

# KOHLHAAS V. STATE: ENCOURAGING DEMOCRATIC REFORM THROUGH CONSTITUTIONAL FLEXIBILITY

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## ABSTRACT

*In the spirit of democracy reform, Alaska recently adopted a jungle primary and ranked choice voting electoral system for all state-wide elections. In Kohlhaas v. State, the Alaska Supreme Court upheld this reform against numerous state and federal constitutional challenges. While doing so, the court avoided rigid constitutional interpretations that would have frozen the electoral system in its current first-past-the-post state. Moreover, the court refused to credit the plaintiff's speculation about the hypothetical malign effects of ranked-choice voting, placing the burden to produce hard evidence of their critiques on RCV's opponents. Alaska can serve as a model for other states, as those states increasingly consider adopting electoral reforms of their own and must interpret similar state constitutional language.*

## I. INTRODUCTION

In 2020, Alaska voters approved Initiative 2 by about one percentage point. That reform measure, which applies to all positions in both state and federal elections, replaced Alaska's partisan primaries with a single, nonpartisan "jungle" primary. It also replaced the state's first-past-the-post general election with a ranked choice voting (RCV) election between the jungle primary's four highest vote-getters. During an RCV vote-counting process, voters rank candidates in order of their preferences instead of selecting only one candidate. In the specific RCV formula Alaska implemented, single-winner RCV, any candidate who more than

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half of voters rank as their top choice wins the election.<sup>1</sup> If no candidate receives more than half of the top-choice votes, the candidate with the fewest top-choice votes is eliminated. Any ballots ranking the eliminated candidate first are then allocated to those candidates that the voters ranked second. This process iterates until one candidate has amassed a majority of the votes.<sup>2</sup>

Any reform so abruptly breaking from Alaska's electoral tradition was bound to attract criticism. In December 2020, a collection of third-party and Republican party members sued to block Alaska from implementing both the jungle primary and RCV general election reforms.<sup>3</sup> In the ensuing litigation, *Kohlhaas v. State*,<sup>4</sup> the Alaska Supreme Court cleared away the legal roadblocks potentially obstructing Initiative 2's implementation. The court interpreted both the federal and state constitutions flexibly to avoid locking in first-past-the-post electoral laws, leaving leeway for electoral reform. Although the court interpreted Alaska's constitution, other state constitutions contain similar language; Alaska's flexible reading of its constitution could influence other state supreme courts to similarly avoid entrenching strict constitutional barriers to reform.

## II. RCV: AN OLD REFORM WITH A LONG HISTORY

Although RCV seems like an insurgent idea in the United States' contemporary electoral landscape, dominated as it is by first-past-the-post voting, RCV has a long history. Denmark first implemented a form of RCV in the 1850s, which by the early twentieth century had spread to other countries, including Malta, Ireland, and Australia.<sup>5</sup> Even in the United States RCV caught on, reaching its height in the early 1940s, with jurisdictions across six states—including twenty-four cities—

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1. Different jurisdictions have implemented different variations of RCV, including single-winner, multi-winner, block-preferential voting, and bottom-up RCV. In the United States, the most common type of RCV is single-winner, also known as instant-runoff. *Types of RCV*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/what-is-rcv> (last visited Apr. 7, 2024). Because single-winner RCV was at issue in *Kohlhaas v. State*, it will be the focus of this Comment.

2. *What is Ranked Choice Voting?*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/what-is-rcv> (last visited Feb. 11, 2024).

3. *Kohlhaas v. State*, 518 P.3d 1095, 1102–03 (Alaska 2022); Brief of Hon. Mead Treadwell & Hon. Dick Randolph as Amici Curiae at \*1, *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022), 2021 WL 6144455.

4. 518 P.3d 1095 (Alaska 2022).

5. *History of RCV*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/history-of-rcv> (last visited Feb. 14, 2024).

implementing a form of RCV.<sup>6</sup> However, backlash from politicians ousted in RCV elections led to repeal efforts across the United States.<sup>7</sup> By 1962, only one U.S. city still used RCV.<sup>8</sup>

### A. A Survey of RCV Usage in United States Jurisdictions Today

In the early 2000s, RCV began to stage a comeback, beginning with cities in California, Colorado, Minnesota, Vermont, and Delaware.<sup>9</sup> Today, more than fifty jurisdictions use RCV and several more jurisdictions are considering adopting the system.<sup>10</sup> Some jurisdictions also rely on RCV in partisan primaries, including Hawaii, Virginia, Kansas, and Wyoming.<sup>11</sup> The state of Nevada and more than a dozen cities either have adopted RCV for future use or have taken initial steps to adopt RCV.<sup>12</sup>

As with RCV in the early twentieth century, modern RCV reforms have provoked opposition. Idaho, Florida, South Dakota, Montana, and Tennessee have all banned RCV.<sup>13</sup> RCV opponents in Maine, California, and Alaska have likewise attempted to annul RCV reforms via a series of lawsuits.<sup>14</sup>

### B. Maine's Recent Statewide RCV Reforms

Maine was the first state to adopt statewide RCV elections in the

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6. *Id.*

7. *Id.*

8. *Id.*

9. *See Jurisdictions using RCV*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#jurisdictions-using-rcv> (last visited Feb. 14, 2024) (listing municipalities that have instituted RCV by date).

