

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

BRIEF OF FAIRVOTE

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STATEMENT OF INTEREST

Incorporated in the District of Columbia, FairVote is a non-partisan tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code whose mission is to make democracy fair, functional, and more representative. FairVote's mission is to promote the voices and views of every voter, grounded in the evidence that the use of fair election methods will create a government that is more representative and effective. FairVote encourages public officials, judges, and the public to explore fairer and more inclusive election methods, including ranked-choice voting (“RCV”). FairVote has experience working with jurisdictions to implement RCV and is familiar with the emerging case law surrounding RCV.

BACKGROUND

The story of American democracy is one of ongoing experimentation. We observe, critique, and amend our electoral systems, always striving to build a government to meet the needs of our times. Some innovations, such as the government-printed ballot, become so well-rooted that it is hard to imagine that they were once a novel creation. Such features blend into the background, unquestioned until they too fall short of our aspirations.

For most of its history, the State of Maine has used single-choice ballots and a “single-choice voting” (“SCV”) system to elect candidates for office. This

approach has certain virtues, such as apparent simplicity. However, under this system, voters' opinions and political preferences are captured in a narrow and restricted manner: voters may express only their top preference, without relaying any information about how they view other candidates in relation to one another. After the ballot captures this single choice, the results are counted using the SCV system, and the candidate who receives more votes than any other candidate wins.

But the apparent simplicity of this system can be misleading and comes at a cost. Voters may be forced to vote strategically, sacrificing their top choice for a less-preferred candidate who seems likely to win, in order to avoid their preferred candidate acting as a "spoiler." Or voters may choose their top choice, but do so with the recognition that their vote is being "wasted" on a candidate with little chance of ultimately prevailing. SCV also encourages candidates to cater to narrower factions of fervent support rather than appealing to the broader electorate. When the field is split among multiple candidates, the winner may end up being a candidate *opposed* by a majority of voters.

On November 8, 2016, the People of Maine chose a different approach. Following a grassroots signature-gathering campaign led by supporters from across the political spectrum, "An Act to Establish Ranked-choice Voting" (the "Act") was referred to the voters pursuant to Article IV, Part Third, Section 19 of the Constitution of Maine. In an historic vote, the People made Maine the first state in

the nation to adopt RCV to elect its Governor, state legislators, and Members of Congress.¹ The law took effect on January 7, 2017.

Ranked-choice ballots and RCV take a different approach to counting that enables voters to express a fuller, richer picture of their preferences. Rather than being forced to pick a single top choice, voters can use their ballot to express their views on as many candidates as they like, conveying how they rank these candidates in relation to one another by gaining the option to rank candidates in order of preference: first, second, and so on. These rankings allow ballot-counters to simulate a series of automatic runoff elections in a single tallying process, with

¹ While Maine is the first state to use RCV for standard statewide elections, various American jurisdictions have used RCV for other races. Alabama, Arkansas, Louisiana, and South Carolina use RCV for overseas voters in certain run-off elections. See Ala. Code § 17-13-8.1; Ark. Code Ann. § 7-5-406; La. Rev. Stat. § 18:1306 (2015); S.C. Code Ann. § 7-15-650. Cities and towns in other states such as California, Colorado, Maryland, and Minnesota have used RCV for municipal elections. See, e.g., Charter of the City of Oakland, Cal., art. 11, § 1105; Home Rule Charter of the Town of Basalt, Colo., art. II, § 2.8; Takoma Park Mun. Charter, art. VI, § 606; Minneapolis Code of Ordinances, tit. 8.5, ch. 167. And voters in Portland, Maine approved RCV in 2010 for mayoral elections starting in 2011. 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/>. Different forms of RCV are also used around the world, including to elect the president of Ireland, members of the House of Representatives in Australia, and the mayors of the capital cities of the United Kingdom (London) and New Zealand (Wellington). Presidential Elections Act 1993 c. 4 § 45-51, 53 (Act No. 28/1993) (Ir.), <http://www.irishstatutebook.ie/eli/1993/act/28/enacted/en/print#sec45>; *Dep't. of the Environment, Heritage, and Local Government, Guide to Ireland's PR-STV Electoral System*, at 1, §1-2 (Feb. 2011), <http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Voting/FileDownload,1895,en.pdf> (plain language explanation of Ireland's voting system); *Commonwealth Electoral Act 1918* p XVIII, ss 274(7AA)(7AB)(7AC)(9) (Austl.), <https://www.legislation.gov.au/Details/C2016C01022>; Scott Bennett & Rob Lundie, *Australian Electoral Systems* (Research Paper No. 5, Parliamentary Library, Parliament of Australia, 2007-08), 3-5, <http://www.aph.gov.au/binaries/library/pubs/rp/2007-08/08rp05.pdf>; Greater London Authority Act 1999 c. 29, § 4(3), sch. 2, [http://www.legislation.gov.uk/ukpga/1999/29/part/V/crossheading/ordinary-elections;Counting the Votes](http://www.legislation.gov.uk/ukpga/1999/29/part/V/crossheading/ordinary-elections;Counting%20the%20Votes), London Elects, <https://londonelects.org.uk/im-voter/counting-votes> (last visited Mar. 2, 2017) (plain language explanation of vote counting in London's mayoral race); Local Electoral Act 2001 s 5B(b) (N.Z.), <http://www.legislation.govt.nz/act/public/2001/0035/latest/whole.html#DLM93435> (laying out the rules for preferential voting in local New Zealand elections); *Mayor Justin Lester*, Wellington City Council, <http://wellington.govt.nz/your-council/mayor-and-councillors/mayor-justin-lester> (last visited Mar. 2, 2017).

