

Arizona Supreme Court

Civil Election Appeal

CV-24-0184-AP/EL

SMITH et al v FONTES/MAKE ELECTIONS FAIR

Appellate Case Information

Case Filed: 9-Aug-2024 Archive on: 22-Aug-2034 (planned)
Case Closed: 22-Aug-2024

Dept/Composition

Side 1. APRIL SMITH, et al., Plaintiff/Appellant
(Litigant Group) APRIL SMITH, et al.

- April Smith
Nira Lee
Joshua Davidian

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Side 2. ADRIAN FONTES, et al., Defendant/Appellee
(Litigant Group) ADRIAN FONTES, et al.

- Adrian P Fontes
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(Litigant Group) STATE OF ARIZONA

- State of Arizona

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Side 3. MAKE ELECTIONS FAIR PAC, Real Party in Interest
(Litigant Group) MAKE ELECTIONS FAIR PAC

- Make Elections Fair Pac

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Side 4. ARIZONA FREE ENTERPRISE CLUB, SUSAN GARVEY, KATHLEEN LILES, JOHN SHADEGG, Plaintiff/Appellant
(Litigant Group) ARIZONA FREE ENTERPRISE CLUB, SUSAN GARVEY, KATHLEEN LILES, JOHN SHADEGG

- Arizona Free Enterprise Club
Susan Garvey
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Side 5. HONEST ELECTIONS PROJECT, Amicus Curiae
(Litigant Group) HONEST ELECTIONS PROJECT

- Honest Elections Project

Attorneys for: Amicus Curiae
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Thomas J Basile, Esq. (AZ Bar No. 31150)

Side 6. J. FIFE SYMINGTON III and RUSSELL "RUSTY" BOWERS, Amicus Curiae
(Litigant Group) J. FIFE SYMINGTON III and RUSSELL "RUSTY" BOWERS

- J Fife Symington, III
Russell Bowers

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CASE STATUS

Aug 22, 2024....Case Closed

Aug 22, 2024....Decision Rendered

Table with 6 columns: PREDECESSOR CASE(S), Cause/Charge/Class, Judgment/Sentence, Judge, Role <Comments>, Trial, Dispo. Row 1: MAR, CV2024-019846, [blank], Frank W Moskowitz, Judge on PC, [blank], [blank]

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**SMITH et al v FONTES/MAKE ELECTIONS FAIR**

PREDECESSOR CASE(S)	Cause/Charge/Class	Judgment/Sentence	Judge, Role <Comments>	Trial	Dispo
MAR CV2024-019880			Frank W Moskowitz, Judge on PC		

**CASE DECISION**

**22-Aug-2024 DECISION ORDER**

\* The Court en banc has considered the briefs and authorities from the parties and amici in this expedited election appeal concerning the "Make Elections Fair Arizona Act" (the "Act"), serial number I-14-2024, a ballot initiative to adopt an amendment

