STATE OF MAINE
BEFORE THE JUSTICES
OF THE SUPREME JUDICIAL COURT

DOCKET NO. OJ-26-1

In the Matter of Request for Opinion of the Justices

REPLY BRIEF OF FAIRVOTE & MAINE WOMEN'S LOBBY

Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 1023
Brunswick, ME 04011
207-387-0820
ben@gaines-law.com

Counsel for FairVote and
Maine Women's Lobby

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

Constitutional Provisions

INTRODUCTION

In 2017, the Justices assumed that a voter's "first preference" was equivalent to a "vote" under 21-A M.R.S. § 723-A and Maine's plurality provisions. *Opinion of the Justs.*, 2017 Me. 100, ¶ 65, 162 A.3d 188, 211. In the years since, that premise has come under scrutiny.[1] Clarifying when votes become legally effective, the Legislature asks the Justices to advise on a narrow but decisive legal question: Can the word "vote" be reasonably construed to include a ranked ballot?

In briefing this question, only two of the 11 filers—the Attorney General (AG) and Republican National Committee (RNC)—argue L.D. 1666 is unconstitutional. Neither brief acknowledges the judicial branch's constitutional obligation to apply a liberal standard of review and resolve all reasonable doubts in favor of the measure's constitutionality. *See infra* Section III. Instead, both appear to start with the same gut instinct (each ranking *must* be "a vote") and then labor against the accepted tools of constitutional construction to press their cramped conclusion.

But as a sister court once cautioned, "We must always be careful in approaching a constitutional question . . . not to be influenced by old and familiar habits . . . . We must not shudder every time a change is proposed." *Moore v. Election*

[1] *See* FEC Advisory Op. 2024-12, at 3, *available at* https://www.fec.gov/updates/ao-2024-12/; *Kohlhaas v. State*, 518 P.3d 1095, 1118-23 (Alaska 2022); Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 Calif. L. Rev. 1773, 1809-18 (2021). *See also* League of Women Voters of Maine (LWV) Br. 27-28; Maine State Senate President & Maine State Speaker of the House Br. 25-30; Richard H. Pildes & G. Michael Parsons (Pildes & Parsons) Br. 23-26.

Comm'rs of Cambridge, 309 Mass. 303, 312, 35 N.E.2d 222, 230 (1941) (internal quotations omitted). When text, history, and purpose are considered—and due deference is properly afforded—the constitutionality of L.D. 1666 is clear.

ARGUMENT

I. L.D 1666 Elects the Most Popular Candidate Based on the Results of a Single Election. Maine's Plurality Provisions Require No More and Demand No Less.

As a matter of standard constitutional interpretation, L.D. 1666 easily aligns with the text, history, and purpose of Maine's plurality provisions.

For text, the Constitution does not define the word "vote," does not use the phrase "first plurality," and does not refer to a "first round of counting." Nor does the plain meaning or concept of a "vote" inherently preclude votes that relay more information than a single choice. *See* LWV Br. 24-27; Marshall J. Tinkle Br. 8.

For history, no brief disputes that the majority-threshold provisions were replaced to solve the very real problem of *failed elections*. *See, e.g.*, AG Br. 8-10, 22. And no brief explains how L.D. 1666 presents that same problem. *Id.*

For purpose, Joshua Chamberlain did not stand on the steps of the State House and risk his life for a ballot format. He stood in defense of that most vital democratic principle: that the will of the people—the power to choose one's representatives—should prevail and endure. Plurality provisions were not adopted to erect technical barriers to the people's power to elect candidates with broad support. They were

adopted to *protect* that power by ensuring the candidate who received the most votes in a single balloting would be elected. That is precisely what L.D. 1666 provides.

To fight this conclusion, the AG makes three arguments. Each miss the mark.

First, the AG and RNC attempt a hyper-technical objection: Even if RCV *does* elect a winner based on a single election, its internal counting process includes a so-called "win condition" because further counting steps do not occur if a candidate is ranked first on a majority of ballots. AG Br. 23; RNC Br. 21-23.

