STATE OF MAINE

BEFORE THE JUSTICES OF THE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-17-1

IN THE MATTER OF REQUEST FOR OPINION OF THE JUSTICES

REPLY BRIEF OF ATTORNEY GENERAL

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For the offices of Governor, State Senator and State Representative, Maine's Constitution establishes a voting system in which the winners are elected by plurality after municipal officials examine the ballots and count the votes – once. This system is expressed in the plain language of the Constitution, Me. Const. art. IV, pt. 1, § 5 & pt. 2, §§ 3-4, art. V, pt. 1, § 3, and is confirmed by the legislative history of the 19th century constitutional amendments that implemented plurality voting in place of the former majority voting system.

Ranked-choice voting ("RCV") is a fundamentally different voting methodology. The proponents' attempts to characterize RCV as just a new way of tabulating votes, or as another form of plurality voting, ignore essential differences between the two systems. RCV may or may not be a better alternative, as a matter of policy, but it conflicts with the voting system set out in the Maine Constitution and thus cannot be implemented by statute without first amending the Constitution.

I. Maine's Constitution establishes a plurality system of determining elections for Governor, Senator, and Representative, based on one count of the votes.

Several of the RCV proponents argue that Maine's Constitution does not specify a particular voting system or method and therefore leaves room for

adoption of RCV by statute.[1] *See, e.g.*, League Br. at 10-11; Tinkle Br. at 24. This argument ignores the express language and history of the Constitution.

The Maine Constitution *does specify* a particular voting system for electing Representatives, Senators, and Governor, and it is the one labeled in some of the briefs and literature as a "first-past-the-post" plurality voting system. This method is clearly articulated in the language of the Constitution, which provides for one round of voting at the municipal level, and determination of a winner by plurality based on "fair copies" of the lists of votes, attested to by the municipal officers and delivered to the Secretary of State. The legislative history demonstrates that Maine voters made a conscious choice to change to a plurality system with the outcome determined by a single count.[2]

By the time the plurality voting system was adopted for the election of Representatives in 1847, Maine voters were very familiar with multiple rounds of balloting. Up to that point, in any election for state Representative, if no candidate received a majority of the votes cast, the voters were required

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[1] References in this brief to the "RCV proponents" include all of the parties who submitted briefs arguing that the Act is constitutional, namely: The Committee for Ranked-choice Voting ("RCV Committee"), the League of Women Voters and Maine Citizens for Clean Elections ("League"), FairVote, Marshall J. Tinkle ("Tinkle"), Professor Dmitry Bam, and Larry Diamond.

[2] The RCV proponents contend that Maine's switch from a majority to a plurality voting system was driven entirely by a desire to have the people (not legislators) determine the outcome of legislative and gubernatorial elections. *See* RCV Committee Br. at 21, 24; League Br. at 14; Tinkle Br. at 23. This interpretation cannot explain the 1847 amendment relating to the election of representatives, however, since the people were empowered under Maine's original Constitution to elect their Representatives even if the first attempt did not produce a majority winner.

to vote again – and again, as necessary – until a candidate achieved a majority. Me. Const. art. IV, pt. 1, § 5 (1820). These were essentially run-off elections, referred to in statute as "trials," each requiring a separate ballot but without any provision for eliminating candidates after each "trial." *See* R.S. 1841, c. 6, §§ 23-25.

In 1846, over 40% of the House seats remained vacant after the election due to the failure of any candidate to win a majority – apparently the largest number of vacancies to occur since 1820. Peter N. Barry, "Nineteenth Century Constitutional Amendment in Maine" (Master's thesis, University of Maine, 1965), at 85.[3] It took "persistent re-balloting [to] finally assure[] a full house." *Id.* After that election, the Legislature "passed a resolve designed to eliminate the recurrence of a similar situation – a plurality of votes was to be sufficient for election." *Id.*

In the years leading up to 1846, the Legislature had debated changing the majority voting system and considered proposals that would have involved successive balloting. Some legislators suggested that if a majority was not obtained at the first election, there should be a second election requiring only a plurality. Barry, at 86 & n. 9. Others wanted a plurality to determine the outcome only if the first two ballots failed to produce a majority candidate. *Id.* Yet another proposal was to hold a second election including only the "the two highest vote getters" based on results of the first round of balloting. *Id.*

[3] This thesis is available at http://digitalcommons.library.umaine.edu/etd/2385/.

"Protracted debate plus more than a dozen amendments to an 1847 resolve resulted in a bill to elect the governor and state senators, as well as state representatives, by plurality vote." *Id.* The voters approved this amendment only with respect to Representatives, rejecting it for Senators and the Governor by a similar narrow margin. *Id.* Barry theorizes that voters may have adopted the amendment for Representatives because they had experienced the "sacrifice [of] time and effort to finally elect representatives" under the majority system. *Id.* Whatever the voters' motivations, the result was clear: from 1847 on, Representatives would be elected by a plurality after one round of voting and a single count.

