

including how to complete and RCV ballots. It is imperative that the Court sustain the lawful implementation of RCV.

I. RCV IS THE LAW

One statute — Title 21-A of the Maine Statutes — governs elections in the State of Maine. The people, as is their “absolute right” under the Maine Constitution, *Opinion of the Justices*, 673 A.2d 693, 697 (Me.1996), enacted Section 723-A (Determination of Winner in Election for an Office Elected by Ranked Choice Voting), and repealed the Act to Implement Ranked-Choice Voting in 2021. The Court’s task in interpreting Section 723-A is “to give effect to the intent of the Legislature,” i.e. the people. *Arsenault v. Secretary of State*, 905 A.2d 285, 288, 2006 ME 111, ¶ 11 (quoting *Cobb v. Bd. of Counseling Prof’ls Licensure*, 2006 ME 48, ¶ 11, 896 A.2d 271, 275).

The purpose of that statute is clear: primary elections in Maine are to be determined by RCV. In November 2016, a clear majority of Mainers voted to replace Maine’s plurality system of voting for RCV in certain primary and general elections. The vestigial language contained in 21-A M.R.S.A. § 723(1), enacted in 1985, does not alter that intent. As the Superior Court correctly concluded in its April 3, 2018 Order in *Committee for Ranked-Choice Voting v. Dunlap*, CV-18-24 (the “Order”), that “there is no question that the Ranked-Choice Voting Act, enacted by successful citizen’s initiative, was drafted with the intent that the

system of ranked-choice voting would be used to determine elections.” Order at 12-13. Citing this Court’s earlier directives, the Superior Court also correctly concluded that newly-adopted Section 723-A “being the most recent expression of the legislative will, must be deemed a substitute for previous enactments, and the only one which is to be regarded as having the force of law.” Order at 11.

II. THE LEGISLATURE HAS TASKED THE SOS WITH IMPLEMENTING ELECTION LAW

Elections are a – if not *the* – core constitutional function of a democracy.

The Legislature has delegated the task of administering this core constitutional function to the Secretary. For example:

- “The Secretary of State shall keep election tabulations in his office for 10 years.” 21-A M.R.S.A. § 23(6). This section also addresses the Secretary’s record-keeping responsibilities with respect to ballots and election materials (§ 23(7)); and the return of votes cast report (§ 23(12-A)).
- “The Secretary of State shall design the application” used for voter registration, and any alternative applications. 21-A M.R.S.A. § 152(5), § 153-A(1), § 182.
- “The Secretary of State is authorized to conduct maintenance of the central voter registration system.” 21-A M.R.S.A. § 161(2-A), *see also* § 194.
- “The Secretary of State shall prepare the election ballots[.]” 21-A M.R.S.A. § 601; *see also* § 603 (preparation of sample ballots), 604 (emergency ballot procedures), § 604-A (authority to combine election ballots); § 606 (Secretary of State furnishes official ballots to each municipality); § 606-A (furnishing absentee ballots).
- The Secretary of State provides instructions to election officials and to voters to facilitate the election process. 21-A M.R.S.A. § 605-A.

The Secretary of State’s authority includes supervision or implementation of nearly all aspects of preparing for elections, conducting elections, and maintaining an election system. Therefore, it was only logical that the legislature should similarly task the Secretary of State with implementing ranked-choice voting, a new citizen approved method of tabulation of election results. The legislature did just that. Specifically, the Secretary of State was assigned the task of “establishing rules for the proper and efficient administration of elections determined by ranked-choice voting.” 21-A M.R.S.A. § 723-A(5-A). Establishing procedures “conducting” ranked-choice voting obviously entails the transportation, security, management, and counting of ballots, and the expenses related to that task. The Secretary of State has done exactly what the legislature directed, and acted well within his authority.

This Court should be very reluctant to interfere in this highly regulated – and Constitutionally core – arena. The Secretary’s office is and has been the agency with lawful, statutory authority to regulate elections. The Secretary, as is demonstrate by the stipulated facts, has a long-established expertise in elections and a developing expertise in RCV.

III. THE AGENCY HAS DISCRETION TO ALLOCATE UNRESTRICTED FUNDS CONSISTENT WITH BROADER DELAGATION OF AUTHORITY

Nor should the Court find a violation of the Legislature’s appropriation authority. The narrow question on referral is whether a violation occurs where the appropriation fails to expressly mention or endorse “RCV,” *i.e.* where an implementing agency (*e.g.* the Secretary’s office) is implementing a statutory provision that has not been called out separately from other provisions in the broader statutory scheme (*e.g.* Title 21-A) the agency has previously been tasked with implementing. The answer is no; there is no constitutional requirement for every single statutory provision to be called out and individually re-authorized with each biennial appropriation. The Secretary is implementing one portion of Title 21-A.