the last-place candidate eliminated after each round of counting and ballots for that candidate added to their next choice. This intuitive and proven process avoids the problems associated with single-choice ballots and allows voters to cast ballots with their true preferences without fear that their votes will be “wasted” or have the perverse effect of helping elect a candidate they oppose.

On February 2, 2017, almost three months after the initiative passed and almost a month after the Act became law, the Maine Senate referred the following questions to the Supreme Judicial Court:

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

Question 2. 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?

Question 3. Does the requirement in the Act that a tie between candidates for Governor in the final round of counting be decided by lot conflict with the provisions of the Constitution of Maine, Article V, Part First, Section 3

relating to resolution of a tie vote for Governor by the House of Representatives and Senate?

Senate Order 12 (128th Legis. 2017). In response, this Court issued a Procedural Order on February 7, 2017, raising two questions:

- (1) whether the Questions propounded present a “solemn occasion,” pursuant to article VI, section 3 of the Maine Constitution; and
- (2) the law regarding the Questions propounded.

ISSUES PRESENTED

As requested in this Court’s Procedural Order dated February 7, 2017, FairVote submits argument below addressing the law regarding the Questions propounded, the second question posed by the Court.

SUMMARY OF ARGUMENT

The matter before this Court raises important questions about the balance of power between the judicial and legislative branches, and the right of the People of Maine to live in a democracy that respects their will and reflects their voice. The campaign to enact RCV was led by several Maine organizations, some of which have filed briefs before this Court. FairVote supports and joins the arguments in those briefs as to why the Senate’s request does not rise to a solemn occasion and why the Act is constitutional on the merits.

FairVote writes separately to help frame these arguments in a national context. First, the Act satisfies the plain language and purpose of the Maine

Constitution's "plurality" requirement. The "plurality of the votes" provision is similar to that found in many state constitutions and reflects a foundational democratic principle: the candidate with the most votes at the end of tabulation wins. Because this is true of RCV, it complies with the "plurality" requirement.

Second, the Act satisfies the Maine Constitution's "sort, count, and declare" requirement on its face because methods for implementation exist that would allow results to be counted, recorded, and announced by local officials before being sent to the Secretary of State for final tabulation. This is what the text and purpose of the provision require, and implementation methods from other jurisdictions demonstrate that complying with this requirement is both feasible and reasonable. The Constitution requires no more, and the Act commands no less.

Finally, no constitutional issue exists with respect to federal elections and primary elections because nothing in the U.S. Constitution or the Maine Constitution prevents the implementation of the Act for these offices and elections.

Like countless generations of Americans before them, the People of Maine have taken a step to improve their system of government. This initiative—and these efforts to continually improve our democratic processes—should be respected and protected.

ARGUMENT

I. The Act satisfies the Maine Constitution’s “plurality” requirement because the candidate with the most votes at the end of tabulation wins.

The Maine Constitution’s “plurality” provisions reflect a simple democratic principle: the candidate with the most votes at the end of tabulation wins. Based on the text and purpose of the requirement, the Act easily satisfies that command.

In interpreting the State Constitution, this Court “look[s] primarily to the language used,” *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) (quoting *Farris ex rel. Dorsky v. Goss*, 60 A.2d 908, 910 (Me. 1948)), and seeks to uphold the will of the people as expressed in statute whenever such an interpretation is reasonably possible, *see id.* at 1102; 1104 (Dufresne, A.R.J., dissenting). “Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend.” *Id.* at 1102. In fact, the Maine Constitution contains few fundamental alterations in part because this Court has “recognized that the meaning of constitutional terms may vary with changing needs and expectations.” Tinkle, *The Maine State Constitution* 21 (2d ed. 2013).

