

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-51

SENATE OF MAINE,)
)
Plaintiff)
)
v.)
)
MATTHEW DUNLAP, in his capacity)
as SECRETARY OF STATE,)
)
Defendant)
)
COMMITTEE FOR RANKED-CHOICE)
VOTING, et als,)
)
Intervenors)

STIPULATED FACTS

The parties agree that the following statements are true, may be accepted as facts, and comprise part of the stipulated record for purposes of a Report to the Law Court pursuant to M.R. App. P. 24.

1. The citizen-initiated petition for “An Act to Establish Ranked-choice Voting” was approved for circulation in October 2014. *See Exhibit (“Ex.”) 1.*

2. Pursuant to 5 M.R.S.A. § 1664, the Governor submitted a proposed biennial budget for FY 17-18 and FY 18-19 including funding for the Department of the Secretary of State (“the Department”) to the Legislature for review and approval.

3. In the fall of 2016, pursuant to 5 M.R.S.A. § 1665, the Department submitted financial information to the Bureau of the Budget for consideration by the Governor in preparation for the Governor's proposed biennial budget for Fiscal Year 2017-2018 and Fiscal Year 2018-2019.

4. The Legislature's Office of Fiscal and Program Review ("OFPR") prepared an estimate of the fiscal impact of the ranked-choice voting citizen initiative, as required by 1 M.R.S.A. § 353. It was printed on the petitions that were circulated for voters to sign in 2015-16 (Ex. 1), and was also included in the *Maine Citizens' Guide to the Referendum Election*, printed and distributed by the Secretary of State in the fall of 2016 (Ex. 2).

5. The fiscal impact statement prepared by OFPR was premised on ranked-choice voting applying to all primary and general elections for the offices of Governor, State Senate, State Representative, Representative to Congress, and United States Senate, after January 1, 2018. It included costs for the Secretary of State as well as for the Department of Public Safety to "retrieve, secure and return election ballots." See *Citizen's Guide* (Ex. 2) at p. 51.

6. The citizen-initiated bill, entitled "An Act to Establish Ranked-choice Voting" ("RCVA"), was approved by the voters of Maine on November 6, 2016, by a popular vote of 388,273 to 356,621, and became law on January 7,

2017, pursuant to Maine Constitution, art. IV, pt. 3, § 19. P.L. 2017, c. 3 (attached as Ex. 3). Section 6 provides that the RCVA applies to elections held on or after January 1, 2018.

7. On January 6, 2017, the Governor submitted his proposed biennial budget for FY17-18 and FY18-19 (L.D. 390).

8. As of January 25, 2017, the State had \$133,556,533 in available and unappropriated funds. Ex. 4.

9. On February 2, 2017, the Maine Senate adopted Senate Order 12, requesting an Opinion of the Justices on the constitutionality of ranked-choice voting as applied to general elections for Governor, State Senator, and State Representative. Ex. 5.

10. Deputy Secretary of State Julie L. Flynn submitted an affidavit to the Supreme Judicial Court on March 3, 2017, describing how the Secretary of State and municipal officials conduct elections currently and how elections would be conducted using ranked-choice voting. Ex. 6.

11. On May 23, 2017, the Justices answered Question 2, as posed by the Senate, in *Opinion of Justices*, 2017 ME 100, 162 A.3d 188.

12. On May 31, 2017, two bills were introduced in the Senate: L.D. 1624, "Resolution Proposing an Amendment to the Constitution of Maine to

Implement Ranked-choice Voting,” and L.D. 1625 “An Act To Repeal the Ranked-choice Voting Law.” Neither one was enacted.

13. On July 4, 2017, the Legislature passed the FY 17-18 and FY 18-19 Budget (L.D. 390) and, pursuant to his authority under Me. Const. art. IV, pt. 3, §§ 2 and 2-A, the Governor signed L.D. 390, which appropriated public funds for FY 17-18 and FY 18-19. P.L. 2017, c. 284 (excerpt attached as Ex. 7).

14. The biennial budget as enacted (P.L. 2017, c. 284) did not contain language explicitly referring to ranked-choice voting, or to elections – special, referendum, primary, or general.

15. On August 2, 2017, the last day of the First Regular Session of the 128th Legislature, Representative Kent Ackley of House District 82 introduced L.D. 1646 “An Act to Bring Maine’s Ranked-choice Voting Law into Constitutional Compliance.” Ex. 8. The bill was carried over to any special or regular session of the 128th Legislature by joint order, H.P. 1138.