Indeed, the existing appropriations scheme underscores the Legislature’s longstanding policy (and the practical necessity) of giving the Secretary discretion to adapt and respond to circumstances – within the boundaries expressed by the Legislature, and absent an express prohibition – to implement the law. The Legislature has given the agency “flexibility to shift... funds within a particular ... appropriation account so that the agency can make necessary adjustments for unforeseen developments changing requirements.” *Lincoln v. Vigil*, 508 U.S. 182, 192–93, 113 S. Ct. 2024, 2031–32 (1993) (*citing LTV Aerospace Corp., supra*, at 318 (citation omitted)).

Specifically, the Secretary is drawing from “General Fund money,” Facts ¶ 39, and determined that the Secretary has sufficient unspent funds. While we have found no Maine case law on point, the Supreme Court’s guidance on the question of agency allocation of general or “lump sum” amounts allocated to it is clear: The courts must defer entirely to the agency’s allocation; the question is not even judicially reviewable.

The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way. For this reason, a fundamental principle of appropriations law is that where “Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on the agency.

Lincoln, 508 U.S. at 192–93 (internal quotes and citations omitted); *see also See also International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Donovan*, 241 U.S.App.D.C. 122, 128, 746 F.2d 855, 861 (1984) (Scalia, J.) (“A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit”). This principle controls here. The Secretary is

allocating unrestricted funds. His allocation is unreviewable. *Id.* At the very least, as noted above, his allocation decision made in the course of implementing a core Constitutional function should be given great deference.

The exception to an agency's general discretion to allocate funds within a lump-sum appropriation is where the legislature has expressly prohibited the expenditure of funds for a particular purpose. *See U.S. v. Dickerson*, 310 U.S. 554, 555 (1946). Here, however, the legislature has placed no such express restriction on the expenditure of the Secretary of State's discretionary budget on the implementation of ranked choice voting.

Although the Fiscal Note attached to an Act to Implement Ranked Choice Voting states that the Legislature chose to delay appropriation of additional funds for the implementation of ranked choice voting, nowhere does it prohibit the expenditure of previously allocated funds on such implementation.² Exhibit 14. At the time the Fiscal Note was written, the Secretary of State had expressed a need for additional money to implement ranked choice voting. In the fiscal note, the legislature explains that it is not appropriating additional funds at that time because ranked choice voting will not be implemented at that time. Subsequently, the Secretary of State concluded that there are sufficient, previously allocated funds to implement ranked choice voting. Facts ¶ 45; Exhibit 26. At no point has

² Further, statements made in a fiscal note do not carry the force of law. This Court should decline to look to extra-statutory sources to infer legislative intent to restrict the expenditure of previously allocated discretionary funds for the conducting of elections. *Cf. Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993).

the legislature expressed any limitation on the Secretary of State's discretion to expend previously allocated funds on the implementation of ranked choice voting.

A failure to allocate funds is not — factually or legally — the same as an explicit denial of appropriations. To hold otherwise would be require the legislature to specifically name every activity an agency is permitted to undertake. Instead, a general grant of discretion to expend certain funds is an authorization to carry out the law unless the legislature specifically directs otherwise. Here, the legislature has not passed an express prohibition on the Secretary of State expending funds to carry out elections by ranked choice voting. This Court should not read one into the legislature's explanation of why it chose to delay a requested appropriation that later became unnecessary.

The suggestion that the Secretary is legally prohibited from handling ballots — unsupported by any citation to statute or legal precedent — ignores both the specific provisions of the Act and the overall purpose of the Bureau of Corporations, Elections and Commissions. The Senate cannot point to any provision of Maine law which casts the slightest doubt on the clear and essential authority included in the Act, and cannot explain how the Secretary could carry out

the procedures set forth in §723-A(2) without arranging for retrieval and transport of ballots.³

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³ Constitutional provisions directing municipalities to “sort, count, and declare” the results of general elections do not apply to the nominations by primary elections at issue here. *See* Me. Const. art. IV, pt. 1, §5; Me. Const. art. IV, pt. 2, §3; Me. Const. art. V, pt. 1, §3.