
BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT
DOCKET NO. OJ-17-1

In the Matter of Request for Opinion of the Justices
in a Communication from the Senate Dated February 2, 2017

Brief of Amicus Curiae Dmitry Bam

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STATEMENT OF THE CASE

Maine’s Constitution contains a number of provisions ensuring that the candidate who receives the most votes in state gubernatorial and legislative elections is declared the winner of those elections.¹ This is so even if the candidate receiving the most votes does not receive a majority of all the votes. On November 8, 2016, the people adopted ranked-choice voting (“RCV”) – a new method for how ballots will be designed and how votes will be cast and counted. While ranked-choice voting changes aspects of Maine elections, it leaves unchanged what happens *after* the votes are counted. Under ranked-choice voting, the candidate receiving the most votes in an election is declared the winner of that election, *even if* that candidate failed to receive a majority of all the votes.²

In addition, Maine’s Constitution requires that votes for Governor and State Legislature be sorted and counted by local election officials, who must then prepare a list of the local results and deliver those results to the Secretary of State.³ Ranked-choice voting does not violate – or even implicate – this constitutional provision. Undoubtedly, the change in ballot design and tabulation procedure will influence *how* local officials count the ballots and the *content* of the lists local officials create. Nonetheless, under ranked-choice voting, just as under the

¹ See Me. Const. art. IV, pt. 1 § 5; art. IV, pt. 2, §§ 3 and 4; art. V, pt. 1, § 3.

² In the language of election scholarship, ranked-choice voting alters the balloting method, but retains the (plurality) decision rule. SAMUEL MERRILL III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC, at 11 (1988); see also Jeffrey C. O’Neill, *Everything That Can Be Counted Does Not Necessarily Count*, 2006 MICH. ST. L. REV. 327, 329.

³ See, e.g., Me. Const. art. IV, pt. 1, § 5.

previous simple-plurality-voting scheme, local election officials retain the power to tabulate the ballots, develop the lists showing all the votes cast for each candidate, and deliver those lists to the Secretary of State.

QUESTIONS PRESENTED

1. Does ranked-choice voting comply with Maine’s constitutional provisions requiring that governors and legislators be elected by a “plurality” of the vote?
2. Does ranked-choice voting comply with Maine’s constitutional provisions requiring that city and town officials sort, count, declare, and record the votes in certain elections?

ARGUMENT SUMMARY

The Senate asks this Court to decide whether the ranked-choice voting system recently adopted by the people of Maine complies with the Constitution’s plurality requirement. As that word is used in the Maine Constitution, “plurality” can only have a single meaning. Put simply, to receive the “plurality” of the vote is to receive the “most votes.” Any other meaning renders the provision nonsensical.

Thus, the Senate’s inquiry with respect to the interaction between ranked-choice voting and the Constitution’s plurality provisions, boils down to this: Under ranked-choice voting, will the candidate receiving the most votes be declared the winner of the election? The answer to that question is an unequivocal yes. In a

ranked-choice voting election, the candidate receiving the most votes in that election is the winner of that election. This is the case whether or not that candidate has received the majority of the overall vote.

Admittedly, given the new ballot design, voters will now express their preferences differently. Rather than exercising their right to vote by expressing a preference for a single candidate (“I prefer Candidate A”), ranked-choice voting enables Mainers to use their vote to provide more detailed instructions to local and state officials tabulating those ballots (“I prefer Candidate A, but if Candidate A is eliminated, then I prefer Candidate B”). I am not aware of any judicial decision or any other legal authority, in Maine or elsewhere, suggesting that providing voters an opportunity to express their vote in a more nuanced fashion violates the Constitution.⁴ To the contrary, courts across the country have upheld ranked-choice voting (and other similar systems, such as cumulative voting) against state and federal constitutional challenges. In fact, the very question that the State Senate asks – whether ranked-choice voting is a plurality voting system – has been answered by election experts and other courts around the nation. These authorities

⁴ The Maine Constitution does not define the word “vote” or limit the way that voters express their preferences on the ballot. Jurisdictions across the nation, and across the world, have created a wide range of voting systems. For example, some voting systems give voters a number of points to allocate among candidates based on their preferences (for example, a voter might have 20 points to distribute, and give 10 points to his first choice candidate, 7 points to his second choice, and 3 points to his third choice). While such a ballot may look different than the simple ballot Maine has historically used in statewide elections, the voter’s assignment of points is still a vote, and is worthy of full consideration.

uniformly recognize that ranked-choice voting is indeed a “plurality” voting system. This Court should do the same.