II. Ranked-choice voting is a fundamentally different voting system than plurality voting.

Contrary to arguments presented by Professor Dmitry Bam and others, ranked-choice voting is not a type of plurality voting system; it is an alternative to plurality voting. *See, e.g., Dudum v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011); Jeffrey C. O'Neill, *Everything that Can Be Counted Does Not Necessarily Count: the Right to Vote and the Choice of a Voting System*, 2006 Mich. St. L. Rev. 327, 333-34 & 345 (Summer 2006) (contrasting plurality voting with Run-off and Instant Runoff Voting);[4] James P. Langan, *Instant Runoff Voting: A Cure That is Likely Worse Than the Disease*, 46 William & Mary Law. Rev. 1569, 1570-71 (Feb. 2005) (juxtaposing plurality and IRV systems

[4] Instant runoff voting ("IRV") is synonymous with RCV. *See* 2006 Mich. St. L. Rev. at 334 & n. 35. Neither one is simply a method of "tabulating" votes. *See* League Br. at 12.

and explaining how IRV may violate state constitutions requiring winner to be the candidate who receives the most votes). Indeed, RCV is often characterized as a type of majority voting system since it specifies that, to win, a candidate must achieve either a majority in the first round of counting or in a final round when there are only two continuing candidates. *See, e.g.,* Douglas J. Amy, *Behind the Ballot Box* (2002) at 49, 51.

Courts and commentators analyze RCV (and IRV) as equivalent to a series of run-off elections that are held on one day, using one ballot. Amy, at 51 (IRV system "essentially operates as a series of runoff elections, with progressively fewer candidates each time, until one candidate gets a majority of the vote"); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 687 (Minn. 2009) (multiple rounds of counting ballots "simulate a series of run-off elections, each narrowing the field of candidates until a candidate achieves the designated threshold number of votes to be elected"); *see also* FairVote Br. at 3-4 (RCV "simulate[s] a series of automatic runoff elections").

Indeed, the fact that each voter's preference gets counted in each round provides the legal basis upon which courts have upheld RCV against constitutional challenges under the First and Fourteenth Amendments of the United States Constitution. *See Dudum*, 640 F.3d at 1112-13; *Minnesota Voters Alliance,* 766 N.W.2d at 690-93 (rejecting claims of vote dilution and unequal weighting of votes under RCV). As one commentator explains:

> Under the instant runoff system the voters' ballots are *counted as votes in a series of distinct runoff elections*. The candidates eligible for each runoff election are determined by the results of the previous round. *Every voter has one and only one vote in each runoff round*. A person whose first choice does not survive the first round has her subsequent choices counted as a new vote in following rounds. Similarly, a person whose first choice survives several rounds also has additional votes because his ballot preference is counted anew as one vote in every round.

Brian P. Marron, *One Person, One Vote, Several Elections? Instant Runoff Voting and the Constitution*, 28 Vt. L. Rev. 343, 357 (Winter 2004) (emphasis added).

The RCV proponents characterize a "vote" under the Act in various ways: as a "set of preferences" (League Br. at 11), "the ranking of preferences" (RCV Committee Br. at 20 n. 17), or "each ballot counts as one vote [that] is assigned based on the voter's preferences" (FairVote Br. at 8). None of these characterizations changes the elemental fact that the RCV system requires multiple rounds of counting voters' ranked preferences, with certain candidates being defeated in early rounds, and continuing *unless or until* one candidate wins a majority of votes in a given round. 21-A M.R.S.A. § 723-A.

RCV is not consistent with the plurality voting system adopted in Maine's Constitution. *See Dudum*, 640 F.3d at 1103 (under a "simple plurality system" "voters choose one candidate, and the winner is the candidate with the most votes"). One of the RCV proponents (*see* League Br. at 10) put it succinctly: "the language [in Maine's Constitution] providing for election by plurality *permits* election of a candidate [who] receives less than half of the total votes cast." The Act adopting RCV does not; therein lies the conflict.

III. The Constitution does not authorize the Legislature or the people to adopt by statute an alternative to plurality voting.

The RCV proponents point to language in Art. IX, § 12, as an indication that the Constitution "does not restrict the method of aggregating and tabulating votes as long as the municipalities are not deprived of their initial functions of receiving, sorting, counting, and listing the votes for these three offices." Tinkle Br. at 17-18. The League and the RCV Committee go farther by suggesting that the language of section 12 "specifically" or "explicitly authorizes" the Legislature to "prescribe the manner in which the votes shall be received, counted and the results of the election declared." League Br. at 16; RCV Committee Br. at 17. The proponents have misread section 12.