The relevant provision requires that State Representatives, State Senators, and the Governor be elected by “a plurality of all of the votes returned.”² These

² *See* Me. Const. art. IV, pt. 1, § 5 (“The Governor . . . shall issue a summons to such [representatives] as shall appear to have been elected by a plurality of all votes returned . . .”); Me. Const. art. IV, pt. 2, §§ 4–5 (“The Governor shall . . . issue a summons to such persons, as shall appear to be

provisions were adopted in 1847, 1875, and 1880, respectively.³ “Plurality” simply means the greatest number and is broader than, but includes, “majority.” As dictionaries from the applicable periods reflect, a “plurality” means “a state of being or having a greater number.” *Plurality, An American Dictionary of the English Language* (1880). This also encompasses results where a candidate prevails with a majority of votes etc.⁴ See, e.g., *The Concise Oxford Dictionary of Current English* (5th ed. 1964). Thus, the “plurality” provisions permit any electoral system where a winning candidate is the one who ultimately receives the highest number of votes. This is the essence of a democratic system.

Nor does the term “vote” preclude the use of a ranked-choice ballot or ranked-choice method of counting. Under RCV, each ballot counts as one vote, and that vote is assigned based on the voter’s preferences with respect to the *field* of candidates. If the voter’s top choice is eliminated, the vote is reassigned based on how that voter views the remaining candidates. This is consistent with the

elected by a plurality of the votes in each senatorial district . . . The Senate shall . . . determine who is elected by a plurality of votes to be Senator in each district.”); Me. Const. art. V, pt. 1, § 3 (“[T]he Senate and House of Representatives . . . shall determine the number of votes duly cast for the office of Governor, and in case of a choice by plurality of all of the votes returned they shall declare and publish the same.”).

³ See Resolves 1847, ch. 45, *reprinted in* A Legislative History of the Amendments to the State of Maine Constitution, 1820 to the Present, vol. 1 (updated Feb. 2013); Resolves 1875, ch. 98, *reprinted in id.*; Resolves 1880, ch. 159, *reprinted in id.* The language for Representatives originally required “the highest number” of votes. This was updated to match the “plurality” language used for Senators and Governor during the Second Constitutional Commission in 1963 with no floor discussion regarding the semantic change. See Tinkle, *supra* at 79; Enacted with Amendment H-488 as Resolves 1963, ch. 75, *reprinted in* A Legislative History of the Amendments to the State of Maine Constitution, 1820 to the Present, vol. 2 (updated Feb. 2013).

⁴ The plurality provision clearly has not been and cannot be interpreted to *preclude* majority outcomes. Such an absurd reading would have barred candidates from taking office under the SCV electoral system if they won more than 50% of the vote.

broad and accepted understanding of the term “vote” in place when the relevant provisions were adopted in the late 1800s. Webster’s defined a “vote” as:

2. Wish, choice, or opinion, of a person or body of persons, expressed in some received and authorized way; the expression of a wish, desire, will, preference, or choice, in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a man to office, or in passing laws, rules, regulations, and the like; suffrage; 3. That by which will or preference is expressed in elections, or in deciding propositions; a ballot, ticket, or the like

Vote, An American Dictionary of the English Language (1880). There can be no doubt that RCV is an “authorized way” of receiving the opinion of a person “in electing a [candidate] to office,” and that a ranked-choice ballot is a way that “will or preference is expressed in elections.” *Id.*

Perhaps even more striking, the widely accepted definition of “vote” in the 1960s—when the plurality provisions were last amended—*expressly included* alternative electoral models, such as transferable votes and cumulative voting.⁵ To argue, then, that the phrase “plurality of the votes” mandates *only* an SCV counting system and single-choice ballot would not only be an unreasonably rigid reading inconsistent with this Court’s interpretive history, it would run counter to the plain language itself.

⁵ *Vote*, *The Concise Oxford Dictionary of Current English* (5th ed. 1964) (“1. Formal expression of will or opinion in regard to election of office etc., sanctioning law, passing resolution, etc., signified by ballot, show of hands, voice, or otherwise, as *shall give my ~ to or for the Labour candidate . . .* CAST ~, SPLIT one’s ~, CASTING-VOTE, TRANSFERABLE ~”); and “voting”, *Id.* (“in vbl senses; ~ paper (used in ~ by ballot in election of M.P. etc.); CUMULATIVE ~.”).

