

STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-18-130

MAINE STATE SENATE,)
)
Plaintiff)
)
v.)
)
SECRETARY OF STATE,)
)
Defendant)
)
COMMITTEE FOR RANKED-CHOICE)
VOTING, et al.,)
)
Intervenors)

SECRETARY OF STATE'S
POSITION PAPER

As confirmed on April 3, 2018, by the Superior Court in *Committee for Ranked-choice Voting v. Matt Dunlap*, AUGSC-CV-18-24 (Me. Super. Ct., Ken. Cty., Apr. 3, 2018), the Maine statutes currently in effect require that ranked-choice voting (“RCV”) be used to determine the winners in the upcoming primary elections on June 12, 2018. The only elections that will be subject to RCV in the upcoming primary are the contests for the Republican and Democratic Party nominations for Governor, the Republican Party nomination for Representative to the Legislature in House District 75, and the Democratic Party nomination for Representative to Congress in District 2. No candidates

seeking the nomination of a party to the office of State Senator are in a contest that would be determined by RCV.

Secretary of State Matthew Dunlap (the “Secretary”) has determined that he has sufficient appropriated funds in his fiscal year 2018 budget to implement RCV for the upcoming primary election. In the biennial budget enacted on July 4, 2017 (P.L. 2017, c. 284), and in a subsequent action authorizing additional appropriated funds to be carried forward from previous fiscal years for software upgrades, the Legislature has appropriated to the Secretary sufficient funds to implement RCV. No additional specific legislative authority is required.

The Senate had the opportunity last year to provide specific direction to the Secretary regarding RCV implementation, but it declined to do so, instead granting the Secretary broad rulemaking powers to implement RCV. *See* P.L. 2017, c. 316, § 9, enacting 21-A M.R.S.A. § 723-A(5-A). The Legislature has refused to allow bills to be considered that would provide additional funding to implement RCV. *See* Stipulated Record, Exhibits (“Exs.”) 19 & 22. Now, at virtually the latest possible moment, when the Secretary has determined that he has enough funding to proceed, the Senate has filed this lawsuit, seeking to disrupt the Secretary from carrying out his duties under the Maine Constitution and existing Maine statutes to make sure that a primary election

occurs on June 12, 2018, in accordance with current election law. As this Court has long held, “[t]he right of the people, as provided by Article XXXI of the constitution, to enact legislation and approve or disapprove legislation enacted by the legislature is an absolute one and cannot be abridged directly or indirectly by any action of the legislature.” *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 911 (1948).

The Senate has not been harmed by any action taken by the Secretary, and it will not be harmed by the implementation of RCV at the upcoming primary election. Nor has the Senate identified any cause of action authorizing any of the legal claims set forth in its complaint. Finally, the Senate’s legal claims are meritless. RCV is currently the law of Maine for this primary election, and the Secretary has the authority to implement RCV under the current existing statutory framework.

The positions of the Secretary on the reported questions and on timing constraints regarding the Court’s final action are as follows:

Question 1 - Non-appropriation: The Secretary has determined that his Department has sufficient funds available and appropriated in the biennial budget law, P.L. 2017, c. 284, as “All Other” funds, together with monies carried forward for software upgrades, to implement ranked-choice voting in the June 12, 2018 Primary Election. *See* Exs. 7 & Ex. 26; and Stipulated Facts

(“Stip.”) ¶¶ 38 - 47. In so doing, he is exercising an appropriate Executive Branch function, not encroaching on the authority of the Legislative Branch.

The Senate’s claim that the Legislature must appropriate funds expressly for the purpose of implementing RCV in order for the Secretary to be authorized to spend current “All Other” appropriations for this purpose is incorrect as a matter of law. The absence of specific language in the budget law referencing ranked-choice voting is of no legal consequence because the budget law does not appropriate funds for specific activities of the Department. Indeed, in the budget, the Legislature does not specifically appropriate funds for “elections” at all – whether primary, referendum, special, or general – even though the Department is responsible, by statute, for administering statewide elections in every biennial budget cycle. Stip. ¶ 14; Ex. 7; *See generally* Title 21-A. The authorization to conduct this primary election by RCV was enacted by the people of Maine.

