

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*

RESPONSIVE BRIEF OF THE ATTORNEY GENERAL

AARON M. FREY
Attorney General

Thomas A. Knowlton, #7907
Deputy Attorney General
Jonathan R. Bolton, #4597
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800
thomas.a.knowlton@maine.gov

Table of Contents

	Page
Table of Authorities	3
Introduction	5
I. <i>Kohlhaas</i> does not provide a reason for the Justices to change their interpretation of the Maine Constitution.....	6
II. RCV is inconsistent with the constitutional duty of municipal officials to “sort, count and declare” the vote	8
III. RCV is a fundamentally different voting system from plurality voting.....	8
IV. The Constitution does not authorize the Legislature to adopt by statute an alternative to plurality voting	13
Conclusion	14

Table of Authorities

Cases

<i>Baber v. Dunlap</i> , 376 F. Supp. 3d 125 (D. Me. 2018)	11
<i>Dudum v. Arntz</i> , 640 F.3d 1098 (9th Cir. 2011)	11
<i>Kohlhaas v. State</i> , 518 P.3d 1095 (Alaska 2022)	6, 7, 8
<i>Minn. Voters All. v. City of Minneapolis</i> , 766 N.W.2d 683 (Minn. 2009)	11
<i>Opinion of the Justices</i> , 2017 ME 100, 162 A.3d 188.....	<i>passim</i>

Statutes

21-A M.R.S.A. § 1(35-A)	5
21-A M.R.S.A. § 711	12
21-A M.R.S.A. § 723-A(1)(D).....	13
21-A M.R.S.A. § 723-A(2)	5, 10

Constitutional Provisions

Alaska Const. art. III, § 3	6
Me. Const. art. IV.....	14
Me. Const. art. IV, pt. 1, § 5	5, 7, 8
Me. Const. art IV, pt. 2, § 3	7, 8
Me. Const. art. IV pt. 2, §§ 3-5	5
Me. Const. art. V	14
Me. Const. art. V, pt. 1, § 3.....	5, 7, 8
Me. Const. art. IX, § 12	14

Legislative Documents

L.D. 1666 (132nd Legis. 2025)..... *passim*

Secondary Sources

Maine State Legislature, Legislative History Collection, *Citizen Initiated
Legislation, 1911-Present*10

Constitutional Resolves

Const. Res. 1919, ch. 2214

Other Authorities

U.S. Federal Election Commission, Advisory Opinion 2014-1212

Introduction

For the offices of State Representative, State Senator, and Governor, the Maine Constitution establishes a voting system where 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; art. IV, pt. 2, §§ 3-5; and art. V, pt. 1, § 3, and confirmed by the legislative history of the constitutional amendments that implemented plurality voting to replace majority voting in the 19th century.

Ranked-choice voting (“RCV”) is a fundamentally different voting methodology that is inconsistent with the Maine Constitution. RCV may or may not be a better alternative to plurality voting as a matter of policy, but it conflicts with the plurality voting system set out in Maine’s Constitution and thus cannot be implemented by statute without first amending the Constitution.

The wordsmithing proposed by L.D. 1666 does not change the fact that RCV requires “sequential rounds” of tabulation, 21-A M.R.S.A. § 1(35-A) (Supp. 2026), and thus produces an initial plurality winner in round one (i.e., the voters’ first choice) who may go on to lose the election in later rounds of tabulation because they were not ranked as the voters’ first choice on more than 50% of the ballots in round one, *see* 21-A M.R.S.A. § 723-A(2) (Supp. 2026). RCV is inconsistent with the plurality requirement of the Constitution.

The Justices recognized the clear discrepancy between RCV and the Constitution in its *Opinion of the Justices*, 2017 ME 100, ¶¶ 65-67, 162 A.3d 188. The Justices unanimously concluded that the fundamental mechanic of RCV – the “tabulation of votes in rounds” – is inconsistent with the constitutional plurality requirement because that mechanic “prevents the recognition of the winning candidate when the first plurality is identified.” *Id.* ¶ 65. That is, RCV “prevents the candidate obtaining a ‘plurality’ from being named the winner unless and until multiple rounds of vote-counting have occurred.” *Id.* ¶ 67.