In addition to the text, the Act embraces the spirit of the plurality provisions by advancing their underlying purposes. Maine’s original constitution *required* that candidates receive a majority of the vote and included different contingencies for when a candidate failed to do so.⁶ These contingencies sometimes involved partisan self-dealing that overrode the choice of the people—a problem the plurality provisions were adopted to address. *See* Tinkle, *supra* at 12–13. RCV fulfills this purpose by ensuring that the candidate garnering the most votes wins.

In short, the “plurality” provision was never intended to freeze in place any one particular electoral method or system. Instead, it reflects a basic democratic principle that is as foundational as it is unsurprising: the candidate with the greatest support—the one who garners the most votes—should win. The centrality of this concept to republican government is reflected in how common the provision is in state constitutions throughout the nation. A majority of state constitutions contain some form of provision requiring the winner to receive a “plurality of the votes,” the “greatest number of votes,” or the “highest number of votes.”⁷

⁶ For Representatives, elections would be repeated until a candidate earned a majority. Me. Const. art. IV, pt. 1, § 5 (1820). Senators would be elected by those legislators who had been elected by majorities. *Id.* art. IV, pt. 2, § 5. For Governor, the House would select two candidates from the top four and the Senate would elect the winner. *Id.* art. V, pt. 1, § 3.

⁷ *See* Alaska Const. art. III, § 3; Ariz. Const. art. V, § 1; Ark. Const. art. VI, § 3; Colo. Const. art. IV § 3; *id.* art. XXI § 3; Conn. Const. art. III §7; *id.* art. IV §4; Del. Const. art. III, § 3; Fla. Const. art. VI, § 1; Haw. Const. art. V, § 1; Idaho Const. art. IV, § 2; Ill. Const. art. V, § 5; Iowa Const. art. IV, § 4; Ky. Const. § 70; Mass. Const. amend. XIV; Miss. Const. art. V, § 140; Mo. Const. art. IV, § 18; Mont. Const. art. IV, § 5; Neb. Const. art. IV, § 4; Nev. Const. art. V, § 4; N.H. Const. pt. 2, art. 42; N.J. Const. art. V, § 1, ¶ 4; N.M. Const. art. VII, § 5; N.Y. Const. art. IV, § 1; N.D. Const. art. V, § 3; Ohio Const. art. III, § 3; Okla. Const. art. VI, § 5; Or. Const. art. V, § 5; R.I. Const. art. IV, § 2; S.C. Const. art. IV, § 5; S.D. Const. art. IV, § 2; Utah Const. art. VII, § 2; Vt. Const. art. II § 47; Va. Const. art. V, § 2; Wash. Const. art. III, § 1; W. Va. Const. art. VII, § 3; Wis. Const. art. V, § 3; Wyo. Const. art. IV, § 3.

At the end of the day, the candidate who receives the most votes in a ranked-choice election is the candidate who prevails. The Supreme Judicial Court of Massachusetts once observed that “elections under [preferential voting] are in accordance with the principle of plurality voting[—]candidates receiving the largest numbers of effective votes counted in accordance with the plan are elected, as would be true in ordinary plurality voting.” *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 238 (Mass. 1941). Maine’s plurality provision reflects this simple democratic imperative. Because the Act is consistent with a reasonable interpretation of the text and purpose of the plurality provision, this Court should exercise its normal deference, adopt this reasonable reading, and uphold the Act as passed by the People of Maine.

II. The Act satisfies the Maine Constitution’s “sort, count, and declare” requirement because results can be sorted, counted, and declared by local officials before being sent to the capital for final tabulation.

The Maine Constitution’s “sort, count, and declare” provisions set out procedural requirements for election administration. Today, at a preliminary stage where the legislature and executive branch have yet to promulgate administrative rules under the Act, this Court’s constitutional analysis should be doubly deferential. This is because both the constitutional language *and* the statutory language must be read in harmony, if reasonably possible. The Act satisfies the plain language and purpose of the “sort, count, and declare” requirements, and therefore should be upheld.

The Act outlines the RCV process in broad, facially unobjectionable terms. The legislature has not yet passed implementing legislation. As such, *how* the State chooses to implement the Act remains to be seen. Thus, if *any* reasonable method of implementation exists by which the Act *could* comply with the Maine Constitution’s procedural requirements, this Court should uphold it. *See, e.g., DaimlerChrysler Corp. v. Exec. Dir. Me. Revenue Serv.*, 922 A.2d 465, 471 (Me. 2007) (“We must avoid an unconstitutional construction of a statute if a constitutional interpretation is reasonable”).