Filed: **22-Aug-2024**

Mandate: **22-Aug-2024**

**Ann Timmer**

**24 PROCEEDING ENTRIES**

1. 9-Aug-2024 FILED: Statement Identifying Appeal as Expedited Election Matter and Request for Initial Telephonic Scheduling Conference; Certificate of Service (Appellants Smith, et al./AFEC, et al.)
2. 12-Aug-2024 On August 9, 2024, Plaintiffs/Appellants April Smith, et al. ("Smith Plaintiffs") and Arizona Free Enterprise Club, et al., ("AFEC Plaintiffs") filed a joint "Statement Identifying Appeal as Expedited Election Matter and Request for Initial Telephonic Scheduling Conference."  
In lieu of a telephonic scheduling conference, Court staff has consulted with counsel for Appellants and Appellee/Real Party in Interest Make Elections Fair PAC, a political action committee. Court staff has been informally advised that the ballot printing deadline is August 22, 2024.  
IT IS ORDERED any transcript shall be filed forthwith.  
IT IS FURTHER ORDERED the Secretary of State shall file a statement forthwith advising the Court of the last day to decide this matter.  
Upon consideration of this matter and agreement of the parties,  
IT IS ORDERED Appellants Smith Plaintiffs and AFEC Plaintiffs will file their opening briefs (no more than 5,000 words each) no later than 11:59 p.m. on Tuesday, August 13, 2024.  
IT IS FURTHER ORDERED that any amicus brief (no more than 2,000 words) will be filed no later than 11:59 p.m. on Wednesday, August 14, 2024. The parties give blanket consent to the filing of amicus briefs. Any amicus brief not meeting the requirements of ARCAP 16(b)(1)(C) will be summarily stricken by the Court.  
IT IS FURTHER ORDERED Appellee/Real Party in Interest will file a combined answering brief (no more than 8,000 words) responding to the opening briefs and amicus briefs no later than 11:59 p.m. on Saturday, August 17, 2024.  
IT IS FURTHER ORDERED Appellants may file their reply briefs (no more than 2,000 words each) responding to the answering brief and amicus briefs no later than 9:00 a.m. on Monday, August 19, 2024. If either Appellant elects not to file a reply brief, such party will file a notice to that effect as soon as possible.  
Due to the expedited nature of these proceedings, the parties are encouraged to utilize shorter briefs and file their pleadings before their deadlines if possible.  
IT IS FURTHER ORDERED briefs will be in a legible 14-point font, double-spaced, and will include all arguments the parties wish to present to the Court. They may be filed in memorandum format (no tables of contents or authorities).  
IT IS FURTHER ORDERED in addition to filing briefs with the Clerk of the Supreme Court (with filing and service through AZTurboCourt), all filings are also to be sent by email to all the parties as required by Rule 10(h), Arizona Rules of Civil Appellate Procedure, and to SACrtDocs@courts.az.gov and Court staff when filed.  
This matter will be considered without oral argument. (Hon. William G. Montgomery)
3. 13-Aug-2024 FILED: Notice Regarding Printing Deadline; Certificate of Service (Appellee Fontes)
4. 13-Aug-2024 There having been a clerical error in the caption of this expedited election matter affecting the order issued on August 12, 2024, IT IS ORDERED correcting the caption as shown above.  
IT IS FURTHER ORDERED this caption shall be used on all further documents filed in this appeal. (Tracie K. Lindeman, Clerk)
5. 13-Aug-2024 FILED: Opening Brief of Arizona Free Enterprise Club, Susan Garvey, Kathleen Liles, and John Shadegg; Certificate of Service; Certificate of Compliance; Addendum (Appellants AFEC, et al.)
6. 13-Aug-2024 FILED: Opening Brief of the Smith Plaintiffs/Appellants; Certificate of Service; Certificate of Compliance (Appellants Smith, et al.)
7. 14-Aug-2024 FILED: Brief of Amicus Curiae Honest Elections Project; Certificate of Service; Certificate of Compliance (Amicus Honest Elections Project)
8. 14-Aug-2024 FILED: (Copy of) Order (ASC) Filed 8/12/24 (Amicus Honest Elections Project)
9. 14-Aug-2024 FILED: Motion for Leave to File Amici Curiae Brief in Support of Real Party in Interest; Certificate of Service; (Proposed) Order Re Motion for Leave to File Amicus Brief (Amicus Symington/Bowers)

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10. 14-Aug-2024 FILED: Brief of Amici Curiae J. Fife Symington, III and Russell "Rusty" Bowers; Certificate of Service; Certificate of Compliance (Amicus Symington/Bowers)
11. 14-Aug-2024 FILED: (Copy of) Order (ASC) Filed 8/12/24 (Amicus Symington/Bowers)
12. 14-Aug-2024 FILED: Notice of Supplemental Filing; Certificate of Service; Exhibit A (Appellants Smith, et al./AFEC, et al.)
13. 14-Aug-2024 FILED: Record
14. 14-Aug-2024 FILED: Record
15. 15-Aug-2024 Amici Curiae J. Fife Symington III and Russell "Rusty" Bowers having filed a "Motion for Leave to File Amici Curiae Brief in Support of Real Party in Interest" along with the proposed amicus brief on August 14, 2024,  
  