The Senate also asks whether ranked-choice voting conflicts with the Constitutional requirement that local officials sort, count, declare and record the votes. It does not. In fact, ranked-choice voting has *absolutely nothing* to do with any of those things. Under ranked-choice voting, just as before, local officials can engage in all those activities so long as ranked-choice voting is properly implemented. And it is up to the Legislature, not this Court, to ensure such implementation.

STATEMENT OF AMICUS CURIAE

Amicus Dmitry Bam is an Associate Professor at the University of Maine School of Law. I teach and write in the areas of Constitutional Law and Election Law. I hope to provide the Court with my academic perspective on the constitutional and election issues raised by the Senate’s Questions to the Justices. I take no position on whether ranked-choice voting is sound policy, or whether the Questions propounded present a “solemn occasion.”

ARGUMENT

I. Ranked-Choice Voting Complies With Maine’s Plurality Provisions

I begin with Senate’s Question 2. The Senate asks:

Does the method of ranked-choice voting established by the Act in elections for Representative, Senator and Governor violate the provisions of the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Sections 3 and 4 and Article V, Part First, Section 3, respectively, which declare that the person elected shall be the candidate who receives a plurality of all the votes counted and declared by city and town officials as recorded on lists returned to the Secretary of State?

Answering the question requires the Court to proceed in two steps. First, the Court must define the word “plurality” as it is used in the Maine Constitution. Second, the Court must decide whether ranked-choice voting accords with that definition.

A. The Constitution’s Plurality Provisions Mean That the Candidate Receiving the Most Overall Votes Is the Winner of an Election

The meaning of the word plurality is clear and largely undisputed. A candidate has received a plurality of the vote when the candidate has received more votes than anyone else. That condition is satisfied if the candidate has received less than a majority of the vote, so long as the next-highest vote-getter has received at least one fewer vote. The condition is also satisfied if one candidate has received the majority of the vote, or in fact even if the result of an election is unanimous. Thus, when our Constitution declares that the winner of an election for Governor, State Representative, or State Senator is to be determined by “a plurality of all the votes” it means, very simply, that the person with the most wins.

Although lawyers frequently distinguish the concepts of plurality, majority, and unanimity (for example, when referring to the composition of judicial decisions), the word “plurality” in the Maine Constitution is not being used in contradistinction to the word “majority.” If the word plurality was read to exclude the idea of “majority,” then a candidate elected by the majority, or even one elected unanimously, would not be eligible for office since he will not have received a “plurality” of the vote. This nonsensical reading must be rejected. Therefore, while a plurality need not be a majority, a candidate receiving the majority of the vote by definition has also received a plurality of the vote.

The word “plurality” is thus a numerical concept and says nothing about the method by which such a plurality is reached. In fact, every dictionary defining the term “plurality” makes references to numbers or numerical concepts; none suggest that the word carries a special loaded meaning describing a particular voting or tabulation procedure.⁵ Scholars have recognized that there is a wide range of plurality voting systems, including Borda count, simple plurality ballots (also known as first-past-the-post)⁶, cumulative voting, ranked-choice voting, and many

⁵ For example, the 1880 edition of *An American Dictionary of the English Language* by Noah Webster defined “plurality” as “a state of being or having a greater *number*” (G. & C. Merriam 1880) (emphasis added). Similarly, the 1964 edition of *The Concise Oxford Dictionary of Current English* defined “plurality” as “large *number*, multitude.” 935 (H.W. Fowler and F.G. Fowler ed., 5th ed. 1964) (emphasis added). See also <http://www.merriam-webster.com/dictionary/plurality> (defining plurality as “a large number or quantity”).