This argument confuses nullifying the results in a failed election with streamlining counting in a successful election. The RCV count identifies the candidate with the most support (whether a plurality or majority of all votes) based on the preferences voters express. *See* Five Maine Voters (Voters) Br. 14-15.[2] That candidate will always be elected. If a candidate is ranked first on more than 50% of ballots, then *the most popular candidate has already been found*. Because the "function of a ballot" is "to *elect* candidates," RNC Br. 20 n.9, no additional steps are needed because no further examination of voters' preferences could ever reveal a candidate with more support. This is not a "win condition"—it is math.

Second, the AG argues that RCV can lead to the defeat of "the plurality winner," AG Br. 16, because the candidate who earns the most votes (based on all

[2] Notably, this administrative convenience was only added to the statute in 2025, well after the 2017 Opinion. The original text of the RCV Act stated that the tabulation should always continue until only two candidates remained. *See* 21-A M.R.S. § 723-A (2) (2016). The "first-round-majority check" process was implemented by regulation. *See* 29-250 C.M.R. ch. 535 § 4(2)(A) (2018).

rankings) can prevail over a candidate who receives the most first preferences. But calling the latter a "plurality winner" *assumes* the answers to the very questions before the Justices: whether a "vote" can embrace more than one mark and whether focusing solely on "the first round of tabulation" is constitutionally required.

Put simply, the AG compares apples and oranges to conflate first-preference rankings with single-choice votes. Voters behave differently under each system. A voter who ranked a long-shot candidate first and a backup candidate second would be shocked if the count stopped at first preferences. *See* Voters Br. 9-11. Of course, if the Maine Constitution truly limits the word "vote" to "a single mark," then L.D. 1666 would not survive—but not because the first step of an RCV count is a "first election" with "real votes" leading to a "first plurality." Since 2017, no legal authority has embraced this flawed analogy. *See* Pildes & Parsons Br. 23-26.[3]

Third, and finally, the AG makes a slippery slope argument: If L.D. 1666 is constitutional, the AG argues, then the Legislature could reimpose separate runoff elections "indistinguishable"[4] from those "abolished by the nineteenth-century constitutional amendments." AG Br. 28. How? By "enacting language defining a

[3] The AG's logic is also self-defeating. If first preferences are "the real votes," then RCV would violate Maine's 1819 *majority* threshold too because a candidate could win at the end of tabulation despite failing to receive a majority in the first round. The analogy falls apart because ranked choice voting (like single-choice voting) is neither a "plurality system" nor a "majority system." It is a balloting *method*, not an election *threshold*. *See* Pildes & Parsons Br. 17-18. The Maine Constitution does not require single-choice voting any more than it requires ranked-choice voting. That is left to the people.

[4] It is notable that the AG acknowledges that RCV is, in fact, "distinguishable" from the separate runoff elections required under Maine's original majority threshold when a general-election balloting failed.

'vote' as encompassing the ballots cast by a given voter over both elections, so that their 'vote' was not complete until both elections had been held." *Id.* This, the AG says, would "cede to the Legislature the judicial branch's responsibility to determine the meaning of constitutional provisions." *Id.* In short, the AG claims that if L.D. 1666 is allowed to stand, then judicial review will fall.

"This . . . parade of dreadfuls calls to mind wise counsel: 'Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom.'" *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 195 n.16 (1999). A liberal construction is not the same as a lawless one—and all the standard tools of constitutional interpretation would easily guard against such a gambit.

That "a vote" can encompass a voter's preferences among the candidates expressed on a single ballot on a single day does not mean a "vote" can encompass two votes on two days separated by an election campaign. That is true as a matter of language. It's also true in terms of the history and purpose of the constitutional amendments, which are clear that calling the public back to the polls for a new election posed a grinding barrier to the electorate's full participation and sometimes allowed candidates to win based on the fatigue and attrition of the voters alone rather than their popular support. *See* Pildes & Parsons, 109 Calif. L. Rev. at 1791.[5] As the