16. The Joint Standing Committee on Veterans and Legal Affairs (“VLA Committee”) held a public hearing on L.D. 1646 on October 16, 2017. The testimony of the sponsor, Rep. Ackley, is attached as Ex. 9. Also attached is the testimony of the Deputy Secretary of State, Julie L. Flynn. Ex. 10.

17. The cost projections provided by Deputy Secretary of State Flynn to the VLA Committee at the public hearing on L.D. 1646 on October 16, 2017,

were based on the premise that ranked-choice voting would apply to primary elections and to general elections for Congress and the United States Senate, but not to general elections for Governor, State Senator, or State Representative.

18. Following a work session held immediately after the public hearing on October 16, 2017, the VLA Committee issued three different committee reports – two ought to pass as amended, and one ought not to pass. Exs. 11, 12 and 13. Committee Amendment A (H-567) added an appropriations clause to cover the costs of implementing ranked-choice voting as outlined in the fiscal note to L.D. 1646. Ex. 11. Committee Amendment B (H-568) added language to delay the implementation of ranked-choice voting until elections held after December 1, 2021. Ex. 12.

19. L.D. 1646, as amended by Committee Amendment B (H-568), was enacted by the Legislature on October 23, 2017, and became law without the Governor's signature on November 4, 2017, subject to the 90-day effective date requirement of Me. Const., art. IV, pt. 3, § 16. P.L. 2017, c. 316 (attached as Ex. 14).

20. On October 27, 2017, an application was filed with the Secretary of State for approval to circulate a people's veto referendum to reject parts of

the new law enacted as Chapter 316 of the Public Laws of 2017. The Secretary issued an approved petition form on November 6, 2017 (attached as Ex. 15).

21. On February 2, 2018, the people's veto referendum petition was timely filed with the Secretary of State's Office in accordance with the Maine Constitution, art. IV, pt. 3, § 17(1).

22. By Complaint dated February 16, 2018, the Committee for Ranked-choice Voting and individual candidates sued the Secretary of State in *Committee for Ranked-choice Voting, et al v. Matt Dunlap*, CV-18-24, seeking, among other things, declaratory and injunctive relief, including a court order requiring the Secretary to implement ranked-choice voting for the June 12, 2018 primary election.

23. On March 5, 2018, the Secretary of State's Office completed its review of the people's veto petition and determined that it contained enough signatures to be valid. Ex. 16. The filing of a valid people's veto petition suspended the effect of those parts of Chapter 316 specified in the petition. *See Me. Const. art. IV, pt. 3, § 17(2)*. The suspended parts include all of the language added by the Legislature in Chapter 316 to delay implementation of ranked-choice voting until after December 1, 2021. *See Ex. 15* (text of the petition). That same day, Secretary Dunlap announced his plans to implement ranked-choice voting for the June 12, 2018 primary election. *See Ex. 17*.

24. The portions of Chapter 316 that were not suspended by the people's veto petition, including the enactment of 21-A M.R.S.A. § 723-A(5-A) authorizing the Secretary for State to "adopt rules for the proper and efficient administration of elections determined by ranked-choice voting," became law on February 5, 2018.

25. On March 16, 2018, the Secretary filed his Answer in *Committee for Ranked-choice Voting v. Matt Dunlap* in which Answer, *inter alia*, the Secretary agreed that he had sufficient legal authority to implement ranked-choice voting for the June 12, 2018 primary elections, but denied that he had sufficient financial means to do so. Answer at ¶ 54.

26. On March 20, 2018, after the Governor declined to do so, the Secretary of State issued a public proclamation declaring that the people's veto referendum question would be submitted to the people for a referendum vote at the next statewide election on June 12, 2018. Ex. 18; Me. Const. art. IV, pt. 3, § 17(3).

27. Representative Jared Golden of House District 60 sponsored "An Act to Fund Ranked-choice Voting" as an after-deadline bill to be considered in the current session of the 128th Legislature, but the Legislative Council voted 5-3 on March 22, 2018 not to allow the bill to be introduced. Ex. 19.

28. On March 28, 2018, the Secretary of State issued a notice of proposed rulemaking, and posted proposed rules for the administration of ranked-choice voting for public comment, pursuant to 21-A M.R.S.A. § 723-A(5-A) and the Administrative Procedure Act, 5 M.R.S.A. §§ 8001-8064. Ex.

20. The comment period ended at 5:00 pm on April 6, 2018. *Id.* The Department is currently reviewing the comments and considering them before deciding whether to change the proposed rule prior to adoption.

