (holding that Idaho's system provided for optional, rather than mandatory, "first and second choice voting").

[12] *See* Direct Primary Legislation, 1899-1908 79 (1908); *State ex rel. Kletzsch v. Widule*, 158 Wis. 387, 391 (1914) ("Under the senatorial election law a voter is entitled to vote for one man as his first choice and for another man as his second choice for the office of senator.").

municipalities followed suit.[13] A few jurisdictions also experimented with other types of alternative voting systems. Most notably, Illinois amended its constitution in 1870 to adopt cumulative voting for certain state legislative elections.[14] But at least some of these jurisdictions seemed to treat RCV as a new concept that went beyond traditional voting. For instance, when Oregon amended its constitution in 1908, it explicitly authorized voters to make multiple ranked choices.[15] That choice suggests Oregon's framers did not think the word "vote," on its own, necessarily included the possibility of RCV, and they needed to say something more.

Precedent. No Connecticut court has ruled on the constitutionality of RCV. Federal precedent is not very helpful here either, since nothing in the federal constitution parallels our Plurality Provisions.[16] Other states' precedent is more instructive, but cuts both ways. The supreme courts of Maine and Alaska, the only state courts to weigh in, split on whether their plurality provisions permit RCV. The question also divides the few other state attorneys general who have taken it up.[17]

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[13] *E.g.*, *State ex rel. Duniway v. Portland*, 65 Ore. 273 (1913) (Portland, Oregon); *McEwen v. Prince*, 125 Minn. 417 (1914) (Duluth, Minnesota); *Garneau v. Cadillac*, 182 Mich. 91, 92 (1914) (Cadillac, Michigan); *Orpen v. Watson*, 87 N.J.L. 69, 73 (1915) (Burlington, New Jersey). In 1921, West Hartford adopted a form of RCV for town council elections. C.S. Hoag, "Proportional Representation in the United States," The Annals of the American Academy of Political and Social Science (1923), http://tinyurl.com/34u5yyy8. The General Assembly responded in 1923 by passing a law (later repealed) that blocked RCV in municipalities. P.A. 1923 Ch. 189. The Plurality Provisions of our state constitution do not apply to municipalities, so West Hartford's experiment does not factor into my opinion here.

[14] *See* Ill. Const. art. XI, §§ 7–8 (1870).

[15] Or. Const. art. II, § 16 ("Provision may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office.").

[16] When Connecticut's constitutional text, history, and state precedent do not resolve a question, our courts may look to federal precedent because "[w]hen the states of the union adopted their own constitutions most followed both the substance and the procedures adopted by the founding fathers in the federal constitution." *Feehan*, 331 Conn. at 453 (quotation marks omitted). But here federal precedent cannot help since the federal constitution has no analogue to the Plurality Provisions. I note, though, that the few federal courts to address challenges to RCV have found that it does not violate the federal constitution. Cong. Research Serv., Ranked-Choice Voting: Legal Challenges and Considerations for Congress (Oct. 12, 2022) ("Federal courts have consistently upheld RCV as a policy choice to implement primary and general elections that do not violate federal constitutional and statutory requirements."), http://tinyurl.com/3fythfhy; *see Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Hagopian v. Dunlap*, 480 F. Supp. 3d 288 (D. Me. 2020); *Baber v. Dunlap*, 376 F. Sup. 3d 125 (D. Me. 2018).

[17] *Compare* Kan. Op. Att'y Gen. No. 2020-7 (Jun. 1, 2020) (concluding that RCV is not prohibited by the state constitution's voting requirements), *with* Idaho Att'y Gen. Op. (May 31, 2023) (concluding that RCV violates the state constitution's plurality-threshold requirement). *See also* Vt. Att'y Gen. Op. #2003-1 (Feb. 24, 2003) (concluding that the state constitution allows RCV for some offices but not for others); S.D. Att'y Gen. Op. No. 22-01 (May 4, 2022) (concluding that RCV is consistent with the term "vote" as used in state statutes but barring RCV for municipal elections because it conflicts with other state law procedural requirements).