[5] As a delegate to the Massachusetts Constitutional Convention of 1853 observed of that state's runoff elections, "[T]he people . . . fall off in numbers; and the man who is finally elected by a majority, would not have received even a plurality on the first day of trial, if the plurality system had prevailed." *Id.* at n.87. Consider the 2016 U.S. House election for Louisiana's 3rd Congressional District. There the leading

RNC points out, RCV does not pose this problem: "When a voter marks a ballot and deposits it in the ballot box, that voter has voted." RNC Br. 20. "Under the plurality standard, the voter cannot amend the ballot [or] change that voter's previously indicated preferences after learning which candidates have continued or been eliminated." *Id.* Instead, "the voter's entire act of democratic participation in the electoral process is complete at the moment the voter submits his or her ballot." *Id.* All of that is correct—and is precisely why the AG's hypothetical fails. Maine's plurality threshold requires the most popular candidate identified through a single balloting to be elected. No more, no less.

II. The Attorney General's Crabbed Construction of "Sort, Count and Declare" Fails as a Matter of Legislative Authority, Continuous Practice, and Basic Fact.

The AG proposes a similarly rigid reading of the Constitution's "sort, count and declare" provision. *See* AG Br. 29-31 (citing Me. Const. art. IV, pt. 1, § 5). Here, too, the AG flips the standard of review, *see infra* Section III, seeking to create conflict where none exists.

First, the AG fails to cite the full sweep of legislative authority over election procedures. The "sort, count and declare" provisions date back to 1819, when they described the only process imaginable at the time. But the surrounding constitutional

candidate in the first election earned 84,912 votes. In the runoff election, the candidate finally won with 77,671 votes. This perverse consequence of holding separate elections is impossible under RCV. All voters cast ballots in a single election and a winning candidate's tally of support can only go up as trailing candidates are eliminated during the counting process, never down.

architecture has been repeatedly updated since then. Later amendments consistently expanded legislative authority over election counting practices and procedures. *See* Me. Const. art. II, § 5 (1935) (authorizing the use of voting machines "at all elections under such regulations as may be prescribed by law"); Me. Const. art. IX § 12 (1870 & 1919) (authorizing the Legislature to divide towns into voting districts "for all state and national elections" and to "prescribe the manner in which the votes shall be received, counted, and the result of the election declared"). None of this means the 1819 text is defunct, only that its reading warrants special caution and its meaning must be carefully circumscribed—lest undue pedantry upend Maine's election code and bind the Legislature to a bygone era that later-in-time amendments explicitly let go.

Second, longstanding practice affirms this broader legislative discretion. To embrace the AG's hidebound reading would make violations of the 1819 text legion. For example, Maine complies with the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) by centrally counting ballots. *See* 21-A M.R.S. § 783. This cannot be solely because the Constitution authorizes absentee voting. Me. Const. art. II, § 4. That provision includes no exception for centralized sorting, counting, and declaring. Maine's UOCAVA process is permissible because the Legislature has the power to "prescribe the manner in which the votes shall be received, counted, and the result of the election declared." Me. Const. art. IX § 12.

The AG also demands exacting precision in how the "list of the persons voted for shall be formed, with the number of votes for each person against that person's name." AG Br. 29 (quoting Me. Const. art. IV, pt. 1, § 5). But one wonders the last time the Secretary of State handed every single polling location's election returns directly to the Governor so she could "examine the returned copies of such lists." *Compare* Me. Const. art. IV, pt. 1, § 5, *with* 21-A M.R.S. § 722 ("[T]he Secretary of State shall tabulate the election returns and submit a certified copy of the tabulation to the Governor."). Or will the AG next insist that "[a]ll such lists" be directly "laid before the House of Representatives"? *Compare* Me. Const. art. IV, pt. 1, § 5, *with* 21-A M.R.S. § 724-A ("At the time the Governor publicly proclaims the result of the vote . . ., the Governor shall also provide written notice of the result of that vote to the President of the Senate [and] the Speaker of the House[.]"). Section 12 of Article IX frees the Legislature from such horse-and-buggy pageantry.[6]