IT IS ORDERED the "Motion for Leave to File Amici Curiae Brief in Support of Real Party in Interest" is granted. The brief shall be filed as of August 14, 2024. (Tracie K. Lindeman, Clerk)
16. 15-Aug-2024 RECEIPT No.: 2024-00218 ; \$280.00, Authorization: 8828226769407853, Applied to: APRIL SMITH, et al. - Class A Filing Fee (\$280.00) Paid for: APRIL SMITH, et al. - By nCourt LLC
17. 17-Aug-2024 FILED: Real Party in Interest Make Elections Fair PAC's Combined Answering Brief; Certificate of Service; Certificate of Compliance (Real Party Make Elections Fair PAC)
18. 19-Aug-2024 FILED: Reply Brief of AFEC Appellants; Certificate of Service; Certificate of Compliance (Appellant AFEC, et al.)
19. 19-Aug-2024 FILED: Reply Brief of The Smith Plaintiffs/Appellants; Certificate of Service; Certificate of Compliance (Appellants Smith, et al.)

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20. 22-Aug-2024 The Court en banc has considered the briefs and authorities from the parties and amici in this expedited election appeal concerning the “Make Elections Fair Arizona Act” (the “Act”), serial number I-14-2024, a ballot initiative to adopt an amendment to the Arizona Constitution to reform primary and general elections as sponsored by the Make Elections Fair PAC, (the “Committee”).

The Act, if approved, would (1) eliminate partisan primaries, (2) allow any qualified elector to vote in any primary regardless of the voter’s partisan affiliation, (3) require that all qualified candidates for the same office appear on the same ballot, and (4) prescribe the same signature requirements for all candidates for the same office. The Act also prohibits the use of public funds to administer political-party elections, except in certain limited circumstances applicable only to the presidential preference election. The Act allows the legislature—or, failing that, the Secretary of State—to decide how many candidates advance from the primary to the general election. If the legislature (or the Secretary) decides that more than two candidates advance for an office to which one candidate will be elected, the Act requires the use of voter rankings at the general election to ensure the ultimate winner enjoys broad electoral support. These changes involve amendments to article 7 of the Arizona Constitution, including section 2 (qualifications of voters), section 7 (amending the section so as to not prohibit ranked voting), section 10 (direct primary elections), and section 11 (general elections). The Committee explains that to facilitate the implementation of these changes, the Act exempts these provisions from article 9, section 23 of the Arizona Constitution, which is known as the “Revenue Source Rule.” The Smith Plaintiffs filed their challenge to the Act and filed a Motion for Summary Judgment and Joint Statement of Facts. The Arizona Free Enterprise Club Plaintiffs filed a separate challenge along with a Motion for Preliminary Injunction. The superior court consolidated the proceedings and conducted oral argument. After taking the matter under advisement, the court denied the motions, clearing the way for the initiative to appear on the ballot in a minute entry incorporating Rule 54(b) language. The ruling also indicated that the challenge to the petition signatures would proceed and that the court would issue a separate ruling when that challenge was resolved. The challenge to petition signatures is not before us in this case.

This Court unanimously agrees with the analysis and conclusions of the superior court. The Plaintiffs’ first challenge was under the “Separate Amendment Rule” of article 21, section 1 of the Arizona Constitution, which requires that “[i]f more than one proposed amendment is submitted at any election, the proposed amendments shall be submitted in such a manner that the electors may vote for or against such proposed amendments separately.” This rule “protect[s] the integrity of the constitutional amendment process from the pernicious practice of log-rolling.” *Ariz. Together v. Brewer*, 214 Ariz. 118, 120 ¶ 3 (2007) (quoting *Kerby v. Luhrs*, 44 Ariz. 208, 214 (1934)) (internal quotation marks omitted).

Yet, courts cannot apply the Separate Amendment Rule “in a manner that unduly encumbers the right of the people to amend the constitution.” *Id.* at 121 ¶ 4. Instead, courts must “ensur[e] that complex solutions to modern legislative problems are not precluded by an unduly narrow reading of the separate amendment rule.” *Id.* (quoting *Korte v. Bayless*, 199 Ariz. 173, 177 ¶ 13 (2001)) (internal quotation marks omitted). To that end, a proposed constitutional amendment involving a “multifaceted approach” satisfies the Separate Amendment Rule so long as “the proposed changes arguably further the purpose” of the amendment. *Korte*, 199 Ariz. at 178 ¶ 15.