Maine's Supreme Judicial Court believes that a "vote" is a voter's initial ranking of preferences. So in 2017, the Supreme Judicial Court held that RCV could not be reconciled with the state constitutional requirement that "successful candidates for offices are identified by a plurality of all votes returned . . . ." *In re Op. of the Justs. of the Sup. Jud. Ct.*, 162 A.3d 188, 197 (Me. 2017) (internal quotation marks omitted). For the Supreme Judicial Court, RCV violates the plurality rule because it "prevents the recognition of the winning candidate when the first plurality is identified." *Id.* at 211. For instance, the court reasoned, if "after one round of counting, a candidate obtained a plurality of the votes but not a majority, that candidate would be declared the winner according to the Maine Constitution as it currently exists." *Id.* But, under RCV, "that same candidate would not then be declared the winner." *Id.*

A few years later, Alaska's Supreme Court came to the opposite conclusion. Under the Alaska constitution, just as under the constitutions of Maine and Connecticut, each voter gets only one vote, and the candidate receiving a plurality of votes wins. But for the Alaska Supreme Court, a "vote" is the voter's preference as determined at the end of the tabulation process. Nothing in its constitution, it argues, requires an election to be called "after one round of counting." *Kohlhaas v. Off. of Lieutenant Governor, Div. of Elections*, 518 P.3d 1096, 1121 (Alaska 2022) (quoting *Op. of the Justices*, 162 A.3d at 211). Instead, "[i]f the vote count is not final after the first round of tabulation, then the candidate in first place after the first round is not necessarily the candidate receiving the greatest number of votes. . . . [T]hat candidate is simply the candidate in the lead before the votes have been fully counted." *Id.* at 1121 (internal quotation marks omitted). The Alaska constitution, it concluded, did not prevent the state from finalizing the vote only after RCV's process of retabulation and reallocation.

In my view, neither of these thoughtful and well-reasoned opinions carries the day. Each offers a diametrically opposite answer to the definitional question I started with: what "vote" means under our constitution. Neither can resolve the meaning of Connecticut's constitutional provisions.

In the end, then, I find no textual or historical evidence that the framers intended our state constitution to authorize RCV. My review of dictionary definitions and practices in Connecticut and other jurisdictions shows that RCV was not generally understood—in 1818 or 1901—to fall within the ordinary meaning of the standalone word "vote." And, significantly, the framers of the 1901 amendment might well have known about RCV—which was then part of the public policy discourse—but, unlike the Oregon framers in 1908, declined to explicitly authorize it. I must conclude that RCV would likely not be constitutional under Connecticut's Plurality Provisions. And my analysis of the Count and Declare Provisions only strengthens that conclusion. I turn to that next.

The Count and Declare Provisions

The Count and Declare Provisions require local election officials ("the presiding officers in the several towns") to tabulate and announce ("count and declare") votes "in open meeting." The officials then make lists of the votes and deliver them to the Secretary of State for canvassing.[18]

Parts of these provisions are clear and, standing alone, not inconsistent with RCV. For example: the "presiding officers in the several towns" language requires local election officials, not state election officials, to perform the counting and declaration. The "open meeting" requirement ensures transparency and accuracy in the vote count. *See Op. of Judges*, 30 Conn. at 599; Conn. Gen. Stat. § 9-309(a) ("[A]mple opportunity shall be given to any person lawfully present to compare the results so announced with the result totals provided by the tabulator and any necessary corrections shall then and there be made . . . .").