Even if the Secretary did not have sufficient funds available to implement RCV by virtue of the budget bill enacted by the Legislature (which is not the case here), the Maine Constitution contemplates that initiated measures requiring the expenditure of funds go into effect 30 days after the public proclamation of the election results in those circumstances where necessary expenditures do not exceed the available and unappropriated state

funds. Me. Const. art IV, pt. 3, § 19. There is no question that the amount required to implement RCV does not exceed the amount of available and unappropriated state funds as of the effective date of the Ranked-Choice Voting Act (“RCVA”). *See* Stip. ¶ 8. Thus the citizen’s initiative, which is now the law in Maine at least for this primary election, provides a “constructive” appropriation.

Question 2 – Scope of Secretary’s Authority: For “elections determined by ranked-choice voting,” including all primary elections, the RCVA directs the Secretary of State to “tabulate the votes according to the ranked-choice voting method described in section 723-A.” 21-A M.R.S.A. § 722(1), as amended by I.B. 2015, c. 3, § 4 and P.L. 2017, c. 316, § 5. As Deputy Secretary of State Julie L. Flynn explained to this Court in her affidavit of March 3, 2017, the only way to tabulate the votes according to the RCV method in a multi-district race, such as a Congressional or gubernatorial primary, is to bring all the ballots and/or memory devices from municipalities within that entire electoral district to a central location where they can be read using computer software that is capable of redistributing voters’ second, third and subsequent choices in multiple rounds of RCV counting. *See* Ex. 6, ¶¶ 21-23; 21-A M.R.S.A. § 1(35-A), as enacted by I.B. 2015, c. 3, § 2, and amended by P.L. 2017, c. 316, § 2 (Exs.

3 & 14). This is exactly what the Secretary proposes to do for the June 12, 2018 primary. *See* Exs. 10, 20, 21.

In the fall of 2017, the Legislature expressly granted rule-making authority to the Secretary 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), enacted by P.L. 2017, c. 316, § 10, and not suspended by the people’s veto. *See* Exs. 14 & 15. The Legislature specified that these rules “[a]t a minimum” “must include procedures, as determined appropriate by the Secretary of State, for requesting and conducting recounts of the results as determined in the rounds of tabulation described in [section 723-A] subsection 2.” This is a broad grant of rulemaking authority made by the Legislature with full knowledge of how the Secretary intended to exercise it. *See* Exs. 6 & 10. If the Legislature had wished to narrow the scope of the Secretary’s rulemaking power, or to direct the Secretary to employ different methods to carry out his statutory obligations, it could have done so when enacting Chapter 316 of the Public Laws of 2017. Its failure to have done so does not generate a legal basis for one body of the Legislature to file a lawsuit claiming that the Secretary is acting beyond the scope of his authority, or to complain that he is acting without sufficient delegation of authority by the Legislature. *See State v. Fin and Feather Club*, 316 A.2d 351, 356 (Me. 1974)

(“general grant of power, unaccompanied by definite directions as to how the power is to be exercised, implies the right to employ means and methods necessary to comply with statutory requirements”).

Question 3 – Conflicting statutes: The Secretary concurs with the Superior Court’s analysis of this claim in *Committee for Ranked-choice Voting v. Dunlap*, Docket No. AUGSC-CV-18-24 (Me. Super. Ct., Ken. Cty. April 3, 2018) (Murphy, J.).

Question 4 – Standing: While there may be rare circumstances in which one body of the Legislature has standing to sue an Executive Branch agency or constitutional officer for violating the Separation of Powers clauses of the Maine Constitution, this is not one of them. The Senate has not demonstrated an “injury in fact” caused by the Secretary of State’s implementation of RCV in the upcoming June primary for two reasons: 1) the Secretary is not spending money that was not appropriated to his Department and available for election administration; and 2) the Secretary has not exceeded any delegation of authority to implement RCV. In addition, no State Senator is in a contest that will be determined by RCV in this primary (Stip. ¶ 49) or in the general election. 21-A M.R.S.A. § 1(27-C)(A) & (B); *see* Ex. 15.

