

**STATE OF MAINE  
MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

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LAW COURT DOCKET NO. KEN-18-130

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MAINE STATE SENATE

Appellees

v.

SECRETARY OF STATE, ET AL.

Appellants

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POSITION PAPER OF INTERVENORS THE COMMITTEE FOR RANKED-  
CHOICE VOTING, LUCAS ST. CLAIR, MARK EVES, DIANE RUSSELL,  
BETSY SWEET and BEN CHIPMAN

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## SUMMARY OF THE ARGUMENT

The Senate of Maine is not entitled to a review of on the merits of its action because the single chamber of a bicameral legislative body lacks standing before the Court to challenge another branch's authorized interpretation of statute. *See United States House of Representatives v. Burwell*, 130 F. Supp. 3d 53, 57 (D.D.C. 2015). Even if the Senate has standing, the claims cannot be considered on the merits because the Senate states no cause of action, instead seeking relief solely under the Declaratory Judgments Act, which cannot serve an independent cause of action. *See Berry v. Daigle*, 322 A.2d 320 (Me. 1974).

The Senate's three claims also fail on the merits. First, the Secretary of State (the "SOS") does not arrogate the Legislature's appropriations authority by committing funds to implement a ranked-choice voting election that the Legislature properly appropriated for the SOS's broad elections budget. Second, the SOS has express rulemaking authority to conduct efficient ranked-choice voting elections, thereby permitting the Secretary to arrange for the retrieval and transport of ranked-choice ballots, if necessary, to "tabulate the votes according to the ranked-choice voting method," § 722(1). Finally, any conflicting statutes enacted prior to the citizen's initiative on ranked-choice voting are repealed by implication because they are clearly repugnant to the citizens' legislative intent. *See Lewiston Firefighters Ass'n, Loc. 785, Intern. Ass'n of Firefighters, AFL-CIO v. City of Lewiston*, 354 A.2d 154 (Me. 1976).

## I. THE SENATE LACKS STANDING.

The Senate lacks standing to assert any of its claims seeking relief from the SOS's interpretation of statute because the right to defend the legislative authority from other branches of government is held by the full bicameral legislative body.

“Standing of a party to maintain a legal action is a ‘threshold issue’ and our courts are only open to those who meet this basic requirement.” *Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984). A legislative body alleging injuries inflicted by another branch of government must overcome an “especially rigorous” standing analysis before it can seek redress in the courts. *Raines v. Byrd*, 521 U.S. 811, 819 (1997). That heightened standard cannot be met, particularly when one considers that the Maine Senate wields unique power to seek redress of any perceived constitutional injury through introduction of legislation or request for a solemn occasion opinion of the Supreme Judicial Court (Me. Const. art. IV, § 9; art. VI, § 9), but here has instead opted to seek relief as a plaintiff in the Courts.

Maine courts have not yet decided the question whether a single legislative chamber has standing to defend the Legislature's separation-of-powers rights stemming from an executive officer's overbroad interpretation of enacted statutes. That precise question, however, was decided by the United States District Court for the District of Columbia in *United States House of Rep. v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015). The Court should look to *Burwell* as a persuasive authority.

*Burwell* involved claims brought by a single chamber of Congress seeking

redress for two distinct claims: (i) executive branch secretaries' withdrawal of unappropriated funds from the federal treasury for unfunded Affordable Care Act programs, and (ii) the loss of legislative power from an executive agency secretary's overbroad interpretation of Affordable Care Act statutes that effectively amended the properly enacted laws of Congress. *See* 130 F. Supp. 3d at 57. The *Burwell* Court concluded that the single legislative chamber had standing to challenge unconstitutional withdrawals of unappropriated funds, but that the single chamber *did not* have sufficient standing to challenge the executive branch's alleged usurpation of legislative power through its interpretation of statute. *Id* at 58. Recognizing a single legislative chamber's standing to challenge the executive branch's interpretation of statute "would contradict decades of administrative law and precedent, in which courts have guarded against the specter of general legislative standing based upon claims that the Executive Branch is misinterpreting a statute or the Constitution." *Id*.

The Senate has stipulated that the SOS has sufficient funds available to implement a ranked-choice voting election, and that no unappropriated funds will be drawn from the state treasury. *See* Record ¶¶ 38-47. Thus, the Senate's claims challenge only the SOS's interpretation of the appropriations legislation and the ranked-choice voting statutes. The SOS in Maine is an executive officer, akin to the executive agency secretaries sued in *Burwell*. *See* Me. Const. art. V, pt. 2, § 4. Like the allegations of separation-of-powers abuses brought against the executive branch in *Burwell*, the Senate's claims here allege that an overbroad interpretation and

application of ranked-choice voting statutes has usurped the legislative branch's unique constitutional authority. *See generally* Complaint.

These causes of action, expressly rooted in constitutional separation-of-powers arguments, are the same as the U.S. House's statutory challenges that the *Burwell* court dismissed for lack of standing and should similarly be dismissed before consideration of the merits. *See id.* at 57-75. As a mere portion of the larger bicameral body, the Maine Senate cannot stand before the Courts to define where the Legislature's constitutionally protected legislative authority ends, and where the executive branch's right to interpret and implement the laws of Maine begins. *See id.* at 75; *Raines* at 819.