The Justices were correct in 2017, and nothing has changed since then.

I. *Kohlhaas* does not provide a reason for the Justices to change their interpretation of the Maine Constitution.

RCV proponents urge the Justices to change their mind based on *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022), where the Alaska Supreme Court ruled that Alaska’s RCV statute did not contradict the provision in its constitution providing that the candidate “receiving the greatest number of votes shall be governor.”¹ *Id.* at 1120 (quoting Alaska Const. art. III, § 3). *See* Presiding Officers Br. at 26-30; League Br. at 26, 29-30; Bam Br. at 24-25; Five Maine Voters Br. at 18; Pildes &

¹ References in this brief to “RCV proponents” include the persons or groups that filed briefs arguing that L.D. 1666 is constitutional: The President of the Maine Senate and Speaker of the Maine House of Representatives (“Presiding Officers”); The League of Women Voters of Maine (“League”); Marshall J. Tinkle (“Tinkle”); Professor Dmitry Bam (“Bam”); Cabanne Howard, Esq. (“Howard”); Five Maine Voters; Richard H. Pildes and G. Michael Parsons (“Pildes & Parsons”); and FairVote and Maine Women’s Lobby (“FairVote”).

Parsons Br. at *passim*; and Tinkle Br. at 16-18. Distilled to its essence, RCV proponents' primary argument is that the Alaska Supreme Court knows better than the Justices how to interpret the Maine Constitution and Maine history.

As the Attorney General discussed, *see* Brief of the Attorney General (“AG Br.”) at 23-27, *Kohlhaas* involved an Alaska court interpreting its own constitution with a different history. The Alaska court's critique of the Justices' 2017 Opinion is misplaced and is not a reason for the Justices to change their mind.

Using the Alaska's court's reasoning of *Kohlhaas*, the changes in L.D. 1666 seek to convince the Justices that a person's “vote” is not any single ranking but the entire array of rankings and, thus, the RCV process does not produce any outcome cognizable under the Maine Constitution until all rounds of tabulation have been completed. But neither *Kohlhaas* nor RCV proponents address the fact that our Constitution requires municipal officials to “sort, count and declare” the “votes” in their respective jurisdictions. Me. Const. art. IV, pt. 1, § 5; *see* art. IV, pt. 2, § 3; art. V, pt. 1, § 3. As discussed, AG Br. at 29-31, that process results in the local creation of an election return that must list “the number of votes for each person against that person's name.” Me. Const. art. IV, pt. 1, § 5. It is from “the returned copies of such lists” that the plurality winner is to be determined. *Id.*

L.D. 1666's conception of a single “vote” as constituting the full array of candidate rankings specified on a ranked-choice ballot conflicts with the

conception of a “vote” embedded in this constitutional text. So when the Alaska court opined that “a ranked-choice vote is a single vote,” *Kohlhaas*, 518 P.3d at 1122, it was interpreting a different constitutional framework that provided no textual clues as to what is and is not a “vote.”

II. RCV is inconsistent with the constitutional duty of municipal officials to “sort, count and declare” the vote.

As noted above and in the Attorney General’s opening brief, AG Br. at 29-31, the Maine Constitution requires that municipal officials “sort, count and declare” the “votes” for Representative, Senator, and Governor in their respective jurisdictions. Me. Const. art. IV, pt. 1, § 5; *see* art. IV, pt. 2, § 3; art. V, pt. 1, § 3. In 2017, the Justices declined to answer whether RCV was also inconsistent with these constitutionally required processes. *Opinion of the Justices*, 2017 ME 100, ¶ 69, 162 A.3d 188. The incompatibility of RCV with these processes is another reason that the Justices should answer “no” to the Legislature’s question.

III. RCV is a fundamentally different voting system from plurality voting.

RCV proponents claim that L.D. 1666 is just another method to carry out the plurality requirement. League Br. at 29-31; Tinkle Br. at 10-12; Bam Br. at 13-17. They made the same argument in 2017 as to the original Act. *See* 2017 League Br. at 10-13; 2017 Tinkle Br. at 24. The Justices emphatically rejected it: “the Act is not simply another method for carrying out the Constitution’s requirement of a plurality.” *Opinion of the Justices*, 2017 ME 100, ¶ 65, 162 A.3d 188.