The Constitution requires that “the election officials of the various towns and cities . . . receive the votes of all the qualified electors, sort, count and declare them in open meeting; and [form] a list of the persons voted for . . . with the number of votes for each person against that person’s name.” Me. Const. art. IV, pt. 1, §. 5. The results are then “delivered into the office of the Secretary of State forthwith,” *id.*, where final tabulation occurs and statewide results are determined.⁸

This Court has been clear in articulating the animating purpose of these procedural requirements. “The object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against a failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators.” *Opinion of the*

⁸ These procedural requirements are laid out with respect to the elections for Representatives. The requirements for Senators and Governor refer back to this provision, stating that the votes in these races are to be “received, sorted, counted, declared and recorded, in the same manner as those for Representatives.” *See* Me. Const. art. IV, pt. 2, § 3; *id.* art. V, pt. 1, § 3.

Justices, 70 Me. 560, 561 (1879). By requiring that local officials record and declare local results, these provisions enhance transparency, accuracy, and public oversight.

This Court has been equally clear, however, that the judiciary is not interested in micromanaging elections for its own sake or using the “sort, count, and declare” provisions to nit-pick the plethora of election administration and implementation decisions naturally entrusted to the legislature and executive. When it comes to the particulars of the form taken for reporting results or the final tabulation process, “substance only is sought for in such matters.” *Id.* at 563–64.⁹

The ballot is the pride, as well as the protection, of all. It is the truest indication of the popular will. . . . [I]f the returns can be understood . . . full effect should be given their natural and obvious meaning. They are not to be strangled by idle technicalities, nor is their meaning to be distorted by carping and captious criticism. When that meaning is ascertained there should be no hesitation in giving to it full effect. . . . The dominant rule is to give such a construction to the official acts of municipal officers as will best comport with the meaning and intention of the parties, as derived from a fair and honest interpretation of the language used, and to sustain rather than to defeat the will of the people

Id. at 568-70.

⁹ In that case, the Court found it “immaterial whether the aldermen returned to the governor and council the detailed vote of each ward separately, or whether they returned the result of all the votes of all the wards for each candidate together” or whether “instead of returning all the names of persons voted for, there is a return of votes as ‘scattering,’ provided that, however such votes may be added or subtracted, some candidate or set of candidates appear to be chosen by a plurality of the votes thrown.”

While it remains to be seen how the legislature or executive will decide to implement the Act's procedures, reasonable and compliant options are readily available. FairVote has assisted jurisdictions across the country with establishing procedures tailored to meet disclosure and oversight requirements, and it is quite common for local officials to compile and publish local results *before* these results are aggregated in a final tabulation.¹⁰ Nor does the statewide scope of the law pose any insurmountable challenges for its effective execution. In 2010, North Carolina used RCV for a statewide judicial election with *thirteen candidates*.¹¹

Under an SCV system, local officials count the ballots, record and declare the results in public, and then send these results to the Secretary of State for final tabulation. *See* 21-A M.R.S. §§ 695, 700, 711, 722. After this tabulation is complete, “the Governor must accept the tabulation of the Secretary of State as the sole basis for the determination of what persons to summon.” *Opinion of the Justices*, 2002 ME 169, 815 A.2d 791, 798. Under an RCV system, the same procedures could remain in place. Local officials can count the ballots and declare

¹⁰ Sequoia scanners have the ability—after a polling place closes—to “prin[t] on [a] results tape, for each RCV contest on the ballot, a list of how many votes [were received] in each rank for each candidate.” These lists can be posted at precincts to provide “redundancy” and “an additional safeguard against ballot tampering.” Wash. Sec’y of State, *Ranked Choice Voting*, § 3.3 (Apr. 2008), https://wei.sos.wa.gov/agency/osos/en/press_and_research/VotingSystems/Dominion/2008/documents/rcv%20requirements.pdf. San Francisco uses the Sequoia Optech Insight, which generates two copies of the local vote-total report. One is posted at the polling location and one is returned to the election center. *See* Cal. Sec’y of State, *Optech Insight, AVC Edge 5.0, & Optech 400C Cal. Procedures*, 307 (Aug. 2008), <http://votingsystems.cdn.sos.ca.gov/vendors/use-procedures/sequoia-use-procedures.pdf>.

¹¹ Setting up a statewide system is not only feasible—it has been executed on a shorter timeline than available here. Election officials in North Carolina mounted the 2010 statewide judicial race with only four months’ preparation. In a single-choice ballot, SCV election, the winner would have garnered a mere 20.3% of the vote. Instead, the RCV winner ultimately received 50.3% of the vote. *See* Affidavit of Gary Bartlett, Exhibit A.

the results to safeguard transparency, accuracy, and public oversight. Then, the Secretary of State can conduct a final, statewide tabulation.