Third, the AG argues it is "literally impossible" to do a local count leading to locally declared final vote totals for many RCV elections. AG Br. 29. That would be news to the Irish, who use RCV to elect their president and count all ballots locally. Under Ireland's Presidential Election Act of 1993, local returning officers count the

[6] Nor can such a severe reading of "sort, count and declare" be reconciled with the Constitution's authorization of voting machines. Me. Const. art. II, § 5. Ballots fed into a tabulator are not sorted, counted, and declared "in open meeting" in a way that would be recognizable to an onlooker from the 1800s. But this more modern, more accurate method is explicitly permitted. And if the AG's argument hinges on whether ballots are, in fact, fed through a tabulator, then this case is merely a case about budget outlays and equipment procurement, not the legality of L.D. 1666 or the constitutional meaning of the word "vote."

first preferences and report that information to the central presidential returning officer. The central officer advises the local returning officers who to eliminate, and the local officers then continue the count, repeating until the tabulation is complete and the final votes are declared in each locality.[7]

To be clear, the Legislature's authority over election rules makes this method unnecessary. Maine's current approach to tabulation falls well within the ambit the Court has long allowed (and the Secretary has long enjoyed) for single-choice races. Ireland's process is just one of many ways RCV *could* adhere to the AG's strict reading. And if it is possible for a "vote" to include a ranked ballot, L.D. 1666 must stand. The "sort, count and declare" provisions do not demand procedural nitpicking. The constitutionality of L.D. 1666 cannot rise or fall on whether the Secretary of State makes phone calls to local officials (as in Ireland) or receives the same ballot information from local officials and does the calculations centrally. "Substance only is sought for in such matters." *Opinion of the Justs.*, 70 Me. 560, 564 (1879).

III. The Constitution Requires Deference to the Will of the People.

Under Maine's Constitution, "the powers of the Legislature are, broadly speaking, absolute, except as limited or restricted by the Constitution." *Laughlin v.*

[7] *See* Presidential Elections Act, 1993, § 51(1) ("Where, at the end of any count, no candidate has reached the quota and no candidate can be deemed to be elected under § 50(4), the presidential returning officer shall direct the local returning officers to exclude the candidate credited with the lowest number of votes and transfer the candidate's ballot papers in accordance with the next available preferences recorded thereon for continuing candidates."); Memorandum for the Guidance of Local Returning Officers at the Presidential Election, 24 October 2025, §§ 21-24, *available at* https://assets.gov.ie/static/documents/d8f294c7/Memorandum_for_the_Guidance_of_Local_Returning_Officers_at_Presidential_Elect.pdf.

City of Portland, 111 Me. 486, 489, 90 A. 318, 319 (1914). Because the judicial department's power to declare legislation void "is attended with responsibilities so grave," the exercise of that power "is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law." *Id.* "It is not enough that the [C]ourt . . . might have held the contrary view;" instead, the legislation must stand "unless no room is left for rational doubt." *Id.* For courts would "lose all confidence and respect if they . . . devis[ed] technical rules under which the dearest rights of the people could be destroyed." *Rounds v. Smart*, 71 Me. 380, 389 (1880).

In short, the responsibility to liberally construe the Constitution and resolve all reasonable doubts in favor of L.D. 1666 is not a matter of comity or grace, but a solemn duty imposed by the Constitution itself.[8] If the word "vote" *may* be construed to allow a ranked ballot, then it *must* be construed to allow a ranked ballot.

CONCLUSION

Mainers have spoken. They demanded better elections. Because nothing in the Constitution "clearly and conclusively" tethers them to a broken politics, the Justices should answer the question propounded in the affirmative.

[8] Nor does it matter if "major changes" to the voting process are often made "by constitutional amendment, rather than statute." AG Br. 11. This objection is "unmoored to any constitutional doctrine, text, or principle—and is contrary to the proper role of the Court vis-à-vis the Legislature." Dmitry Bam Br. 12-13 n.1.

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/s/ Benjamin Gaines_____
Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 1023
Brunswick, ME 04011
207-387-0820
ben@gaines-law.com
Counsel for FairVote and
Maine Women's Lobby