The Maine courts must “guard[ ] against the specter of general legislative standing based upon claims that the Executive Branch is misinterpreting a statute or the Constitution” by dismissing the Senate's abuse-of-power claims. *Burwell*, 130 F. Supp. 3d at 63. Such action properly ensures that a legislative chamber's mere reference to “general provisions [of legislative authority] does not transform a statutory violation into a constitutional case or controversy,” *id.*

## **II. THE SENATE HAS NOT STATED A CAUSE OF ACTION.**

Even if the Court finds the Senate has standing to challenge the SOS's statutory interpretation, the claims fail because the Senate does not assert a cause of action upon which relief can be granted. The Law Court has recognized that the Declaratory Judgments Act, 14 M.R.S.A. §§ 5951, et seq., provides only limited relief. *Berry v. Daigle*, 322 A.2d 320 (Me. 1974). “The Declaratory Judgments Act does not

create a new cause of action; it merely authorizes a new form of relief,” *Id.*

The Senate alleges a violation of Me. Const. art. V, pt. 3, § 4 and seeks a remedy for that violation under the Declaratory Judgments Act, 14 M.R.S.A. §§ 5951, et seq. Under the guise of declaratory relief, the Senate seeks a finding by the Court that the SOS has violated the constitutional bar on withdrawal of unappropriated funds from the treasury. While Section 5954 of the Declaratory Judgments Act offers a remedy for the Court to interpret statutes, *Berry* holds that the Act *cannot* serve as a stand-alone cause of action for alleged acts that violate the constitution. *See id.* at 326. The Senate’s claims should be dismissed before consideration of the merits.

### **III. THE SECRETARY OF STATE ACTS WITHIN HIS DISCRETION WHEN HE SPENDS GENERAL ELECTIONS APPROPRIATIONS ON A RANKED-CHOICE VOTING ELECTION.**

The SOS does not arrogate the Legislature’s appropriations authority by committing funds to implement a ranked-choice voting election because the Legislature appropriated the funds toward the Secretary’s baseline elections budget.

The Legislature has the exclusive right to earmark state funds for particular programs or initiatives. *See generally* Ex. 7. The funds contested by the Senate here, however, were appropriated into a generic “all others” category of the SOS’s Bureau of Corporations, Elections and Commissions through legislation that was properly enacted while the ranked-choice voting law was in effect. *See* Record ¶¶ 13, 39. The baseline elections funds were appropriated in a manner consistent with the Legislature’s practice of omitting specific mention of the types of elections for which

the appropriations are intended, deferring to the SOS's interpretation of the appropriations bill to determine its proper expenditure. *See* Record ¶ 14.

To demonstrate that conduct violates the separation of powers provisions of the Maine Constitution, a party must show “that the power in issue [has] been explicitly granted to one branch of state government, and to no other branch,” *State v. Hunter*, 447 A.2d 797, 800 (Me.1982). The Senate here fails to satisfy the *Hunter* test, because the power at issue—deciding what type of elections will be funded using generic appropriations to the Bureau of Corporations, Elections and Commissions’ “all other” budget category—is deferred to the SOS’s discretion. *See* Record ¶ 14. The Legislature effectively waived its right to earmark funds for a particular purpose when it appropriated funds into the SOS’s baseline elections budget. The Legislature’s failure to specify which types of elections it choose to fund (or not) through its biennial appropriations demonstrates that the Legislative “power in issue” was intentionally shared with the SOS, and *not* “explicitly granted to one branch of state government, and to no other branch.” *Hunter*, 447 A.2d at 800.

The Senate’s demand for authority over the minutiae of appropriations earmarking would create absurd results if extrapolated across the complete state budget. The Legislature’s appropriations enactment routinely extends to over 800 pages in length. Requiring line-item detail on state expenditures, down to the minutiae of legislative authorizations for the SOS to conduct a special election, referendum

election or ranked-choice election, would render the state’s budget process nearly impossible, and would usurp the executive’s right to operate day-to-day obligations.

#### **IV. THE SECRETARY HAS AUTHORITY TO ARRANGE FOR THE RETREIVAL AND TRANSPORT OF RANKED-CHOICE BALLOTS.**

The current statutory framework for ranked-choice voting provides the SOS with broad authority to “adopt[] rules for the proper and efficient administration of elections determined by ranked-choice voting,” 21-A M.R.S.A. § 723-A(5-A), thereby granting the SOS authority to arrange for the retrieval and transport of ranked choice ballots if necessary to “tabulate the votes according to the ranked-choice voting method described in section 723-A.” 21-A M.R.S.A § 722(1).