The scope of Article IX, § 12 is extremely narrow. Adopted initially in 1869, it authorized the Legislature by law to divide towns with 4,000 or more inhabitants (or with voters residing on islands within the town) into voting districts for the election of Representatives. Const. Res. 1869, c. 91. The very first amendment to the Constitution, Const. Res. 1834, c. 43, had authorized cities to be divided into wards for voting purposes, but there had been no parallel provision for towns with large populations or island voters to have separate voting places. Adding Article IX, § 12 provided a means for towns to avoid having a single polling place "swamped with voters," and for "people residing on islands or other relatively inaccessible places [to] exercise their

right of franchise less hazardously." Barry at 47.[5] The provision was amended in 1919 to allow the Legislature to divide towns of any size into voting districts, not just for election of state representatives, but for all state and national elections. Const. Res. 1919, c. 22.

The RCV proponents unduly rely on the portion of section 12 that authorizes the Legislature to "prescribe the manner in which the votes shall be received, counted and the result of the election declared." This language appears at the end of the single-sentence provision authorizing the creation of voting districts within towns. It relates exclusively to voting districts within towns, and how they should gather and report their election results.[6] There is no textual basis, nor any legislative history, to support reading Article IX, §12 as allowing the Legislature to enact a method of deciding elections contrary to that specified in Articles IV and V.

Some of the briefs imply that Article IX, § 12 may have been added to replace the proviso that appears at the end of Article IV, pt. 1, § 5 in the original Constitution (*see* Tinkle Br. at 17-18):

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[5] It appears that the Legislature did not act pursuant to this amendment until 1887 when it authorized an island district for the Town of Cumberland. P.L. 1887, c. 36. The Town of Fairfield was divided into two voting precincts in 1889. P.L. 1889, c. 240. *See* R.S. 1903, page 106, notes (a) and (b). Two years later, a comprehensive election law, P.L. 1891, c. 102, § 20, included general language authorizing municipal officers to create voting districts, and this was incorporated into the 1903 Revised Statutes. R.S. 1903, c. 6, § 20. *See also* 21-A M.R.S.A. § 631.

[6] The question posed to the voters for approval was "Shall the Constitution be amended as proposed by a resolution of the Legislature granting to the Legislature power to *authorize towns to have more than one voting place* for all State and national elections?" Const. Res. 1919, c. 22 (emphasis added).

> *Provided*, That the Legislature may by law prescribe a different mode of returning, examining and ascertaining the election of the representatives in such classes.

Such a reading strips the proviso of its context, however. The 1820 proviso, like Article IX, § 12, applied to a very limited circumstance.

In the 1820 Constitution, towns with fewer than 1,500 inhabitants did not qualify for a single representative, but were grouped into "classes" by the Legislature, with "each such district [to] elect one representative." Me. Const. Art. IV, pt. 1, § 3 (1820). Article IV, pt. 1, § 5 then spelled out the process by which towns belonging to a "class" were to notify residents of elections, and receive, sort, count, and declare the votes, but the proviso allowed the Legislature to change how these classed towns and plantations could meet to compare, combine and report their election results.[7] The language regarding "classes" of towns in section 5 was removed in 1864, rendering the proviso unnecessary; accordingly, it was removed as well. Const. Res. 1864, c. 344.

The Constitution does not preclude the Legislature (or the people) from fleshing out the details of election procedures by statute, as in Title 21-A and its predecessors. However, those statutory provisions may not conflict with the basic constitutional framework, which incorporates a plurality voting

[7] There is evidence that the Legislature understood the limited scope of its authority under this proviso since, while it was in effect, the Legislature found it necessary to amend the Constitution in order to allow cities to be divided into wards for voting purposes. Const. Res. 1834, c. 43. Had the power to "prescribe a different mode of returning, examining and ascertaining the election" been read as broadly as the RCV proponents suggest, such a change could have been accomplished by statute.

system for these three offices. In requiring a new method of casting and counting votes, and determining winners, the RCV Act goes beyond specifying procedural details; it enacts a different voting procedure than the one prescribed in the Maine Constitution and used for the past 150 years.[8]

CONCLUSION

For the foregoing reasons, as well as those outlined in our initial brief, the Attorney General recommends that the Justices address the questions posed by the Senate and answer them in the affirmative.

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Respectfully submitted,

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[8] *See Opinion of the Justices*, 2015 ME 107, ¶¶ 40, 53, 123 A.3d 494 (relying on long-settled practice in interpreting Constitution).