Courts thus examine “whether provisions of a proposed amendment are sufficiently related” to the measure’s purpose, so that “the proposal can be said to constitute a consistent and workable whole on the general topic embraced.” *Save Our Vote*, *Opposing C-03-2012 v. Bennett*, 231 Ariz. 145, 149 ¶ 12 (2013) (quoting *McLaughlin v. Bennett*, 225 Ariz. 351, 354 ¶ 8 (2010)). Doing so tests “(1) whether a proposition’s provisions are ‘topically related,’ and (2) whether they are ‘sufficiently interrelated so as to form a consistent and workable proposition.’” *Id.* at 149–50 ¶ 12 (quoting *Ariz. Together*, 214 Ariz. at 121 ¶ 6).

*Save Our Vote* involved a similar challenge to a similar initiative, Proposition 121, ten years ago. Proposition 121 would have ended taxpayer-funded primary elections to select partisan candidates. *Id.* at 147 ¶ 1. It also would have amended the Arizona Constitution to replace partisan primary elections with an open “top two” primary in which all candidates appear on the same ballot and the two receiving the most votes, regardless of party, advance to the general election. *Id.*

In that challenge, we considered whether the provisions of Proposition 121 were sufficiently interrelated to comply with the Separate Amendment Rule, noting that the rule does not require “that all components of a provision be logically dependent on one another.” *Id.* at 150 ¶ 15 (quoting *Ariz. Together*, 214 Ariz. at 122 ¶ 10). Instead, we measured the provisions against objective factors, such as:

whether various provisions are facially related, whether all the matters addressed by an initiative concern a single section of the constitution, whether the voters or the legislature historically has treated the matters addressed as one subject, and whether the various provisions are qualitatively similar in their effect on either procedural or substantive law.

*Id.* (quoting *Korte*, 199 Ariz. at 177 ¶ 11). We concluded that the act’s provisions were not only facially related but also logically related, observing that the legislature has historically treated the matters addressed in that proposition as one subject and finding that the provisions were “qualitatively similar” in their effect on procedural or substantive law. *Id.* at 151 ¶ 19. And although the opponents in *Save Our Vote* argued that there was no “good reason” why a vote for or against funding of certain party activities “should be bundled with a vote on an open primary,” and further argued that the adoption of the proposition would require changes in a large number of Arizona statutes, we concluded, “[t]he fact that the objectives of a constitutional measure could be achieved by an alternative means does not itself establish a violation of the separate amendment rule.” *Id.* ¶ 20–21.

Here, the provisions of the Act are topically related, sufficiently interrelated, involve matters that have historically been treated as one subject and are qualitatively similar in their effect on the law, even if the changes concern more than one section of article 7 of the Arizona Constitution. As the superior court noted, touching on more than one section of the constitution is not necessarily fatal. See *Id.* at 148–49 ¶ 7 (holding that Proposition 121, which would replace article 7, section 10 of the Arizona Constitution with a new section 10 containing eight subparts, did not violate the Separate Amendment Rule); *Korte*, 199 Ariz. at 175–78 (holding that Proposition 100, which proposed extensive amendments to article 10 of the Arizona Constitution, did not run afoul of the separate amendment rule).

Plaintiffs also point to the Act’s intention to exempt itself from the Revenue Source Rule. See *Ariz. Const.* art. 9, § 23. Under the Revenue Source Rule, “[a]n initiative or referendum measure that proposes a mandatory expenditure of state revenues for any purpose” must “provide for an increased source of revenues sufficient to cover the entire immediate and future costs of the proposal.” *Id.* The Committee argues that the Revenue Source Rule would not apply to the Act, and if it did, the exemption simply allows the Act to be implemented. We agree. To conclude otherwise would effectively require any initiative be presented