In sum, a decentralized system for counting, declaring, and recording votes can easily be established. To complain that the *format* of local results is different under RCV is to elevate style over substance. To protest that the final tabulation by the Secretary of State uses a different *method* of aggregation under RCV is simply “carping and captious criticism.” *Opinion of the Justices*, 70 Me. at 569. The will of the people should not be “strangled by [such] idle technicalities.” *Id.*

At the end of the day, the goal remains to “sustain rather than to defeat the will of the people.” *Id.* at 570. Unless the Act is unavoidably in conflict with the essential substance and purpose of the “sort, count, and declare” provisions, this Court should uphold it. The Maine Constitution requires that votes be sorted, counted, and declared by local officials before they are compiled and sent to the capital for final tabulation. Neither the text nor the purpose of the provisions requires more, and nothing on the face of the Act conflicts with these commands.

III. Nothing in the U.S. Constitution or Maine Constitution prevents the legislature from immediately implementing ranked-choice voting for federal offices and primary elections.

The Senate’s request only reaches questions regarding the constitutionality of general elections for certain state offices under the Maine Constitution. Notably, the request does not suggest or imply that the Act might be unconstitutional for primary elections or for the federal offices also covered by the Act. Indeed, the

weight of authority strongly suggests otherwise: courts have been *unanimous* in upholding RCV against challenges under the U.S. Constitution.

The limited scope of the Senate’s request is critical because Maine statutory and case law reflects a policy in favor of severability. *See* 1 M.R.S. § 71(8) (2016); *Lambert v. Wentworth*, 423 A.2d 527, 535 (Me. 1980). This Court has made clear that, whenever possible, “[t]he illegal will be deleted, while the legal will be retained,” *id.*, unless the invalid portion of the statute is “such an integral portion of the entire statute . . . that the enacting body would have only enacted the legislation as a whole,” *Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1190 (Me. 2004).

This policy means that the legislature must implement RCV in the general elections for U.S. Senator and U.S. Representative as well as the primary elections for federal and state offices.¹² Thus, the legislature must authorize and appropriate the funds necessary to hold RCV elections.¹³

¹² The Act’s tie-vote provision is also severable. It is difficult to conceive of an issue less ripe for judicial resolution than the tie-vote provision. A tied vote for Governor has *never* occurred in Maine history, is extremely unlikely, and could be resolved without great delay if it ever occurred. Regardless, the Act’s tie-vote provision is irrelevant to the implementation or constitutionality of RCV. There can be little doubt that the freestanding “tie-vote” provision in the Act was not a “make or break” element of the push to establish ranked-choice elections in the State of Maine.

¹³ As other briefs in support of the Act have pointed out, this also suggests that a solemn occasion is not present. The Senate states that “the 128th Legislature . . . must determine during the current legislative session whether to authorize and appropriate in excess of \$1,500,000 in the biennial budget for the period beginning July 1, 2017 to implement the Act.” Senate Order 12 (128th Legis. 2017). But that question has already been answered by the People of Maine with a resounding “yes.” The implementation must be funded for federal offices and primary elections *even if* the Act is found unconstitutional for state office general elections. *See Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997) (“A solemn occasion exists *only* when . . . the body asking the question *requires* guidance in the discharge of its obligations and has serious doubts as to its power and authority to take such action . . .”).

A. RCV has repeatedly been found consistent with the First and Fourteenth Amendments.

To date, every court to consider RCV under the U.S. Constitution has upheld the method against challenge. See *Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *McSweeney v. City of Cambridge*, 422 Mass. 648 (1996). Under the U.S. Constitution, states have the authority to establish their own election processes. See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). The U.S. Supreme Court has recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (citing *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Thus, state electoral regulations usually receive a deferential standard of review. *Burdick*, 504 U.S. at 434. Under this standard of review, “when a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.” *Id.*

RCV plainly satisfies this standard. “[RCV,] like every election system, offers a menu of benefits and limitations.” *Dudum*, 640 F.3d at 1105. RCV increases voters’ ability to express nuanced political preferences and improves the

Indeed, even if there were an open question regarding funding, using this basis to find a solemn occasion would permit the legislature to seek an advisory opinion every time an act requires funding.

odds that the winning candidate has widespread support. *See id.* at 1116 (noting that RCV “advances the City’s legitimate interests in providing voters an opportunity to express nuanced voting preferences and electing candidates with strong plurality support”); *id.* (observing that “the ability to express more nuanced preferences means that candidates with greater plurality support (although not necessarily majority support) tend to be elected, as compared to a traditional plurality system”). As the Massachusetts Supreme Judicial Court has stated, “a preferential scheme, far from seeking to infringe on each citizen’s equal franchise, seeks more accurately to reflect voter sentiment This purpose is not a derogation from the principle of equality but an attempt to reflect it with more exquisite accuracy.” *McSweeney*, 422 Mass. at 654.