10. *See id.* (listing state and local governments that have adopted RCV and others considering adoption).

11. *Where is RCV Used?*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/where-is-rcv-used> (last visited Feb. 14, 2024).

12. *Upcoming Implementations*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#upcoming-implementations> (last visited Feb. 14, 2024) (listing municipalities that have adopted RCV and have implementation dates starting soon); *Possible Use for Future Elections*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#possible-use-for-future-elections> (last visited Feb. 14, 2024) (listing state and local governments in the process of implementing or with statutory permission to implement RCV).

13. Andrew Welhouse, *These States Are Banning Ranked Choice Voting. Yours Should, Too*, FOUNDATION FOR GOVERNMENT ACCOUNTABILITY (May 15, 2023), <https://thefga.org/blog/these-states-are-banning-ranked-choice-voting-yours-should-too/>.

14. *See, e.g., Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Baber v. Dunlap*, 376 F.Supp.3d 125 (D. Me. 2018).

modern era. Between 2001 and 2013, the state legislature considered multiple RCV bills, all of which failed.<sup>15</sup> Finally, a group of RCV advocates circulated a citizens' initiative petition to place RCV on the 2016 election ballot.<sup>16</sup> Although the initiative passed, the Maine Senate questioned its validity and requested an advisory opinion from Maine's Supreme Judicial Court on the measure's constitutionality.<sup>17</sup> In 2017, that court determined that RCV-tabulated state elections violate the Maine Constitution.<sup>18</sup> Nevertheless, after a series of petitions and special legislative sessions, RCV proponents won approval for RCV implementation in the 2018 federal primary and general elections.<sup>19</sup> Opponents again filed lawsuits challenging the constitutionality of RCV, but the courts upheld RCV's use in Maine's federal elections.<sup>20</sup> Today, Maine uses RCV for all federal elections and some local elections.<sup>21</sup>

### C. New York City's Recent Citywide RCV Reforms

Voters in New York City approved a ballot measure in 2019 to use RCV for a number of city offices, including city council, mayor, and comptroller.<sup>22</sup> Although New York City mishandled its first RCV election, the 2023 election went smoothly, with far less of the voter confusion that marred the 2019 election.<sup>23</sup> Today, New York City is the most populous jurisdiction to use RCV.<sup>24</sup>

## III. NONPARTISAN PRIMARY REFORMS IN OTHER JURISDICTIONS

Other jurisdictions have adopted the first stage of Alaska's

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15. *A Timeline of Ranked-choice Voting in Maine*, ME. SEC'Y OF STATE, <https://www.maine.gov/sos/cec/elec/upcoming/pdf/RCVpowerpointtimelin.e.UpdateJAN2021.pdf> (last visited Feb. 15, 2024).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Jurisdictions Using RCV*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#jurisdictions-using-rcv> (last visited Feb. 15, 2024).

22. *Ranked Choice Voting*, BD. OF ELECTIONS IN THE CITY OF N.Y., <https://vote.nyc/page/ranked-choice-voting> (last visited Feb. 15, 2024).

23. Maya King & Zach Montellaro, *New York's 'Head Swirling' Mistake Puts Harsh Spotlight on Ranked-Choice Voting*, POLITICO (July 6, 2021, 4:30 AM), <https://www.politico.com/news/2021/07/06/new-york-ranked-choice-voting-498221>.

24. *See Jurisdictions Using RCV*, FAIRVOTE, <https://fairvote.org/our-reforms/ranked-choice-voting-information/#jurisdictions-using-rcv> (last visited Feb. 15, 2024) (listing the jurisdictions that have adopted RCV reforms).

elections—the open, nonpartisan, “jungle” primary—without an accompanying second-stage ranked-choice election. Washington, California, and Nebraska all use top-two nonpartisan primaries, in which voters vote for candidates regardless of party affiliation in a primary election; the top two candidates then advance to a second, first-past-the-post round of elections.<sup>25</sup> Proponents of the open, nonpartisan primary note benefits including an average voter turnout rate six percentage points higher than the national average, “better” candidate choice not driven by extreme party bases, and incentives for candidates to represent all their constituents.<sup>26</sup> Of course, these reforms have also met challenges. Although Washington’s reform passed as a ballot initiative in 2004, the reform snaked its way to the U.S. Supreme Court (which approved the measure) before the state could finally implement it during the 2008 election.<sup>27</sup>