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in two bites—one for the substance of the Act, and one to address the Revenue Source Rule. Such a requirement would place too great a burden on the initiative process. Although a revenue source consequence could conceivably stray so far from the subject of an initiative as to be untenable under the Separate Amendment Rule, it does not do so in this case. Here, the exemption from the Revenue Source Rule serves the common purpose of reforming elections—a putative solution relating to a complex matter—“while guarding against the passage of a combination of proposals, unrelated to a common principle or purpose, that proponents combine only to garner support from otherwise distinct groups of voters.” Korte, 199 Ariz. at 178 ¶ 13. As for suppositions that the Act will otherwise taint city elections or invite further Revenue Source Rule exemptions in future initiatives, these are policy arguments best addressed by the political process. In general, “the proper place to argue about the potential impact of an initiative is in the political arena, in speeches, newspaper articles, advertisements and other forums.” Tilson v. Mofford, 153 Ariz. 468, 473 (1987).

Likewise, although the Plaintiffs object to the prospect that the Secretary of State could be called upon to determine how many candidates advance to the general election if there is more than one open office, the Committee notes that the Secretary serves as a backstop for implementation decisions only if the legislature fails to act. Also, the Committee observes that the Secretary is a constitutional officer, Ariz. Const. art. 5, § 1(A), who already has the power to promulgate rules and regulations with the force of law. See Ariz. Pub. Integrity All. v. Fontes, 250 Ariz. 58, 63 ¶ 15 (2020).

Plaintiffs also contend that the Act should not be able to limit the ability of future legislatures to change the number of candidates that advance to the general election. But other authorities require periodic legislative action or restrict legislative action. See Ariz. Const. art. 4, pt. 2 § 1(3) (implementing an independent redistricting commission “each year that ends in one”); A.R.S. § 16 452(B) (requiring the Secretary to submit the elections procedural “manual to the governor and the attorney general not later than October 1 of the year before each general election”). Also, when they adopted the Voter Protection Act, voters expressly restricted the legislature’s power to repeal, amend, or supersede voter-approved initiatives. Ariz. Const. art. 4, pt. 1, § 1(6)(B)–(C); Cave Creek Unified Sch. Dist. v. Ducey, 233 Ariz. 1, 6, ¶ 20 (2013). And the Act does not abridge the legislature’s power to repeal or enact any law—it only determines how often the legislature can change the number of candidates who will advance to the general election from the primary.

The Smith Plaintiffs also argue that the petition signature sheets circulated to qualify the measure for the ballot violated A.R.S. § 19–102(A), arguing that the 200-word description omitted a principal provision and was misleading. As they note, § 19-102(A) requires an initiative petition to “[i]nser[t] a description of not more than two hundred words of the principal provisions of the proposed measure or constitutional amendment.” This Court has deemed it sufficient if the “chosen language” of the description “alert[s] a reasonable person to the principal provisions’ general objectives.” Molera v. Hobbs, 250 Ariz. 13, 20 ¶ 11 (2020). The Smith Plaintiffs contend that the nature of the Act’s exemption from the Revenue Source Rule is misrepresented. We disagree. The description aptly and adequately explains within the confines of the 200-word statutory limitation that, “[the] Amendment is exempt from the revenue source requirement.”

Therefore,

IT IS ORDERED affirming the superior court’s judgment denying injunctive relief. The Secretary of State will include the Make Elections Fair Act on the general election ballot, absent any future orders to the contrary. We note that this Court remanded the signature challenge to the trial court, see Smith v. Fontes, No. CV-24-0190-AP/EL (Aug. 21, 2024), where it is pending.

IT IS FURTHER ORDERED the Clerk shall issue the mandate forthwith. (Hon. Ann A. Scott Timmer)

- 21. 22-Aug-2024 ----CASE STATISTICALLY TERMINATED----
- 22. 22-Aug-2024 MANDATE TO THE SUPERIOR COURT  
Issued Mandate and Copy of Decision Order to Trial Court.
- 23. 23-Aug-2024 RECEIPT No.: 2024-00230 ; \$140.00, Authorization: 8652360711773954, Applied to: MAKE ELECTIONS FAIR PAC - Class B Filing Fee (\$140.00) Paid for: MAKE ELECTIONS FAIR PAC - By nCourt LLC
- 24. 21-Aug-2024 FILED: Supplemented Superior Court e-Record with Revised Index of Record