As such, as long as the “limitations” imposed by RCV are not discriminatory or unreasonable, the electoral model survives constitutional scrutiny. Courts have repeatedly found this to be the case. For example, some challengers have claimed that eliminating “exhausted” ballots effectively denies a voter’s right to vote, either by denying some voters access to later rounds of tabulation based upon their vote or by failing to count their ballot at all. *Dudum*, 640 F.3d at 1107; *Minnesota Voters Alliance*, 766 N.W.2d at 690-91; *McSweeney*, 422 Mass. at 652. The argument that RCV treats voters’ ballots differently has been firmly rejected:

All voters can rank . . . choices on a single ballot, cast those ballots at the same time, and have their preferences calculated in the same manner. . . . [N]o voter is denied

an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters.

Dudum, 640 F.3d at 1109. Nor is it correct to say that ballots for eliminated candidates are not counted at all: “[exhausted ballots] are read and counted; they just do not count toward the election of any of the . . . successful candidates.”

McSweeney, 422 Mass. at 652. “[I]t is no more accurate to say that these ballots are not counted than to say that the ballots designating a losing candidate in a two-person, winner-take-all race are not counted.” *Id.*; see also *Dudum*, 640 F.3d at 1110.

Plaintiffs alleging a “dilution of voting power” under the Equal Protection Clause and the U.S. Supreme Court’s “one person, one vote” principle have been similarly unsuccessful. Articulated in *Reynolds v. Sims*, the “one person, one vote” principle states that “the Equal Protection Clause guarantees the opportunity for equal participation by all voters in [state] election[s].” 377 U.S. 533, 566 (1964). Challengers have argued that voters who rank the most popular candidate first only have their vote counted once whereas voters who rank less popular candidates first have their vote counted more than once as their top-choice candidates are eliminated. See, e.g., *Minnesota Voters All.*, 766 N.W.2d at 690. This is false. “Every voter has the same opportunity to rank candidates when she casts her ballot, and in each round every voter’s vote carries the same value.” *Id.* at 693.

The U.S. Court of Appeals for the Ninth Circuit has rejected this equal-protection-based challenge in no uncertain terms:

At its core, [the plaintiff's] argument is that some voters are literally allowed more than one vote (i.e., they may cast votes for their first-, second-, and third-choice candidates), while others are not. [This] contention mischaracterizes the actual operation of [the RCV] system and so cannot prevail. In fact, the option to rank multiple *preferences* is not the same as providing additional *votes*, or more heavily-weighted votes, relative to other votes cast. Each ballot is counted as no more than one vote at each tabulation step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate, and each vote attributed to a candidate, whether a first-, second- or third-rank choice, is afforded the same mathematical weight in the election. The ability to rank multiple candidates simply provides a chance to have several preferences recorded and counted *sequentially*, not at once.

Dudum, 640 F.3d at 1112. Because there is no barrier to using RCV in the general elections for federal office, there is no justification for delaying implementation of the Act.

B. The State's broad authority to regulate elections extends to primary elections and permits the State to require the use of RCV in primaries.

States possess a "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' which power is matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (quoting U.S. Const. art. I, § 4, cl. 1).

The U.S. Supreme Court has held that "States have a major role to play in

structuring and monitoring the election process, including primaries,” and has considered it “‘too plain for argument,’ . . . that a State may require parties to use the primary format for selecting their nominees.” *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)).

Of course, the State’s power over primaries “is not absolute,” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008), and is “subject to the limitation that [it] may not be exercised in a way that violates . . . specific provisions of the Constitution.” *Williams v. Rhodes*, 393 U.S. 23, 29 (1968). For example, primary rules must respect the freedom of political association protected by the First Amendment. *See Cal. Democratic Party*, 530 U.S. at 572-73; *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989).

Consistent with these requirements, Maine’s election laws require that nominations by parties that qualify to participate in a primary or general election must “be made by primary election.” *See* 21-A M.R.S. §§ 1(28), 331(1). These laws consider each primary election “to be a separate election for each party which takes part in it,” *see id.* § 339, and permit each political party to establish the enrollment qualifications for its own primary election, *see id.* § 340(1).

Nothing about the Act unwinds this structure, requires party actors to associate with unaffiliated voters, or prohibits party actors from associating with

such voters. The Act simply replaces the SCV method of tabulation currently employed for party primaries with the RCV method of tabulation.