While Louisiana also historically used this “top-two” electoral system, the Louisiana Governor is expected to sign a law, House Bill 17, abolishing Louisiana’s jungle primary system and subjecting judicial appointments, congressional seats, and a few other statewide electoral posts to partisan primaries and first-past-the-post elections.<sup>28</sup> Proponents of the Louisiana change have argued that “when you are electing somebody for your nominee for a party, it should be those members of that party.”<sup>29</sup> In turn, detractors have pointed out that this reform would all but exclude third-parties from viably competing in elections.<sup>30</sup> House Bill 17 passed the Louisiana legislature along party lines, with Republicans generally supportive of the new, more closed primary system and Democrats attempting to protect the old jungle primary.<sup>31</sup>

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25. *Nonpartisan Primaries*, UNITE AMERICA, <https://www.uniteamerica.org/nonpartisan-primaries> (last visited Feb. 15, 2024).

26. *Id.*

27. *Top 2 Primary: FAQ for Voters*, WASH. SEC’Y OF STATE, <https://www.sos.wa.gov/elections/voters/helpful-information/top-2-primary-faqs-voters> (last visited Feb. 12, 2024).

28. Wesley Muller, *Gov. Landry, Lawmakers Disrupt How Louisiana Has Voted for Nearly 50 Years*, LA. ILLUMINATOR (Jan. 19, 2024, 5:40 PM), <https://lailluminator.com/2024/01/19/closed-primaries-2/>.

29. Wesley Muller, *Lawmakers Consider End of ‘Jungle’ Primary Elections in Louisiana*, LA. ILLUMINATOR (Jan. 19, 2024, 5:00 AM), <https://lailluminator.com/2024/01/17/jungle-primary/>.

30. *See id.* (Third parties “haven’t won enough votes in prior elections to qualify to hold a primary election” and “[s]ome lawmakers expressed concern over whether [the] proposal would disenfranchise independents and other minority party voters”).

31. Wesley Muller, *supra* note 29.

#### IV. ALASKA'S INITIATIVE 2: REFORM, RESULTS, AND BACKLASH

In 2020, Alaska voters narrowly approved Initiative 2.<sup>32</sup> This reform replaced Alaska's partisan primaries and first-past-the-post elections with one nonpartisan jungle primary and a general election between the four candidates receiving the most jungle primary votes. Only in the four-way general election are votes tabulated by voters' ranked choices.<sup>33</sup> While the reform applies to all state and federal offices,<sup>34</sup> municipalities may still pass their own election ordinances, with runoff elections as the default municipal election rule.<sup>35</sup> Proponents insisted that ranked-choice voting would moderate elections and promote centrist candidates by incentivizing candidates to appeal to all voters instead of just hyperpartisan primary voters.<sup>36</sup>

Although ranked-choice-voting proponents often argue the reform will help strengthen third parties, Alaska's historically strong third parties opposed Initiative 2. In July 2020, a group of plaintiffs led by Scott Kohlhaas<sup>37</sup> of the Alaska Libertarian Party and the Alaska Independence Party (and supported by a former Republican lieutenant governor and Libertarian state representative as amici) challenged the law.<sup>38</sup> After oral argument, the Anchorage Superior Court quickly rejected the litany of state and federal constitutional arguments the *Kohlhaas* plaintiffs raised. The Alaska Supreme Court heard the case on an expedited timeline and affirmed the Superior Court's ruling the next day, dispatching these arguments in a later opinion.<sup>39</sup>

At first glance, Initiative 2's reforms appear to have had a

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32. 2020 *General Election Results: Election Summary Report*, ALASKA DEP'T OF ELECTIONS (Nov. 3, 2020, 2:53 PM), <https://www.elections.alaska.gov/results/20GENR/data/sovc/ElectionSummaryReportRPT24.pdf>.

33. *Meyer v. Alaskans for Better Elections*, 465 P.3d 477, 498 (Alaska 2020); ALASKA STAT. § 15.15.350 (2022). The initiative also contained campaign finance reforms. *Alaskans for Better Elections*, 465 P.3d at 490–91. That is outside the scope of this Comment, because that provision was not challenged during the *Kohlhaas* litigation.

34. ALASKA STAT. § 15.15.025 (2022).

35. ALASKA STAT. § 29.26.060 (2011).

36. Kelsey Piper, *Alaska Voters Adopt Ranked-Choice Voting in Ballot Initiative*, VOX (Nov. 19, 2020, 6:20 PM), <https://www.vox.com/2020/11/19/21537126/alaska-measure-2-ranked-choice-voting-results>.