The problem arises with the requirement that all "votes" be counted and declared in that localized open meeting. Recall that an RCV system can only be constitutional under the Plurality Provisions if each "vote" is understood as the voter's ultimate candidate preference after elimination, reallocation, and retabulation. *See Kohlhaas*, 518 P.3d at 1096 (distinguishing between votes and preferences).[19] And under the Count and Declare Provisions, that ultimate "vote"—not the preferences used in reaching it—must be counted and declared by local officials in open meeting.[20]

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[18] Article third, § 9, which concerns general assembly elections, provides:

> At all elections for members of the general assembly the presiding officers in the several towns shall count and declare the votes of the electors in open meeting. The presiding officers shall make and certify duplicate lists of the persons voted for, and of the number of votes for each. One list shall be delivered within three days to the town clerk, and within ten days after such meeting, the other shall be delivered to the secretary of the state.

Article fourth, § 4, largely parallels those provisions for state officer elections:

> The votes at the election of state officers shall be counted and declared in open meeting by the presiding officers in the several towns. The presiding officers shall make and certify duplicate lists of the persons voted for, and of the number of votes for each. One list shall be delivered within three days to the town clerk, and within ten days after such meeting, the other shall be delivered to the secretary of the state.

[19] I am mindful that the definition of "vote" in the Count and Declare Provisions should be the same as the definition in the Plurality Provisions. *See McGovern v. Mitchell*, 78 Conn. 536, 551 (1906) (each provision of the constitution must be construed in relation to the whole instrument.).

[20] Requiring local officials to merely count and declare the electors' ranked preferences—instead of the actual votes those preferences ultimately lead to—would not promote the constitutional goal of ensuring transparency and accuracy in tallying final votes. Abstractly declaring that "Candidate A received 500 first preferences, 300 second preferences, and 200 third preferences" tells the public nothing about which candidate received which votes or how many. Nor would counting and declaring preferences on a ballot-by-ballot basis (e.g., "Ballot 1 listed, in order of preference,

But it would be difficult, if not impossible, for Connecticut's local election officials to count and declare the "votes" in an RCV system, at least for statewide or multi-district elections. Again: in RCV, at least as widely practiced, an elector's final "vote" can be determined only after every ballot cast in that election is tabulated and each elector's ranked preferences are cross-checked and eliminated based on other electors' preferences. Each final vote turns on other voters' selections. So in a multi-town district or a statewide race, each town's election officials would struggle to count and declare "votes"— the final outcome of the retabulation process—in an open meeting. They could only count and declare preliminary preferences.

This is not just a (significant) logistical concern. Logistics here are bound up with the background assumptions that underlie our elections system. The framers and amenders of our constitution wrote with a specific type of election infrastructure in mind. It seems relatively unlikely that they left the door open for a kind of election that would be at the very least impracticable given the localized election system they knew was in place across the state. The conflict between the Count and Declare Provisions and the state's election infrastructure is probative of the framers' underlying intent, a key consideration in interpreting our state's constitutional provisions.

I weigh that conflict heavily, and think that courts would, too, because I found little countervailing evidence. There are no other indicia of drafters' intent. As with the Plurality Provisions, no Connecticut or federal court has considered the question. Among state courts, only the Maine Supreme Judicial Court has spoken, if briefly, to a similar issue, which it described as merely "logistical." *Senate v. Sec'y of State*, 183 A.3d 749, 759 (Me. 2018). But that logic is not persuasive in the Connecticut context, where the problem is not just logistical but also substantive, going to the framers' intent.

Other Possible Challenges

In closing, I briefly consider two other challenges to RCV. Both contend that RCV violates federal and state constitutions because it supposedly gives some people more votes than others. But courts have rejected these challenges, and I conclude that Connecticut's would, too.[21] The Connecticut

Candidate A, Candidate B, and Candidate C"), since those preferences mean nothing without knowing the preferences expressed on every other ballot in the election.