Nor does RCV impose any greater burden on associational rights than a legislature’s decision to “prescribe party use of primaries or conventions to select nominees who appear on the general-election ballot.” *See, e.g., N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008). Although a “political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents its political platform,” these associational rights “are circumscribed . . . when the State gives the party a role in the election process . . . by giving certain parties the right to have their candidates appear with party endorsement on the general-election ballot.” *Id.* at 202-03. As such, there is no barrier to using RCV in Maine’s primary elections, and there is no justification for delaying implementation of the Act.

CONCLUSION

“[A]s Chief Justice Marshall instructed” in the early years of the Republic: “We must never forget, that it is a *constitution* we are expounding.” *Allen*, 459 A.2d at 1102 (quoting *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)). A constitution sets out our broadest principles, our most cherished rights, and a framework within which the will of the People—democracy itself—unfolds and takes form. It must not be used to smother the new and the novel, however

unfamiliar, lest the weight of history extinguish the very spirit that allowed our predecessors to shape it.

As the New York Court of Appeals once observed in commenting upon electoral reforms in that state:

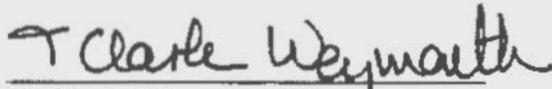
We must always be careful in approaching a constitutional question dealing with principles of government, not to be influenced by old and familiar habits, or permit custom to warp our judgment. We must not shudder every time a change is proposed. . . . This proposed system may be unworkable; it may be so cumbersome or so intricate as to be impracticable; the results desired may not be obtained; the remedy may be worse than the disease, but what have all these to do with the Constitution? If the people . . . want to try the system, make the experiment, and have voted to do so, we as a court should be very slow in determining that the act is unconstitutional, until we can put our finger upon the very provisions of the Constitution which prohibit it.

Johnson v. City of N.Y., 9 N.E.2d 30, 38 (N.Y. 1937).

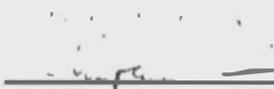
The People of Maine have made their voices heard through the most direct of democratic vehicles and voted in favor of innovation, experimentation, and hope. Through this Act, the People of Maine seek to renew their sovereign authority; to project their will in the halls of the statehouse and the Congress with greater nuance, detail, and fealty; and to lead the nation in perfecting our system of representative government.

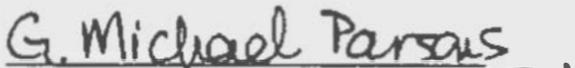
For the foregoing reasons, FairVote respectfully requests that, if this Court finds that a solemn occasion exists, it should also find that the Act must be upheld under the Maine Constitution.

Respectfully submitted,



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Counsel for Interested Party FairVote

March 3, 2017

Affidavit of Gary Bartlett

Name: Gary Bartlett

Occupation: Project Leader, Ranked Choice Voting Resource Center

I, Gary Bartlett, swear or affirm that:

1. I make this affidavit from personal knowledge, am over 21 years of age, and am competent to testify to the matters set forth below.
2. From 1993 to 2013, I was the Executive Director of the North Carolina State Board of Elections.
3. During my tenure, North Carolina ran four judicial vacancy elections with ranked choice voting, including one statewide election.
4. The statewide judicial election was held in 2010 and drew 13 candidates.
5. The statewide judicial election was organized and implemented within three months.
6. Our analysts concluded RCV worked as intended.
7. After first choices were counted, the leading candidates were Cressie Thigpen with 20.33% of first-choice preferences and Doug McCulloch with 15.21% of first-choice preferences.
8. After all elimination rounds, Doug McCulloch was declared the winner with 50.31% of the vote.

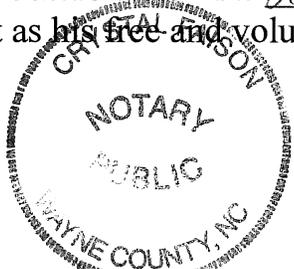
After being duly sworn, I declare under penalty of perjury of the laws of the State of Maine that the above and foregoing representations are true and correct to the best of my information, knowledge, and belief.

3/2/17
Date

Gary O. Bartlett
Signature

STATE OF NORTH CAROLINA
WAYNE COUNTY

I, the undersigned Notary Public, do hereby affirm that Gary Bartlett personally appeared before me on the 2nd day of March 2017, and signed the above Affidavit as his free and voluntary act and deed.



Crystal Faison
Notary Public / Attorney