37. Kohlhaas has appeared before the Alaska Supreme Court to support other initiatives, including an unconstitutional secession measure. *Kohlhaas v. State, Off. of Lieutenant Governor*, 147 P.3d 714 (Alaska 2006); *Scott Kohlhaas*, BALLOTPEdia, [https://ballotpedia.org/Scott\\_Kohlhaas](https://ballotpedia.org/Scott_Kohlhaas) (last visited Feb. 16, 2024).

38. *Kohlhaas*, 518 P.3d at 1102–03; Brief of Hon. Mead Treadwell & Hon. Dick Randolph as Amici Curiae, *Kohlhaas*, 518 P.3d 1095, 2021 WL 6144455 at \*1.

39. *Kohlhaas*, 518 P.3d at 1102–03.

moderating impact on Alaska's elections. In 2022, moderate Democrat Mary Peltola won a special election to fill the late Representative Don Young's vacant at-large seat, becoming the first candidate to win an election under Initiative 2's jungle primary and ranked-choice-voting general election.<sup>40</sup> She subsequently won reelection in the 2022 general election; moderate Republican Lisa Murkowski and conservative Republican Mike Dunleavy also won reelection during the same electoral cycle.<sup>41</sup>

As with past RCV reforms, those politicians with vested interests in the status quo cried foul. After the 2022 election, former President Donald Trump and Senators Tom Cotton and Ted Cruz, derided ranked-choice voting as having "rigged" the elections.<sup>42</sup> Sarah Palin and Kelly Tshibaka, who lost to more moderate candidates in 2022, have backed efforts to repeal the reform.<sup>43</sup> Critics have complained that voters make mistakes using ranked-choice ballots and that ballot counters are more prone to error when counting ranked-choice ballots.<sup>44</sup> Others have protested that Mary Peltola, a Democrat, won despite more voters in the initial round of voting supporting Republicans candidates than Democratic candidates.<sup>45</sup> These objections ignore the fact that ranked-choice voting intentionally empowers voters to choose from a broader array of candidates than an election between two party nominees provides. This critique also assumes voters will always prioritize party affiliation over individual candidates, a premise RCV rejects.

While the *Kohlhaas* plaintiffs failed to overturn Initiative 2 in the courts, a movement to repeal the reform has emerged in the state legislature; right now, there is a bill in the Alaska House of

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40. Becky Bohrer, *Peltola Beats Palin, Wins Alaska House Special Election*, ASSOCIATED PRESS (Sept. 1, 2022, 1:26 AM) <https://apnews.com/article/2022-midterm-elections-sarah-palin-voting-government-and-politics-f9855f1138a922ab1147da7900819fa8>.

41. Associated Press, *Democrat Mary Peltola, the 1st Alaska Native in Congress, Wins a Full Term*, NAT'L PUB. RADIO (Nov. 24, 2022, 10:11 AM) <https://www.npr.org/2022/11/24/1139155670/mary-peltola-wins-alaska-election-congress>.

42. Yereth Rosen, *North to the Future? Alaska's Ranked Choice Voting System Praised and Criticized Nationally*, ALASKA PUB. MEDIA (Sept. 19, 2023), <https://alaskapublic.org/2023/09/19/north-to-the-future-alaskas-ranked-choice-voting-system-is-praised-and-criticized-nationally/>.

43. *Id.*

44. Trent England & Jason Snead, *Opinion: Failed Election Shows Why Alaska Should Repeal Ranked-Choice Voting*, JUNEAU EMPIRE (Dec. 5, 2023, 1:30 AM), <https://www.juneauempire.com/opinion/opinion-failed-election-shows-why-alaska-should-repeal-ranked-choice-voting/>.

45. *Alaska's New Year's Resolution: Repeal RCV*, FOUND. FOR GOV'T ACCOUNTABILITY (Jan. 10, 2023), <https://thefga.org/blog/alaska-new-years-resolution-repeal-rcv/>.

Representatives that would repeal Initiative 2.<sup>46</sup> Other non-legislative citizen groups are also working to place a repeal initiative on the ballot.<sup>47</sup>

## V. THE KOHLHAAS DECISION: ENCOURAGING CONSTITUTIONAL FLEXIBILITY

The *Kohlhaas* plaintiffs failed to show the unconstitutionality of Initiative 2's jungle primary and RCV vote tabulation provisions under either the federal or Alaska constitution.<sup>48</sup> The plaintiffs first challenged the open primary, arguing that it violates party speech and associational rights and also violates the Alaska Constitution's rules for electing the lieutenant governor and governor.<sup>49</sup> Second, the plaintiffs contended that the RCV general election places an unconstitutional burden on the right to vote.<sup>50</sup>

Rejecting these arguments, the Alaska Supreme Court interpreted the state constitution's provisions flexibly. In doing so, the court avoided constitutionally freezing the electoral system in its current first-past-the-post state. The Alaska Supreme Court did not abdicate its role in policing the state's electoral laws. Rather, the court insisted that it would not credit the plaintiffs' speculation about the hypothetical malign effects of reform, placing the burden to produce hard evidence of their critiques on RCV's opponents (evidence the *Kohlhaas* plaintiffs failed to present). Though many issues the court considered are rooted in the Alaska Constitution's text, similar language appears in state constitutions across the country. The court's analysis—to the extent it does not rely on interpretive methods like constitutional drafting history other courts may shun—may prove persuasive as other states' courts increasingly examine RCV reforms.

