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ATTORNEY GENERAL OPINION NO. 2020- 7

The Honorable Adam Smith
State Representative, 120th District
1970 Road 3
Weskan, Kansas 67762

Re: Constitution of the State of Kansas—Elections—Mode of Voting; Ranked-Choice Voting

Synopsis: Article 4, § 1 of the Kansas Constitution prescribes the methods by which votes may be cast but is silent on the method to be used for allocating votes and therefore does not prohibit the use of ranked-choice voting methodology. Cited herein: Kan. Const., Art. 4, § 1; K.S.A. 25-702.

* * *

Dear Representative Smith:

As State Representative for the 120th District, you request our opinion concerning the constitutionality of the use of “ranked-choice election methodology.” Specifically, you ask whether ranked-choice election methodology would be in violation of Article 4, § 1 of the Kansas Constitution and whether language would need to be added to the Kansas Constitution “to clarify and allow ranked-choice election methodology” for calculating election results. We conclude that the answer to your first question is no, which dictates that the answer to your second question is also no.

Your request explains that, for the purpose of your request, ranked-choice election methodology is “a single-ballot, majority winner process for voting and tallying election results” to be used in races among more than two candidates. Ranked-choice voting methodology allows voters to mark their ballots for more than one candidate for a position, indicating their first-choice candidate and then also their second-, third-, and subsequent-

choice candidates.¹ When election results are tallied, if no candidate receives more than 50% of the first-choice votes cast, the candidate with the fewest first-choice votes is eliminated from consideration and the votes on the ballots listing that candidate as first choice are distributed to the candidates who those voters ranked as their second choice.² This process of elimination of candidates and redistribution of votes continues until one candidate has garnered more than 50% of the votes cast.³

In contrast, the historical—and in 49 states, current—method has voters select a single candidate for each position.⁴ The winner of the election is the candidate who garners the most votes.⁵ This system is known as the “plurality” system.⁶ Under this system, in a race with three or more candidates, it is possible that the candidate who garners the most votes does not garner more than 50% of the votes cast.⁷

With this understanding of these two systems, we now consider Article 4, § 1 of the Kansas Constitution. It states, “All elections by the people shall be *by ballot* or *voting device*, or both, as the legislature shall by law provide.”⁸ “Ballot” is a familiar term in voting and is defined as “a sheet of paper used to cast a secret vote” and “the action or system

¹ *Ranked-Choice Voting*, Nat’l Conf. of State Legislators, May 14, 2019, <https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting636934215.aspx> (last accessed March 25, 2020). This system is sometimes referred to as “instant-runoff” voting. *Id.*

² *Id.*

³ *Id.*

⁴ The first, and so far only, state to use the ranked-choice method for statewide voting is Maine. *Id.* In 2018, under its Ranked-Choice Voting Act, Maine used ranked-choice voting in races for the U.S. House and Senate primary and general elections, as well as statewide and state assembly *primaries*. *Id.* The method was not used for the election of state representatives, state senators, or governor because the Maine Constitution states that those offices are to be elected by a plurality of votes. Me. Const. Art. IV, pt. 1 § 5, pt. 2 § 4; Art. V, pt. 1, § 3; *see also Opinion of the Justices*, 162 A.3d 188, 205 (Me. 2017). In other settings—caucuses and city and county elections—ranked-choice voting, and variations thereof, have been used in caucuses and city and county elections dating back to the early twentieth century and are currently used in some state party caucuses and city and county elections. *See, e.g., State ex rel. Farris v. Simpson*, 155 So. 831 (Fla. 1934) (considering the method of voting for party’s state executive committee); *Minnesota Voters All. v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (considering constitutionality of instant runoff voting election methodology adopted by city); Dan Dorio and Wendy Underhill, *Ranked-Choice Voting*, Nat’l Conf. of State Legislators LegisBrief, Vol. 25, No. 24 (June 2017), *available at* <https://www.ncsl.org/research/elections-and-campaigns/ranked-choice-voting.aspx> (last accessed May 5, 2020) (noting that ten cities currently use ranked-choice voting).

⁵ K.S.A. 25-702 mandates plurality voting, stating: “In all elections for the choice of any officer . . . unless it is otherwise expressly provided, the person [or governor/lieutenant governor pair] having the highest number of votes for any office shall be deemed to have been elected to that office.”

⁶ A plurality may be “an excess of votes over those cast for an opposing candidate” or “a number of votes cast for a candidate in a contest of more than two candidates that is greater than the number cast for any other candidate but not more than half the total votes cast.” Plurality. *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/plurality> (last accessed May 5, 2020).

⁷ *Id.* *See also* Clarence Gilbert, Hallett Hoag, George Hervey, Jr., *Proportional Representation* 2 (1926) (defining a plurality as a relative majority).

⁸ Kan. Const. Art. 4, § 1 (emphasis added). The Kansas Supreme Court has interpreted Article 4, § 1 as guaranteeing voters the right to secrecy in their vote. *Sawyer v. Chapman*, 240 Kan. 409, 413 (1986).

of secret voting.”⁹ “Device” is defined as “a piece of equipment or a mechanism designed to serve a special purpose or perform a certain function.”¹⁰ From these definitions, we conclude that both “ballot” and “voting device” as used in Article 4, § 1 are physical means for casting votes. Thus, we conclude that Article 4, § 1 of the Kansas Constitution prescribes the physical manner in which votes may be *cast*, but does not prescribe the manner in which votes are to be *allocated* to the candidates.

“It is fundamental that our state constitution limits rather than confers powers. . . . [T]he question presented is, therefore, not whether the act is authorized by the constitution, but whether it is prohibited thereby.”¹¹ Applying these principles, we conclude that because Article 4, § 1 of the Kansas Constitution is silent on the manner in which votes are allocated to the candidates, it does not prohibit the use of ranked-choice voting.

Your second question is whether additional language would need to be added to the Kansas Constitution “to clarify and allow ranked-choice election methodology for calculating the election results.” This question is necessarily answered by our answer to your first question.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/AnnLouise Fitzgerald

AnnLouise Fitzgerald
Assistant Attorney General

DS:AA:AF:sb

⁹ Ballot. *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/ballot> (last accessed March 26, 2020).

¹⁰ Device. *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/device> (last accessed March 26, 2020).

¹¹ *State ex rel. Tomasic v. Unified Gov't of Wyandotte Cty./Kansas City, Kan.*, 264 Kan. 293, 300 (1998) (citations omitted). In *Tomasic*, the Kansas Supreme Court applied these principles to evaluate the constitutionality of a statute. Here, no statute concerns ranked-choice voting, so we cannot opine on the constitutionality of a statute and opine only on whether there is a constitutional prohibition on using that methodology.