29. On March 29, 2018 (after the people's veto petition had suspended portions of P.L. 2017, c. 316), Deputy Secretary of State Julie L. Flynn made a presentation to the VLA Committee regarding the Department's plans and revised cost projections for implementing ranked-choice voting in the June 12, 2018 primary and costs associated with implementation. *See Ex.* 21.

30. Deputy Secretary Flynn explained to the VLA Committee that the Department had eliminated some of its originally planned expenditures, such as leasing additional DS-200 tabulating machines for more of the towns that currently count ballots by hand. She explained that, although that would reduce the number of ballots that would have to be retrieved from towns for a centralized RCV count, the Department concluded that there was insufficient

time to add the new units to the State's lease and get the units tested and delivered to the additional municipalities prior to the primary election.

31. The Department's updated cost projections reduced the estimated ballot printing costs, as well, based on a revised assumption that all the candidate races for the June 2018 primary could be printed on a single two-sided ballot. *Id.*

32. On April 2, 2018, the Senate adopted Senate Order 28, as amended by S-437, authorizing the President of the Senate to retain legal counsel to file a lawsuit to address statutory and constitutional questions regarding ranked-choice voting. Ex. 22.

33. On April 2, 2018, John Cote, acting Colonel, Maine State Police, sent a letter to Senator Garrett Mason and Representative Louis Luchini, Chairs of the VLA Committee. Ex. 23.

34. On April 3, 2018, the Superior Court issued an injunction in *Committee for Ranked-choice Voting v. Matt Dunlap*, Docket No. CV-18-24, ordering the Secretary of State to continue to implement ranked-choice voting for the June 12, 2018 primary election.

35. On April 3, 2018, the Senate of Maine filed *Senate of Maine v. Matthew Dunlap, Secretary of State*, CV-18-51.

36. On April 5, 2018, Senator Michael Carpenter moved to adopt a “Joint Order Directing the Joint Standing Committee on Veterans and Legal Affairs to Report Out a Bill To Implement Ranked-Choice Voting,” to include provision of all necessary funding to the Department of the Secretary of State to conduct elections in 2018, expressly authorize the Secretary of State to take physical control of ballots and related materials as necessary to implement ranked-choice voting, and expressly authorize the State Police, at the direction of the Secretary of State to retrieve ballots from voting jurisdictions as necessary to implement ranked-choice voting. *See Ex. 24.* During debate on the floor of the Senate, Senator Carpenter stated that he did not think the Senate Order was necessary because he believed the Secretary of State had authority to conduct the election with ranked-choice voting. The Senate defeated the measure by a tie vote on April 5, 2018.

37. The Governor has not submitted a proposed supplemental budget to the current second session of the 128th Legislature.

38. Of the \$36,900 in “ERM Software/hardware” costs to implement ranked-choice voting in the June primary, as shown on Exhibit 21, \$6,900 is for software. Another software expense for the “RCV Utility” to process the rounds of counting ranked-choice ballots was unknown at the time Deputy Secretary Flynn presented to the VLA Committee. The Department has since

received a quote for \$15,500 to license and use this software for the primary election, making a total of \$22,400 for software-related expenses to implement ranked-choice voting in June.

39. In the biennial budget, the Legislature appropriated a total of \$1,793,372 of General Fund money for the Department's Bureau of Corporations, Elections and Commissions in the "All Other" category (i.e., not personnel and not capital expenditures) for the current fiscal year ending June 30, 2018. P.L. 2017, c. 284 (Ex. 7) at p. 598. Additionally, \$427,411 was carried forward from unexpended balances from FY15-FY17 to make software upgrades. At the request of the Secretary of State, this carry-forward amount was approved by the Governor. Ex. 25. Of these combined funds, the Secretary of State has determined that as of April 9, 2018, \$712,892 (\$546,814 of general fund money and \$166,078 of money carried forward for software upgrades) is unspent and available to administer the operations of the Bureau and for software upgrades.

40. Out of the \$546,814 of general fund money for All Other expense, a total of \$375,262 represents unexpended balances from previous quarters of the current fiscal year that need to be moved forward to the fourth quarter pursuant to an emergency budget order. The Department submitted this budget order on April 9, 2018.