### A. Challenges to the Initiative's Campaign Finance Reforms Previously Failed

Although Initiative 2 also included campaign finance reforms

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46. Iris Samuels, *Alaska House Committee Advances Legislation to Repeal Ranked Choice Voting*, ALASKA PUB. MEDIA (Jan. 18, 2024), <https://alaskapublic.org/2024/01/18/alaska-house-committee-advances-legislation-to-repeal-ranked-choice-voting/>.

47. Iris Samuels, *Ranked Choice Voting Opponents File Petition in Quest to Overturn Alaska's Voting System*, ANCHORAGE DAILY NEWS (Jan. 14, 2024), <https://www.adn.com/politics/2024/01/12/ranked-choice-voting-opponents-file-petition-in-quest-to-overturn-alaskas-voting-system/>.

48. *Kohlhaas*, 518 P.3d at 1103.

49. *Id.*

50. *Id.*



strengthening donor disclosure laws, the *Kohlhaas* plaintiffs did not attack those provisions. In 2020, before voters considered Initiative 2, Lieutenant Governor Kevin Meyer tried and failed to block those reforms from the ballot.<sup>51</sup> The Alaska Supreme Court rejected his argument that campaign finance reform is so dissimilar from election reform that it violates Alaska's one-subject initiative law.<sup>52</sup>

## B. Upholding the Jungle Primary Against Constitutional Attack

Alaska's Supreme Court dispatched two constitutional challenges to the first-stage jungle primary, thus refusing to read constitutional rules as locking in the electoral status quo. The court first refused to accord political parties overly-strong associational rights that would block future moderating reforms (and would have granted political parties effective control over state primaries).<sup>53</sup> The court also declined to adopt a stunted reading of the language governing how voters must elect executive officials.<sup>54</sup>

### 1. Challenges Alleging Infringement of Party Associational Rights

Both the United States Constitution and Alaska Constitution protect the rights of "political parties[] to associate together to achieve their political goals," though the Alaska Constitution is typically more protective than the United States Constitution.<sup>55</sup> The *Kohlhaas* plaintiffs argued that the jungle primary infringed political party associational rights by depriving parties of their ability to choose their own nominees and forcing parties to "associate with candidates" that "display their party affiliations on the ballot," despite not having won a traditional party primary.<sup>56</sup> Yet, in *Washington State Grange v. Washington State Republican Party*, the U.S. Supreme Court upheld Washington's similar jungle primary against a similar challenge, dismissing as "sheer speculation" the fear that voters would confuse candidates that list their preferred party as official party nominees.<sup>57</sup>

When the *Kohlhaas* amici argued that parties ought to have stronger rights protections under Alaska law than under the federal constitution, the Alaska Supreme Court retorted that "looking more closely cannot

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51. See *Alaskans for Better Elections*, 465 P.3d at 498 (dismissing Meyer's objection that such citizen initiatives were invalid).

52. *Id.* at 478-79.

53. See discussion, *infra*, Part V.B.1.

54. See discussion, *infra*, Part V.B.2.

55. *Kohlhaas*, 518 P.3d at 1104-05.

56. *Id.* at 1104.

57. 552 U.S. 442, 454 (2008).

reveal something that does not exist.”<sup>58</sup> While the Alaska Supreme Court recognized that parties have a right “not to be forced to accept a candidate the party does not want,” it refused to find that “decoupl[ing]” state elections from the political party nomination process imposes any burden on party rights.<sup>59</sup> Indeed, the new system freed the party nomination system from any state control at all.<sup>60</sup> Similarly, the court refused – absent any evidence – to determine that the jungle primary would trick voters into thinking candidates that expressed party preferences were nominated by that party, putting “faith in the ability of individual voters” and declaring “Alaska voters are not easily fooled.”<sup>61</sup> A disclaimer explaining that candidates are not endorsed by the party they claim was sufficient for the U.S. Supreme Court to uphold Washington’s reform and was enough for the Alaska Supreme Court to uphold Alaska’s reform, too.<sup>62</sup>