⁶ Simple-plurality voting is the familiar first-past-the-post voting system. Despite the fact that the word “plurality” is used to describe this method, it is important to recognize that simple-plurality voting is only one of many plurality voting systems where the person with the most votes is declared the winner of the election. See, e.g., Stanford Encyclopedia of Philosophy, *Voting Methods*, available at <https://plato.stanford.edu/entries/voting-methods/#2>.

others. In other words, as long as the person with the most votes is declared the winner of the election, the Constitution's plurality provisions are satisfied, regardless of which voting system the people use to reach that plurality.

This common-sense meaning is confirmed by the history of Maine's plurality provisions. This history shows that the purpose of the plurality provisions of the Maine Constitution was to limit the *government's* authority to disregard the final vote count when no candidate received a majority of the vote. There is absolutely no indication that the purpose of the provision was to impose a restriction on ballot design or tabulation methodology, or to constrain the people to the first-past-the-post voting system. The history of the plurality provision in Article V is particularly telling. Before the provision was added, the Legislature hand-picked the Governor if no candidate received a majority of the vote. After the 1879 gubernatorial election yielded no majority, and following an attempt by a sitting Governor to manipulate the legislative selection process, the people amended the Constitution to clarify that the Legislature *must* select the person receiving the most votes. The revised language is undoubtedly designed to limit the discretion of our elected officials to disregard the final results of an election. But there is nothing in the history of this amendment suggesting that the people also wanted to bind themselves in their ability to develop new election processes. The ratification history is completely silent in that regard.

Looking at the constitutional text as a whole further clarifies this narrow, numerical meaning of plurality provisions. Each of the plurality provisions in the Constitution deals with who must be declared the winner *after* all the votes have been tabulated. Article IV, Part First, Section 5, for example, lays out a lengthy description of the election procedures for the House of Representatives. Ranked-choice voting complies with that procedure. That section then spells out what must happen after the votes have been cast and counted: “The Governor shall . . . issue a summons to such persons as shall appear to have been elected by a plurality of all votes returned, to attend and take their seats.” Article IV, Part Second, Sections 3 and 4 impose a similar requirement for Senate elections. And Article V, Part First, Section 3 mirrors those provisions for gubernatorial elections. Under this Section, the Secretary of State, along with the Maine Legislature, must *first* “determine[] the number of votes duly cast for the office of Governor.”⁷ *Then*, and only then, “in case of a choice by plurality of all of the votes returned they shall declare and publish the same.”

All three uses of the word “plurality” thus refer to the Legislature’s duty to declare a winner of the election based on the returned results *after* they have been duly cast and calculated. These provisions say nothing about when the vote counting must stop, what happens *before* those results are returned, or *how* any

⁷ Once again, this is the stage of the election process where ranked-choice voting operates.

official – local officials or the Secretary of State – should go about “determin[ing] the number of votes duly cast for the office of Governor” or any other office.

When the Constitution is silent on an issue, like the *method* of counting the votes, questions of ballot design, or even the definition of what constitutes “a vote,” courts generally defer to the political process, or the people themselves, to fill those gaps. And the ranked-choice voting procedure, described in more detail below, has nothing whatsoever to do with the Legislature’s obligations once the votes have been counted. In other words, ranked-choice voting and the plurality provisions operate at entirely different points of the electoral process. Ranked-choice voting is about how people will cast their ballots, and how those ballots will be counted. The plurality requirement, on the other hand, is about what the government must do after all the ballots have been counted.

B. Under Ranked-Choice Voting, the Candidate Receiving the Most Votes Is the Winner of an Election

Having established that the “plurality” requirement means nothing more than that the person with the most votes is the winner of the election, we can now answer the question posed by the Senate: is ranked-choice voting a plurality voting system. In other words, under ranked-choice voting, will the candidate with the most votes be declared the winner of the election, as required by the Maine Constitution? To see why the answer is yes, it is important to understand how

ranked-choice voting works. Once we understand how the system operates, there can be no doubt that ranked-choice voting is, indeed, a plurality voting system.