41. The Department estimates that the following expenditures will be required to administer the June 12, 2018 primary election – exclusive of expenses related solely to ranked-choice voting:

\$127,886	printing and distribution of people's veto referendum ballot
\$206,913	printing and distribution of candidate ballots
<u>\$101,918</u>	all other primary-election related expenses and general operations of the Bureau of Corporations, Elections and Commissions
\$436,717	Total

42. Payment of these expenditures out of the \$546,814 of general fund monies appropriated would leave a balance of \$110,173 in All Other funds for general operations and ranked-choice voting.

43. The additional expenditures required for the Secretary of State to implement ranked-choice voting in the June 12, 2018 primary election, exclusive of the cost to retrieve and transport ballots are as follows:

6,900	ERM software
<u>15,500</u>	RCV utility
22,400	<i>subtotal for software upgrades</i>
\$30,000	ERM hardware (to upload scanned results from the memory devices into the software in preparation for running the RCV utility)
2,640	two temporary workers
18,925	lease of ESS Model 850 high-speed tabulator
<u>6,000</u>	security hardware to secure central RCV counting facility
\$57,565	<i>subtotal for other expenses</i>
\$79,965	Total

44. The Department had originally proposed spending \$50,000 on voter outreach, as shown on the materials provided by Deputy Secretary Flynn to the VLA Committee on March 29, 2018. The Department will be preparing instructions for voters as part of its regular election administration duties and posting educational materials on its web site, but it no longer expects to be able to undertake additional voter outreach efforts before the June 12, 2018 primary and thus will not incur these costs in the current fiscal year.

45. The Department has determined that it has available \$166,078 of General Fund monies that were carried over from FY15-FY17, specifically appropriated for software upgrades, and not yet expended. The Department has determined that this money is available to pay the \$22,400 of software costs related to implementation of ranked-choice voting in the June 12, 2018 primary election. If the balance of \$57,565 in ranked-choice voting costs were paid out of the \$110,173 of unspent All Other funds, it would leave \$52,608 to cover the costs of retrieving and transporting ballots and memory devices to a central location in Augusta for processing to determine the results of ranked-choice voting, in the event no candidate receives a majority of first choice votes.

46. The Department has identified a private courier service that will be able to retrieve ballots and memory devices from all 500 voting jurisdictions, bring them to a central counting location in Augusta, and return ballots to the hand-count municipalities afterwards for less than \$52,608.

47. On April 9, 2018, Secretary of State Dunlap wrote to the Chairs of the VLA Committee to inform them that his Department has now determined that the Department currently has sufficient appropriated funds in its FY 2018 budget to cover the projected cost of implementing ranked-choice voting for the June 12, Primary Election. Ex. 26.

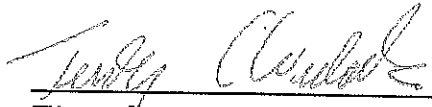
48. A report on the status of the State's General Fund, as of the most recent revenue forecast in March 2018, projects a surplus of \$74,631,183 at the end of the current fiscal year on June 30, 2018. Ex. 27.

49. The only election contests that will be subject to ranked-choice voting in the June 12, 2018 primary election, if RCV is implemented, are for the Republican and Democratic Party nominations for Governor, the Republican Party nomination for Representative to the Legislature in House District 75, and the Democratic Party nomination for Representative to Congress in District 2. No candidates seeking the nomination of a party to the office of State Senator are in a contest that would be determined by ranked-choice voting pursuant to 21-A M.R.S.A. § 723-A.

50. Exhibits 1 through 27 attached hereto constitute the stipulated record for purposes of this proceeding, along with these Stipulated Facts.

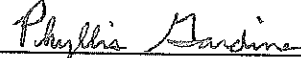
DATED: April 11, 2018

Respectfully submitted,



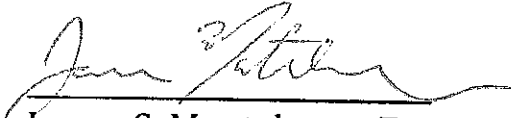
Timothy C. Woodcock, Esq.
Maine Bar No. 1663
Easton Peabody
P.O. Box 1210
80 Exchange Street, 7th Floor
Bangor, Maine 04402-1210
Tel: (207) 947-0111

Attorney for Plaintiff



Phyllis Gardiner, Esq.
Maine Bar No. 2809
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Tel: (207) 626-8830
Fax: (207) 287-3145

Attorney for Defendant



James G. Monteleone, Esq.
Maine Bar No. 5827
Bernstein Shur
100 Middle Street
Portland, ME 04111
Tel: (207) 774-1200

Attorney for Intervenor