The Alaska Supreme Court – despite some federal authority limiting the regulatory interests election law can pursue – was quick to find that these reforms advanced “important regulatory interests” that could justify the burden – if any – imposed on party associational rights.<sup>63</sup> Although the U.S. Supreme Court found that “affording voters greater choice and increasing voter participation” were insufficient state interests to justify a different California election reform, the Alaska Supreme Court still determined its own caselaw would allow these interests to justify a “modest burden” on party rights. The decision erected a higher barrier for RCV opponents to clear under Alaska law than under federal constitutional law.<sup>64</sup>

## 2. *Challenges Alleging Violations of Executive Branch Election Rules*

The Alaska Supreme Court refused to adopt an overly strict reading of the Alaska Constitution’s provisions for electing inferior executive officers like the lieutenant governor.<sup>65</sup> Article III, Section 8 of the Alaska Constitution instructs that “[t]he lieutenant governor shall be nominated in the manner provided by law for nominating candidates for other elective offices.”<sup>66</sup> A strict reading of this clause thus links the constitutional electoral requirements for other offices with those

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58. *Kohlhaas*, 518 P.3d at 1109.

59. *Id.* at 1108.

60. *Id.* at 1109.

61. *Id.* at 1110 (quoting *Wash. State Grange*, 552 U.S. at 454).

62. *Id.* at 1110–11.

63. *Id.* at 1111–13.

64. *Kohlhaas*, 518 P.3d at 1111–13.; *California Democratic Party v. Jones*, 530 U.S. 567 (2000).

65. *Kohlhaas*, 518 P.3d at 1118.

66. ALASKA CONST. art. III § 8.

controlling the lieutenant governor's election.<sup>67</sup>

Some amici challenging the law argued that, because Initiative 2 places both the governor and the lieutenant governor on the same ballot, the reform would have unconstitutionally required electing both officials in a different manner (with the lieutenant governor as a mere tagalong).<sup>68</sup> Nevertheless, the court rejected this argument. Section 8's language does not require that both officials win the election in the "exact same manner," but instead suggests that the delegates to Alaska's Constitutional Convention intended for some flexibility by not directly prescribing an electoral system.<sup>69</sup> Some other state constitutions explicitly prescribe methods of choosing a lieutenant governor.<sup>70</sup> Less flexible supreme courts may use similar "provision[s] governing a single office" to restrain "the legislature's [or people's] flexibility to design the elections process for all other elected state officials" without constitutional amendment, as the Alaska Supreme Court refused to do.<sup>71</sup>

### C. Upholding the RCV General Election Against Constitutional Attack

The plaintiffs also challenged the second-stage RCV general election, alleging that, first, the system unconstitutionally burdens the right to vote, and, second, the system unconstitutionally allows a candidate to win without receiving the highest number of votes.<sup>72</sup> On this second point, the plaintiffs took issue with the fact that even if a first-round winner won the most votes, RCV requires reshuffling ballots until one candidate receives a majority of votes cast.<sup>73</sup> Again, as with the jungle primary, the Alaska Supreme Court refused to strangle reform through inflexible constitutional interpretations.<sup>74</sup>

#### 1. *Challenges Alleging RCV Places an Undue Burden on the Right to Vote*

The *Kohlhaas* plaintiffs first argued that RCV elections burden the right to vote because voters cannot make knowledgeable choices about

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67. *Id.*; *Kohlhaas*, 518 P.3d at 1117 (explaining how reading these clauses to require exactly the same electoral process for different offices would stifle reform).

68. *Kohlhaas*, 518 P.3d at 1118.

69. *See id.* at 1117–18 (emphasis in original) (providing historical background on the Alaska Constitutional Convention, during which delegates stated the language should be "broad enough to make it flexible").

70. Kristin Sullivan, *Electing Lieutenant Governors*, CONN. GEN. ASSEMBLY OFFICE OF LEGIS. RSCH., <https://www.cga.ct.gov/2015/rpt/2015-R-0021.htm> (last visited Feb. 16, 2024).

71. *Kohlhaas*, 518 P.3d at 1117.

72. *Id.* at 1103.

73. *Id.* at 1120.

74. *See generally id.* at 1118–24.

later rounds of vote tabulation (or “voting” as the plaintiffs characterized it).<sup>75</sup> The plaintiffs thus described the RCV vote tabulation process as “voting blind.”<sup>76</sup> They further contended that voters whose ballots are “exhausted” before the final round of tabulation are essentially removed from the voting process completely.<sup>77</sup> In determining that neither of these arguments hold merit, the Alaska Supreme Court enumerated a list of broad state interests RCV reforms serve.<sup>78</sup> Thus, even if RCV opponents could—unlike the *Kohlhaas* plaintiffs—muster evidence of RCV’s malign impact, that burden would have to outweigh the many substantial state interests RCV serves.