1. How Ranked Choice Voting Works

The legislation approved by Mainers last November establishes a process by which the Governor and state and federal legislators are to be elected. Under this ranked-choice voting process, voters can (but need not) rank candidates for an office in order of preference. Winners of the offices elected by this ranked-choice voting process are determined by the prescribed tabulation procedure. Tabulation proceeds until all the votes are counted, as last-place candidates are eliminated. Ballots that ranked eliminated candidates higher are counted as votes for the next highest-ranked “continuing candidate” in subsequent rounds of tabulation until two candidates remain. After all the votes have been counted, “*the candidate with the most votes* is declared the winner of the election.”⁸

2. Ranked Choice Voting is a Plurality System

Describing the ranked-choice voting procedure is enough to answer the Senate’s question whether ranked-choice voting is a plurality voting method. Maine’s Constitution requires that the person with the most votes be declared the winner of an election. And as shown above, that is precisely what ranked-choice

⁸ 21-A M.R.S. § 723-A(2)(A) (emphasis added).

voting does. After all the ballots have been counted, the person with the most votes wins.

To be sure, in the midst of the counting process, before all the votes are counted, a candidate may hold a temporary lead. But the plurality provisions of the Maine Constitution do not require (or even permit) the counting to stop just because a candidate is in the lead but before all the votes have been counted. As discussed earlier, the plurality provisions are triggered only after all votes have been tabulated. Stopping after, say, the first round of counting ignores the voter's ballot, and the voter's intent to express his preference for a different candidate if his first choice is eliminated. When the voter declares "I prefer A, but if A is eliminated I prefer B, and if B is eliminated I prefer C," the government may not simply cross out everything after "I prefer A . . ." and declare a winner by essentially disregarding the remaining two-thirds of the voter's ballot.⁹ Even if this yields a different plurality "winner" than the plurality winner that will emerge at the end of the tabulation process, the plurality provisions do not require election officials essentially to annul the vote that was cast.

There is no Maine precedent deciding whether the plurality provisions in the Constitution constrain the vote tabulation procedures. But courts considering the constitutionality of ranked-choice voting and other similar voting systems have

⁹ Likewise, if Mainers voted by assigning points to candidates – say, 5 points for the first choice, 3 points for the second choice, and 1 point for the third choice – the state could not simply tabulate all the 5s and declare that a plurality has been reached based on the 5s alone. Rather, the entire vote must be given its proper weight.

uniformly upheld this tabulation methodology against all challenges. For example, the Massachusetts Supreme Court upheld a similar procedure used in the city of Cambridge. The Court explained that “elections under [RCV] are in accordance with the principle of plurality voting . . . [C]andidates receiving the largest number of effective votes counted in accordance with the plan are elected, as would be true in ordinary plurality voting.”¹⁰ Other courts have also upheld similar procedures against constitutional challenges.¹¹

The most thorough discussion of ranked-choice voting was offered by the Ninth Circuit in *Dudum v. Arntz*.¹² The Court expressly considered whether an instant run-off system like ranked-choice voting is a plurality voting method. The Ninth Circuit recognized that “the [RCV] system does not necessarily produce a majority result; a plurality of the total votes cast can prevail, as the majority is only [] the last stage of calculation, when many candidates have been mathematically eliminated.”¹³ The Court explained that “[i]n essence, a more complete explication of the tabulation process demonstrates that ‘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 runoff election.”¹⁴ The Court went

¹⁰ Moore v. Election Comm’rs of Cambridge, 35 N.E.2d 222, 238 (Mass. 1941).

¹¹ See, e.g., Minnesota Voters Alliance v. City of Minneapolis, 766 N.W.2d 683 (Minn. 2009).

¹² 640 F.3d 1098 (9th Cir. 2011).

¹³ *Id.* at 1111.