[21] Brandon Bryer, Comment, *One Vote, Two Votes, Three Votes, Four: How Ranked Choice Voting Burdens Voting Rights and More*, 90 U. Cin. L. Rev. 711, 71 (2021); *see also* Cong. Research Serv., Ranked-Choice Voting: Legal Challenges and Considerations for Congress (Oct. 12, 2022) ("Federal courts have consistently upheld RCV as a policy choice to implement primary and general elections that do not violate federal constitutional and statutory requirements."); *e.g.*, *Dudum*, 640 F.3d at 1098; *Hagopian*, 480 F. Supp. 3d at 288; *Baber*, 376 F. Supp. 3d at 125; *Kohlhaas*, 518 P.3d at 1095; *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *McSweeney v. City of Cambridge*, 422 Mass. 648 (1996); *Moore v. Election Commissioners of Cambridge*, 309 Mass.

Constitution does not appear to provide materially different protections than the federal constitution here, so I see no reason that a different result would be warranted under Connecticut law.

The first challenge contends that RCV effectively allows some people to vote more than once. Suppose Jack's ballot ranks (in order of preference) Candidates A, B, and C. Jill's ballot, meanwhile, ranks Candidates C, B, and A. If Candidate A is eliminated after the first round of tabulation, the argument goes, then Jack effectively gets to cast a second vote for Candidate B. But Jill still casts only one vote—for Candidate C.

Courts disagree, and so do I. The Ninth Circuit concluded that the argument "mischaracterizes the actual operation" of RCV because "the option to rank multiple preferences is not the same as providing additional votes." *Dudum v. Arntz*, 640 F.3d 1098, 1112 (9th Cir. 2011). In RCV, the Ninth Circuit explained, "each ballot is counted as no more than one vote at each tabulation step . . . and each vote attributed to a candidate, whether a first-, second- or third-rank choice, is afforded the same mathematical weight in the election."[22] The constitutionally important question is whether voters have an equal opportunity to cast a vote. In RCV, they do.

Another version of the inequality argument contends that RCV deprives some people of the vote. Suppose Jack's ballot ranks, in order, Candidates A, B, and C. Jill lists Candidate C as her first choice, but lists no other candidate. If Candidate C is eliminated after the first round of tabulation, then Jill's ballot is "exhausted." The second round of tabulation effectively becomes a two-candidate race between Candidates A and B. Jack's vote for Candidate A will be counted, while Jill's vote for Candidate C is simply not counted at all in the second round. So, RCV opponents argue, Jack has more votes counted (1) than Jill (0).

But courts rightly reject this argument, which again mischaracterizes RCV. To quote the Ninth Circuit: "'Exhausted' ballots *are* counted in the election, they are simply counted as votes for losing candidates, just as if a voter had selected a losing candidate in a plurality or run-off election." *Dudum*, 640 F.3d at 1110 (emphasis in original).

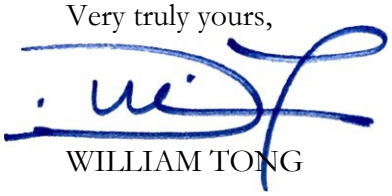
303 (1941); *State of New Mexico, ex rel., Perez et al. v. City Council of Santa Fe*, Case No. D-101-CV-2017-02778 (1st Jud. Dist. Ct. N.M. Nov. 20, 2017); *Stephenson v. Ann Arbor Bd. of City Canvassers, et al.*, File No. 75-10|66 AW (Mich. Cir. Ct. Nov. 1975). The New Mexico and Michigan trial court decisions are unpublished, but are available here, http://tinyurl.com/29x6tmcj, and here, https://archive.fairvote.org/?page=397.

[22] *See also Baber*, 376 F. Supp. 3d at 140–41; *Minnesota Voters Alliance*, 766 N.W.2d at 690; *McSweeney*, 422 Mass. at 652; *Stephenson*, File No. 75-10|66 AW.

Conclusion

This is a close call. But I must conclude that legislation implementing RCV in state general elections would not pass constitutional muster absent a constitutional amendment. I trust this opinion responds to your request.

Very truly yours,



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