As a preliminary matter, the *Kohlhaas* plaintiffs’ arguments that voters vote blindly and exhaust their ballots early in RCV elections rested on misunderstandings about the RCV process. These arguments relied on the premise that voters are burdened when they do not know how other voters will vote in subsequent RCV tabulation rounds.<sup>79</sup> However, this objection misunderstands RCV, which is not multiple rounds of votes, but one round of votes tabulated in a particular way. Voters are no more burdened by RCV than they are by single-choice voting. In fact, voters may be less burdened with an RCV election because each ballot can account for more nuance in voter choices. The *Kohlhaas* plaintiffs’ contention that exhausted votes are not counted was similarly unpersuasive. Voters are permitted to rank as many preferences as they wish. Even if they rank only one candidate, they have some impact on the election’s outcome during as many rounds as that candidate remains viable.

Yet, even if the plaintiffs could have shown RCV imposes real burdens on voters, the Alaska Supreme Court and the U.S. Supreme Court have recognized that the elections process will always impose some burden upon citizens, and that the process may do so as long as that burden is modest and supported by important state regulatory interests.<sup>80</sup> None of the concerns the *Kohlhaas* plaintiffs raised are burdens heavy

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75. *Id.* at 1123.

76. *Id.*

77. *Kohlhaas*, 518 P.3d at 1123.

78. *Id.* at 1124.

79. *Id.* at 1123 (explaining the plaintiffs’ argument that “the voter is voting blind” when she cannot change preferences between rounds of tabulation and dismissing that argument because “[the] complaint about the difficulty of casting a vote without knowing how others will vote is not unique to ranked-choice voting”).

80. *See, e.g.,* O’Callaghan v. State, 914 P.2d 1250, 1253, 1263 (Alaska 1996) (Alaska’s blanket primary was reasonable and nondiscriminatory and the harm was justified by state interests); *Burdick v. Takushi*, 504 U.S. 428, 434, 441–42 (1992) (Hawaii’s write-in ballot ban was reasonable and nondiscriminatory and justified by important regulatory interests).

enough to overcome the reasonable and important state interests RCV advances. Importantly, the Alaska Supreme Court went further than federal law and articulated numerous strong state interests RCV reform can serve, including:

[the] values of elected officials more broadly reflect[ing] the values of the electorate, mitigat[ing] the likelihood that a candidate who is disapproved by a majority of voters will get elected, encourag[ing] candidates to appeal to a broader section of the electorate, allow[ing] Alaskans to vote for the candidates that most accurately reflect their values without risking the election of those candidates that least accurately reflect their values, encourag[ing] greater third-party and independent participation in elections, and provid[ing] a stronger mandate for winning candidates.<sup>81</sup>

The U.S. Supreme Court has not ruled on whether these interests are important and reasonable.<sup>82</sup> However, several other courts have found RCV to pose a minimal burden in the face of interests such as “providing voters an opportunity to express nuanced voting preferences and electing candidates with strong plurality support”<sup>83</sup> and “increasing voter turnout, encouraging less divisive campaigns, and fostering greater minority representation.”<sup>84</sup> Ultimately, although RCV opponents often malign RCV’s complexity and potential for confusion, there are no examples of successful RCV challenges based on the burden RCV imposes on the right to vote.<sup>85</sup> Even if empirical claims of RCV confusion are true, RCV reforms still vindicate a host of legally cognizable state interests.

## 2. *Challenges Alleging RCV Violates Rules Requiring Victors Win the Most Votes*

Lastly, the *Kohlhaas* plaintiffs argued that Initiative 2’s RCV provision violates the Alaska Constitution by requiring winners to earn a *majority* of the votes, rather than the *most* votes, as required by Article III.<sup>86</sup>

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81. *Id.* at 1124.

82. Thus far, the U.S. Supreme Court has held that preventing “unrestrained factionalism,” “guard[ing] against party raiding,” deterring and detecting voter fraud, and ensuring voter confidence are legitimate interests. *Burdick*, 504 U.S. at 439–40; *Crawford v. Marion County Board of Elections*, 553 U.S. 181, 192–99 (2008). None of these are directly reflected in Alaska’s expressed interests but demonstrate the U.S. Supreme Court’s willingness to accept a wide variety of state interests.

83. *Dudum*, 640 F.3d at 1116.

84. *Minn. Voters All. v. Minneapolis*, 766 N.W.2d 683, 697 (Minn. 2009); *see also Baber*, 376 F.Supp.3d at 143 (noting that RCV in Maine does not impose a burden on the right to vote).

85. *See id.* (all examples of such challenges that have failed).

86. *Kohlhaas*, 518 P.3d at 1118.

They further contended that RCV denies victory to the candidate who receives the most votes by forcing her to endure successive rounds of voting in which she may ultimately be defeated.<sup>87</sup> As with other arguments the plaintiffs raised, these arguments are based on a fundamental misunderstanding of the RCV process.