¹⁴ *Id.* at 1110.

on to conclude that a system identical to ranked-choice voting is, indeed, a plurality system. It demonstrated this as follows:

When a candidate receives the fewest votes in a stage, any ballots that would otherwise be “exhausted” by that candidate’s last-place finish could continue to be reflected as a vote for that candidate in subsequent rounds. . . . In other words, even though last-place candidates could no longer mathematically win the election . . . one could clutter the tabulation process by showing their votes on the tabulation tables. . . . The winner could then be defined as the candidate who receives a plurality of the total votes cast (including votes cast for candidates mathematically eliminated in prior stages), as long as he also receives a majority of the votes cast for candidates who were not mathematically eliminated previously.¹⁵

Maine’s own experience confirms the Ninth Circuit’s logic, as ranked-choice voting has resulted in candidates winning office with a mere plurality of the vote.¹⁶ And election experts also recognize ranked-choice voting as a plurality voting system.¹⁷

II. Ranked Choice Complies with Local Tabulation Requirement

The Senate also asked the following question:

Question 1. Does the Act’s requirement that the Secretary of State count the votes centrally in multiple rounds conflict with the provisions of the Constitution of Maine that require that the city and town officials sort, count, declare and record the votes in elections for Representative, Senator and Governor as provided in the Constitution

¹⁵ *Id.*

¹⁶ See Seth Koenig, *Brennan to become Portland’s first popularly-elected mayor in 88 Years*, BANGOR DAILY NEWS (Nov. 9, 2011), <http://bangordailynews.com/2011/11/09/news/portland/brennan-to-become-portland%E2%80%99s-first-popularly-elected-mayor-in-88-years/> (last accessed Feb. 20, 2017) (describing how Portland mayor was elected with 8,971 votes out of 20,184 ballots cast).

¹⁷ See Samuel Merrill III, MAKING MULTICANDIDATE ELECTIONS MORE DEMOCRATIC, at 11 (1988) (classifying systems essentially identical to ranked-choice voting as plurality electoral systems).

*of Maine, Article IV, Part First, Section 5, Article IV, Part Second,
Section 3 and Article V, Part First, Section 3?*

Question 1 is, in some ways, the more difficult question to answer because it asks this Court to evaluate the constitutionality of the law's potential implementation before it has been implemented. Nonetheless, just like ranked-choice voting does not implicate the Constitution's plurality provisions, ranked-choice voting has little, if anything, to do with the constitutional provisions raised by the Senate's questions.

As explained earlier, ranked-choice voting, like all electoral systems, has two components: a balloting rule (i.e. a rule about how votes will be cast) and a decision rule (i.e. a rule for how the votes are counted and the winner declared). Maine's Constitution says that local elections official must "receive the votes of all the qualified electors, sort, count and declare them in open meeting; and a list of the persons voted for shall be formed, with the number of votes for each person against that person's name." Ranked-choice voting is silent about all of those issues. Of course, ranked-choice voting requires the Secretary of State to perform the final tabulation, but ranked-choice voting itself does not address the sharing of responsibility between local officials and state officials, and does not interfere with local officials' ability to sort and count the ballots in the first instance.

In the abstract, ranked-choice voting is thus entirely consistent with the "sort, count, and declare" requirement. Properly implemented, ballots can be sorted,

counted, and declared by local officials before being sent to the Secretary of State to declare the winner of the election based on who has received the most votes. Ultimately, it falls on the legislature to implement ranked-choice voting in a way that satisfies the Constitution. Such implementation may not even be all that difficult. Currently, local officials sort and count the ballots, declare the results, and then send these local results to the Secretary of State for final tabulation. Ranked-choice voting permits those procedures to continue. Local results can still be collected; they can still be counted; they can still be declared; and they can still be sent to the Secretary of State to conduct a final, statewide tabulation.

CONCLUSION

Ranked-choice voting may or may not be good policy. But that question should be left entirely to the people of the state of Maine. The constitutional question – whether ranked-choice voting is a plurality voting system – is relatively simple and has often been answered by judges, election-law scholars, and election-design experts. In our Constitution, Mainers have decreed that the person receiving the most votes is the winner of the election, regardless of whether that person has received a majority of the votes. In passing the ranked-choice voting initiative, Mainers have reaffirmed that constitutional principle. While the ranked-choice

voting ballot and tabulation processes may look different,¹⁸ after *all* the votes are counted, the candidate with the most votes will still be the winner of Maine's elections.

Respectfully submitted,

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¹⁸ As the Ninth Circuit explained in *Dudum*, ranked-choice voting has been around since the 1870s, and have been used in the United States and elsewhere since then. 640 F.3d at 1103.