Moreover, the RCV proponents' argument ignores the express language and history of the Constitution. The Constitution specifies a particular voting system for electing Representatives, Senators, and Governor: it is a "first-past-the-post" plurality voting system. This method is set out in the plain text 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. As the Justices explained, *id.* ¶¶ 61-65, history shows that Maine voters made a conscious choice to change to a plurality system with the outcome determined by a single count, i.e., the first candidate to achieve a plurality. *See also* AG Br. at 8-13, 29-31.

According to RCV proponents, Maine's switch from a majority to a plurality voting system was driven mainly by a desire to have the people (not legislators) decide the outcome of legislative and gubernatorial elections. League Br. at 22-24; Bam Br. at 17-18; Howard Br. at 5. In 2017, RCV proponents made the same claim. 2017 League Br. at 14; 2017 Tinkle Br. at 23. The Justices were not persuaded.

Moreover, this interpretation cannot explain the 1847 amendment relating to the election of Representatives, since the people were empowered under our original Constitution to elect their Representatives even if the first attempt did not produce a majority winner. From 1847 on, Representatives would be elected by a plurality after one round of voting and a single count.

Unlike a plurality voting system, RCV is a majority voting system since it specifies that, to win, a candidate must achieve a majority either in the first round of counting or in a final round when there are only two continuing candidates, and the candidate with the most votes in the final round wins. 21-A M.R.S.A. § 723-A(2). Indeed, the ballot question presented to Maine voters in 2016 expressly described the RCV process as having a “majority”-vote threshold. *See* Maine State Legislature, Legislative History Collection, *Citizen Initiated Legislation, 1911-Present*, at <https://www.maine.gov/legis/lawlib/lldl/citizeninitiated/>.

Nonetheless, RCV proponents argue that RCV does not require a majority. *Presiding Officers Br.* at 1, 17, 21-26; *Tinkle Br.* at 12; *Five Maine Voters Br.* at 19. RCV proponents made the same argument in 2017. *See* *2017 League Br.* at 10-11; *2017 Tinkle Br.* at 23-24. The Justices correctly rejected that argument.

RCV proponents’ contention that RCV does not require a majority ignores the way that the RCV process actually works. RCV proponents rely heavily on the fact that L.D. 1666 would insert “plurality” into several provisions in Title 21-A. *See* *Presiding Officers Br.* at 22-24; *League Br.* at 30-31; *Pildes & Parsons Br.* at 18-19; *Five Maine Voters Br.* at 13, 19; *Tinkle Br.* at 11; *Bam Br.* at 13-14. But the cosmetic changes in L.D. 1666 would not change RCV’s actual operation.

RCV proponents also rely on the fact that a majority, by definition, “always is a plurality.” *Presiding Officers Br.* at 28. But as the Justices noted, “a plurality

may be, but is not necessarily, a majority.” *Opinion of the Justices*, 2017 ME 100, ¶ 61 n. 36, 162 A.3d 188. This latter point is dispositive under the Constitution.

RCV is equivalent to a series of run-off elections, using one ballot. Indeed, that each voter’s preference is counted in each round provides the legal basis on which courts upheld RCV against challenges under the First and Fourteenth Amendments of the U.S. Constitution. *See Baber v. Dunlap*, 376 F. Supp. 3d 125, 135–36 (D. Me. 2018); *Dudum v. Arntz*, 640 F.3d 1098, 1112-13 (9th Cir. 2011); *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 690-93 (Minn. 2009).²

According to RCV proponents, under L.D. 1666, a “ranked ballot is a single vote that expresses multiple preferences” – and “nothing in the words ‘vote’ or ‘plurality’ prohibits the Legislature from allowing a voter to express a more nuanced set of contingent preferences.” League Br. at 15; *see also* Tinkle Br. at 11, 17; Five Maine Voters at 7-8, 14-15. In 2017, RCV proponents made similar claims. 2017 League Br. at 11; 2017 FairVote Br. at 17-19. The Justices were not persuaded. As shown above and in our initial Brief (AG Br. at 27-31), this redefinition of a “vote” conflicts with the constitutional text.