Mathematically, winning an RCV election does not necessarily require a candidate to win a majority of votes, negating the first concern expressed by the plaintiffs. As the Alaska Supreme Court explained:

[V]oters do not have to select second- or third-choice candidates, and many may not. When a voter's first-place candidate is eliminated and the voter has not ranked a second-place candidate, the ballot is not redirected to another candidate. Because these votes do not go into the numerator (votes for a successful candidate) but remain in the denominator (total votes cast), a successful candidate can win the election with less than half of the total votes cast even though the candidate receives more than half of the votes counted in the final round of tabulation.<sup>88</sup>

This mathematical point aside, other courts have agreed with the plaintiffs' argument that, because the RCV vote tabulation process involves multiple rounds of tabulation, a candidate winning the most votes after the first round is illegally denied victory if another candidate wins the final round.<sup>89</sup> According to RCV opponents, each round provides those whose votes have gone to losing candidates a new opportunity to allocate their votes.<sup>90</sup> Indeed, in a 2017 advisory opinion, the Maine Supreme Judicial Court found that the Maine Constitution prohibits RCV for this reason.<sup>91</sup> That court determined that RCV is, in fact, multiple rounds of voting, thus violating the constitutional requirement that a plurality of votes cast secures victory.<sup>92</sup> However, the Maine opinion spent two brief paragraphs deciding this issue, with little accompanying analysis.<sup>93</sup>

The Alaska Supreme Court rejected the Maine Supreme Judicial Court's logic and instead followed the Ninth Circuit's broader, more flexible definition of "vote" in *Dudum v. Arntz*.<sup>94</sup> In a case involving an instant runoff in San Francisco, the Ninth Circuit characterized RCV as "a

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87. *Id.*

88. *Kohlhaas*, 518 P.3d at 1119-20.

89. *See, e.g.*, Opinion of the Justices, 162 A.3d 188, 211 (Maine 2017).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 204-05.

94. *Kohlhaas*, 518 P.3d at 1121 (citing *Dudum*, 640 F.3d at 1107).

single and equal opportunity to express [voting] preferences.”<sup>95</sup> After citizens cast their ranked-choice ballots, they do not later update those ballots or cast new votes.<sup>96</sup> Instead, the RCV system initiates another round of tabulation with the same set of vote preferences.<sup>97</sup> Because an RCV ballot is a single ballot—and each vote a single vote—the Ninth Circuit rejected the claim that the first round of tabulation is somehow final (rather than a single step in a longer process).<sup>98</sup> The *Kohlhaas* Court looked to the Alaska Constitutional Convention, the Alaska Constitution, and the dictionary to confirm that “vote” does not mean a single-choice vote or require a particular method of tabulation.<sup>99</sup> Indeed, definitions of “vote” are quite broad and refer to expressions of opinion or indications of choice.<sup>100</sup> Ultimately, this particular issue is state-dependent and outcomes may vary depending on the constitution and reform at issue.

## VI. *Kohlhaas* and the Future of Ranked Choice Voting

In *Kohlhaas*, the Alaska Supreme Court disarmed the legal threat to Alaska’s Initiative 2 reforms. In doing so, the Alaska Supreme Court refused to interpret the state’s constitution as barring novel policy and electoral experimentation, allowing Alaska to serve as a true laboratory of democracy. However, RCV proponents must still contend with political threats, as Alaska’s citizens may yet overturn RCV with another ballot initiative.

Under federal law, there are no real barriers to a well-written RCV statute; the primary challenges will come from state constitutions. While at first glance, many legal challenges to RCV found their basis in Alaska law, similar legal issues have arisen under Maine and California law, too. These same concerns will likely arise as RCV opponents challenge future reforms. Other states considering RCV, like Nevada and Wisconsin,

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95. *Dudum*, 640 F.3d at 1107.

96. *What is Ranked Choice Voting?*, RANKED CHOICE VOTING RES. CTR., <https://www.rcvresources.org/what-is-rcv> (last visited Feb. 11, 2024).

97. *Id.*

98. *Id.* at 1108.

99. *Kohlhaas*, 518 P.3d at 1122–23.

100. *See, e.g., Vote*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/vote> (last visited Feb. 15, 2024) (“formal expression of opinion or will in response to a proposed decision.”); *Vote*, OXFORD ENGLISH DICTIONARY (Sept. 2023) (“A formal indication of opinion given by a member of a group, in assent to a proposition or in favour of the election of a person; an indication of choice between two or more candidates or courses of action, typically expressed through a ballot, show of hands, or other approved means.”); *Vote*, BLACK’S LAW DICTIONARY (11th ed. 2019) (An “expression of one’s preference or opinion in a meeting or election by ballot, show of hands, or other type of communication.”).

should look to the *Kohlhaas* decision as an example of how state constitutions can function flexibly in the face of reform.