The Senate contends that the omission of a specific reference to the retrieval and transport of ballots somehow renders the ranked-choice voting statutory framework void. Provisions of Section 723-A(5-A) that properly grant the Secretary supplemental rulemaking authority were adopted by the Legislature. *See* Record. ¶ 19; Ex. 9, at 1. The rulemaking authority in Section 723—A(5-A), adopted by the Senate, is expressly limited to such rules necessary “for the proper and efficient administration of elections determined by ranked-choice voting,” which includes the Secretary’s statutory obligation to “tabulate the votes,” 722(1). Rulemaking regarding retrieval and transportation of ballots is well within that discretionary authority delegated to the Secretary by the Legislature

The delegation of rulemaking authority in Section 723-A(5-A) is constitutionally valid because it ensures “that (1) regulation can proceed in accordance with the basic policy determinations made by those who represent the electorate and (2) some safeguard is provided to assist in preventing arbitrariness in the [Secretary’s] exercise of power.” *Lewis v. State Dep’t of Human Servs.*, 433 A.2d 743, 747 (Me. 1981).

Alternatively, if the statutory framework is deemed ambiguous as to retrieval and transport of ballots, the Court must look to the legislative intent of citizen legislators who adopted the ranked-choice voting statutory framework for the purpose of implementing ranked choice voting (Record ¶ 6), *and* the Legislature’s amendments to grant the Secretary supplemental rulemaking authority. (Record ¶¶19, 23). *See Mainetoday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104. The Legislative intent of the citizen legislators is clear: Determine the winner of these elections by ranked-choice voting. Record ¶ 6. Deference must be granted to that intent. “When the people enact legislation by popular vote, [the Court] construe[s] the citizen initiative provisions of the Maine Constitution liberally in order to facilitate the people’s exercise of their sovereign power to legislate.” *Allen v. Quinn*, 459 A.2d 1098, 1102–03 (Me.1983).

If ambiguity exists within statutory framework of ranked-choice voting as to the retrieval and transport of ballots, the demand of the citizen legislators for ranked-choice elections demonstrates that the Secretary is reasonably authorized to take steps necessary for the SOS to obtain and tabulate ballots for a ranked-choice election.

Moreover, even if the Secretary *does not* have authority to retrieve and transport ballots, a ranked-choice election may still lawfully be conducted by transmitting cast-vote records that are counted by municipalities before the records are transferred to a central location as necessary to “tabulate the votes according to the ranked-choice voting method described in section 723-A,” 21-A M.R.S.A § 722(1), because tabulation can be done without transporting original ballots.

## **V. STATUTES CONFLICTING WITH LATER-ENACTED RANKED-CHOICE VOTING LAWS ARE REPEALED BY IMPLICATION.**

All statutory provisions in conflict with 21-A M.R.S.A. 723-A are effectively repealed by implication. Provisions requiring primary elections to be decided by a plurality of voters (§ 723(1)) or in a manner the same as the general election (§ 339) are repealed by implication because the statutes cannot be read congruously; and the voters’ intent to apply ranked-choice voting to primary elections is expressly stated by the later-enacted statutory provisions.

Maine law establishes that an earlier statute is repealed by implication where the legislative intent in a later enactment was for the new statute to address the same subject matter as the pre-existing statute. *Lewiston Firefighters Ass'n, Loc. 785, Intern. Ass'n of Firefighters, AFL-CIO v. City of Lewiston*, 354 A.2d 154, 159-160 (Me. 1976). “An implied repeal results [...] when an earlier statute is repugnant to or inconsistent with a later one, for duplicative or conflicting enactments are contrary to rational and effective legislation.” *Id.* at 160.

Although implied repeal is a disfavored remedy, *Lewiston Firefighters*, 354 A.2d at 159, it properly applies here because citizens acting as legislators are entitled to broad deference when interpreting their legislative intent “in order to facilitate the people’s exercise of their sovereign power to legislate,” *Allen*, 459 A.2d at 1102–03. When interpreting a statutory change adopted by Maine voters, legislative intent may be gleaned from the question placed before the voters. *See Opinion of the Justices*, 283 A.2d 234, 235–36 (Me. 1971). No dispute exists that the question here was whether to use ranked choice voting as the method of determining successful election candidates. *See Record* ¶ 6. Accordingly, *any* pre-existing statutory provisions conflicting with the citizen’s ranked-choice voting initiative are properly repealed by implication.

The same result would apply if an ambiguity analysis was utilized. The Superior Court recognized that under general rules of statutory interpretation, “Our primary purpose in statutory interpretation is to give effect to the intent of the Legislature.” *Arsenault v. Sec’y of State*, 2006 ME 111, 11, 905 A.2d 285. “The first step in statutory interpretation is to discern legislative intent from the plain meaning of the statute.” *FPL Energy Me. Hydro, LLC v. Dep’t of Env’tl. Prot.*, 2007 ME 97, 25, 926 A.2d 1197. When two statutes conflict, the Court applies the analysis from *Opinion of Justices*, 311 A.2d 103, 108 (Me. 1973). Under either an implied repeal theory or an ambiguity analysis, the Superior Court correctly decided that the legislative intent of the people of Maine was to be carried out the implementation of ranked choice voting in the June 12, 2018, primary elections.

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