² That several courts, including the Law Court, have rejected other types of legal challenges to the use of RCV, *see* Presiding Officers Br. at 11, FairVote Br. at 25-27, Tinkle Br. at 12 n. 11, has no bearing on the question before the Justices.

RCV proponents rely on the FEC’s 2024 advisory opinion that “the entire [RCV] process ... constitutes a single election” under federal election law, subject to a \$3,300 federal contribution limit per individual. FEC Advisory Opinion 24-12 at 3-6. *See* Presiding Officers Br. at 28-29; League Br. at 13; Five Maine Voters Br. at 18; Pildes & Parsons Br. at 7. But the fact that RCV constitutes a single “election” under federal election law says nothing about whether an RCV ballot’s set of contingent preferences is a single “vote” under Maine’s Constitution.

RCV proponents also point to the 2018 CD2 election as evidence that RCV satisfies the constitutional plurality requirement. Presiding Officers Br. at 1, 25-26; League Br. at 28 n.4; Pildes & Parsons Br. at 20 n. 42. That election undermines their argument. As shown in Exhibit A to the Attorney General’s Brief, Bruce Poliquin was the plurality winner in the first round of tabulation with 46.3% of the votes. This was also the result in the election returns that municipal officials sent to the Secretary, which “report . . . only the first choice votes cast.” 21-A M.R.S.A. § 711 (2024). Thus, Poliquin would have been the winner under the plurality system that the Constitution mandates for the elections at issue here.

But Poliquin was not the winner for CD2 under RCV. Because Poliquin had obtained less than a majority of first-choice votes in round one, a centralized RCV count was required. The Secretary conducted that count in a multi-day process. Once Bond and Hoar were eliminated and votes on any continuing ballots were

reallocated to the remaining candidates based on next-highest rankings, Golden won only because he received *a majority* of the votes – 50.6% – in the final round.

That some RCV results can be characterized as wins by less than a majority, depending on the calculation used, does not mean that RCV is consistent with a “plurality” requirement. That is, if the denominator used to calculate the win percentage includes ballots not counted in the final round of tabulation because they were “exhausted” – meaning the voter ranked neither of the final candidates or otherwise marked the ballot in a way that excluded it from the final round, *see* 21-A M.R.S.A. § 723-A(1)(D) (Supp. 2026) – the final-round winner may, in some scenarios, be said to have won with less than 50% of the votes, even though they necessarily received more than 50% of the votes counted in the final round. Under this theory, Golden could be said to have won the 2018 CD2 race by a plurality.

The Justices correctly concluded that this nuance of mathematics did not matter. *Opinion of the Justices*, 2017 ME 100, ¶ 65 n. 38, 162 A.3d 188. In that circumstance, RCV would still violate the Constitution because it “would not declare the first candidate to achieve a plurality to be the winner.” *Id.*

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

According to RCV proponents, the Maine Constitution does not specify a particular voting system and therefore allows for adoption of RCV by statute. *See* Presiding Officers Br. at 22-24; League Br. at 16-20, 24-31; Bam Br. at 10-15;

Tinkle Br. at 10-13. As shown above and in our opening Brief, however, the Constitution does specify a particular voting system: the “first-past-the-post” plurality voting system. Because RCV conflicts with the Constitution, it may not be implemented by statute without amending the Constitution.

As they did in 2017, some RCV proponents suggest that Article IX, § 12, authorizes the Legislature to enact L.D. 1666. *See* Presiding Officers Br. at 22; Bam Br. at 16. They unduly rely on the portion of § 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.³ There is no textual basis or 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.

Conclusion

For the reasons stated above and in our opening brief, the Attorney General urges the Justices to answer “no” to the question propounded by the Legislature.

³ The question posed to the voters for approval in 1919 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, ch. 22.

March 20, 2026

Respectfully submitted,

AARON M. FREY
Attorney General

/s/ Thomas A. Knowlton
THOMAS A. KNOWLTON
Deputy Attorney General
Maine Bar No. 7907
JONATHAN R. BOLTON
Assistant Attorney General
Maine Bar. No. 4597
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8832

Counsel for the Attorney General