Question 5 – Political Question Doctrine: The political question doctrine “concerns ‘questions of which courts will refuse to take cognizance,

or to decide, on account of their purely political character, or because their determination would involve an encroachment upon the executive or legislative powers.” *Wright v. Dep’t of Defense & Veterans Servs.*, 623 A.2d 1283, 1284-85 (Me. 1993) (quoting *Black’s Law Dictionary* 1043 (5th ed. 1979)). The source of this doctrine is the separation of powers principle, which prevents one branch of government from interfering with powers reserved to another branch. *Baker v. Carr*, 369 U.S. 186, 210 (1962); see *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982).

As discussed above, the Secretary’s actions to implement RCV are plainly within the scope of his authority and within the funds appropriated to his Department by the Legislature. How the Secretary decides to exercise his authority or spend funds that have been appropriated to the Department presents a nonjusticiable political question.

Question 6 – Ripeness: The Senate bears the burden of showing its claims are ripe, or justiciable. See *Hathaway v. City of Portland*, 2004 ME 47, ¶ 11, 845 A.2d 1168. To the extent the Senate presses any claims regarding the authority of the Secretary to promulgate RCV rules, such claims are not ripe. The Secretary’s rules have been proposed, and are in the review process. Stip. ¶ 28. “For a case to be ripe there must be a genuine controversy and a concrete, certain, and immediate legal problem.” *Clark v. Hancock Cty.*

Comms., 2014 ME 33, ¶ 19, 87 A.3d 712 (quotations omitted). That is, “[a] justiciable case or controversy involves a claim of present and fixed rights, as opposed to hypothetical or future rights.” *Hathaway v. City of Portland*, 2004 ME 47, ¶ 11, 845 A.2d 1168 (quotations omitted). “[R]ights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future.” *Connors v. Int’l Harvester Credit Corp.*, 447 A.2d 822, 824 (Me. 1980). Since the rules have not yet been finalized and adopted, any claim related to the proposed rules is not justiciable. *Maine AFL-CIO v. Superintendent of Ins.*, 1998 ME 257, ¶ 7, 721 A.2d 633 (recognizing that ripeness doctrine applies to judicial review of rules under 5 M.R.S. § 8058 and holding challenge to rule not ripe when pilot program created by rule had not yet been implemented).

Question 7 – Cause of Action: To proceed with its legal claims, the Senate must show that it has a legislatively created or judicially recognized right of action under a statute or the Maine Constitution. The Senate appears to bring this action solely pursuant to the Maine Declaratory Judgments Act, 14 M.R.S.A. § 5951, *et seq.* However, a claim for a declaratory judgment is not a cause of action; it is a form of relief. *Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172; *Hodgdon v. Campbell*, 411 A.2d 667, 669 (Me. 1980).

Time Constraints: Ballots have already been designed using the RCV lay-out on one side of the ballot for those contests to be determined by RCV, and the offices to be determined by plurality on the other side. Each side contains voter instructions specific to the method of voting for the candidates and offices listed. The Secretary's Office has a contractual obligation to provide final copy of all the ballot styles for the upcoming primary election to its contractor by April 20, 2018. The contractor has to return "printer proofs" to the Secretary by April 24, which must then be proofed and verified. The Secretary must approve the ballots for printing by April 27, 2018. Printed absentee ballots must be shipped to municipalities so that they are received by May 11, 2018, in order to make them available to voters 30 days before the primary election, as required by 21-A M.R.S.A. § 752.

The ballots for military and overseas voters are designed by a different process and uploaded to a secure website that may be accessed by individual voters with a log-in and password. By federal law, this must be accomplished so that ballots are available to military and overseas voters at least 45 days before the election – i.e., by Saturday, April 28, 2018. The design of these ballots is now complete, but could be revised between April 20 and April 28 if necessary.

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Respectfully submitted,

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