

State of Maine

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BEFORE THE JUSTICES  
OF THE SUPREME JUDICIAL COURT  
DOCKET NO. OJ-26-1

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**In the Matter of Request  
For Opinion of the Justices**

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**Brief of Professor Dmitry Bam**

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## **STATEMENT OF INTEREST**

I am a Professor at the University of Maine School of Law. I teach and write in the areas of constitutional law, particularly state constitutional law, election law, and judicial power. I submit this brief to provide the Court with my perspective on the constitutional issues raised by the Legislature's request. This brief expresses views that are my own and not an official position of the University of Maine School of Law or the University of Maine System.

## **STATEMENT OF THE CASE**

The Maine Constitution requires that the Governor and Legislature be elected by a "plurality" of the votes. In 2017, this Court advised that Ranked Choice Voting (RCV) violated this provision, a conclusion premised on the statutory understanding that a "vote" was complete upon the tally of the first preference when a "first plurality" is reached. *Op. of the Justices*, 2017 ME 100.

In response to that Opinion, the Legislature enacted LD 1666. This statute clarifies when and how a "vote" becomes final and effective for the purposes of Maine election law. Under the revised statute, "[t]he ranking of a candidate for an office on a voter's ballot is an instruction

from the voter on the relative order in which the voter intends the ballot to be tabulated.” LD 1666. In short, the voter’s first-preference marking is no longer presumptively the voter’s entire “vote.” Instead, only the final, fully tabulated preference derived from the voter’s ranked instructions constitutes the voter’s “vote.” After all these votes are counted, the person with the most votes is declared the winner. This case presents the question of whether the constitutional meaning of the term “vote” is capacious enough to encompass this “contingent preference” approach, and whether that approach satisfies the Maine Constitution’s plurality requirements.

### **SUMMARY OF THE ARGUMENT**

The Maine Constitution provides that the candidate receiving a plurality of the votes shall be declared elected. Although the word “plurality” has several possible meanings, the constitutional meaning in this context is clear: a plurality means the greatest number of votes. Under the revised RCV statute, the candidate with the greatest number of lawfully cast votes after all preferences have been counted is declared the winner. The system therefore complies with the plurality provisions of the Maine Constitution.

The Court’s earlier Advisory Opinion relied on a judicial assumption that a “vote” is synonymous with a voter’s first-choice mark. The Legislature has now corrected that assumption. Under the revised statute, a “vote” is based on – and only final after – a unitary, conditional instruction set provided by the voter is fully counted. A ballot containing rankings is a single vote that may require multiple steps to fully count. Because the “vote” must reflect the entire ranked sequence, no plurality exists, and no winner can be constitutionally determined, until that single vote is fully processed. The Constitution commands that the winner have the most votes; it does not dictate that the “vote” must be a primitive, single-choice mark.

The history of Maine’s plurality provisions confirms this understanding. Those provisions were adopted to prevent governmental actors from disregarding election results, especially when no candidate received a majority, and to ensure that the person with the most votes would prevail. They limit the ability of the Legislature to alter the outcome of an election after the votes have been cast. They do not limit the ability of the people to decide how elections will be conducted in the first place. Nothing in the Constitution’s text, structure, or history

suggests that the people intended to dictate ballot design or to freeze a particular method of counting votes. It would be an extraordinary conclusion that, in seeking to eliminate post-election manipulation by the government, the people also deprived themselves of the ability to adopt improved methods of voting and tabulation so long as the candidate with the most votes still wins.

Reading the plurality clauses to require first-past-the-post tabulation would therefore transform a limitation on legislative interference into a limitation on democratic choice. It would lock Maine into a single voting method and prevent future reform even when the constitutional rule that the candidate with the greatest number of votes prevails is fully honored. Other jurisdictions have experimented with a variety of voting methods, but under this interpretation the people of Maine alone would be confined to first-past-the-post voting. Courts ordinarily do not infer such restrictions on popular self-governance absent clear language, and the Justices of the Supreme Judicial Court should not do so here.

Because the revised statute ensures that the winner of the election is the candidate receiving the greatest number of lawfully (and fully)

counted votes, RCV complies with the plurality provisions of the Maine Constitution.

### **QUESTION PRESENTED**

The plurality clauses of the Maine Constitution require that the candidate with the greatest number of votes be declared elected but do not prescribe how votes must be tabulated. Does a system that determines the winner only after all lawfully cast votes have been fully counted satisfy those provisions?

### **ARGUMENT**

#### **I. The Plurality Clauses Require Only That the Candidate with the Greatest Number of Votes Be Declared Elected.**

The Maine Constitution provides that candidates for Governor and for the Legislature shall be elected by a plurality of the votes. The term “plurality” has a settled and ordinary meaning. A candidate receives a plurality of the vote when that candidate receives more votes than any other candidate after all the legally cast ballots have been counted, regardless of whether that number constitutes a majority.

Contemporary and modern dictionaries reflect this same understanding. A plurality is defined as the “largest number” or “greater number” among competing totals. See, e.g., Noah Webster, *An American*

Dictionary of the English Language (1828) (defining plurality as “a greater number”); Webster’s Third New International Dictionary (1961) (plurality is “an excess of votes over those cast for an opposing candidate”). Legal usage in election law has long employed the term in this sense. See, e.g., 29 C.J.S. Elections § 420 (plurality means the highest number of votes cast for any candidate).

The constitutional provisions themselves confirm that plurality refers to the *result* of the election, not to the mechanics of voting or counting. Each clause operates at the final stage of the electoral process. After the votes have been collected, counted, and returned, the relevant officials must determine which candidate has received the greatest number of votes and declare that person elected. The clauses do not prescribe ballot structure or design, limit the manner in which voters may express their preferences, or dictate how tabulation must occur.

Nothing in the text requires that voters select only one candidate, prohibits ranking or other forms of expressing preference, or mandates a single round of counting. That silence matters. When there are few “specifics beyond the naked reference to a [term] provided in the text of the Maine Constitution itself,” then “[t]he indefinite nature of the

constitutional text allows it to remain viable as circumstances change over time.” *Winchester v. State*, 2023 ME 23, ¶ 17, 291 A.3d 707, 716 (2023). As this Court has held, “[c]onstitutional 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.” *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983).

Where the Constitution is silent, it leaves matters to the Legislature and to the people. The constitutional command is simply that, once the votes have been lawfully counted, the candidate with the greatest number of votes must prevail, even if the candidate did not receive the majority of the votes. LD 1666 satisfies that command.

Historical plurality provisions in state constitutions were commonly adopted to prevent elections from being decided by legislatures or through multiple successive ballots when no candidate achieved a majority. These provisions were designed to ensure that elections would be resolved in a single electoral event rather than through repeated runoff contests or legislative selection. Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked Choice Voting*, 109 CAL. L. REV. 1773, 1810–18 (2021). Ranked-choice voting serves that same function by

producing a plurality winner from a single election without requiring a separate runoff. Because voters cast one ballot in one election and the outcome is determined from those ballots alone, RCV is consistent with the original purpose of Maine’s (and other states’) plurality provisions.

## **II. The Revised Statute Clarifies That the Constitutional Plurality Is Determined Only After All Lawfully Cast Votes Are Fully Tabulated.**

Many details of the process and tabulation of voting – such as the form of the ballot, the manner in which votes may be cast, and the procedures by which election officials tabulate and certify results – have historically been governed by statute. That is because “[t]he power granted to the Legislature of the State of Maine is plenary and subject only to those limitations placed on it by the Maine and United States Constitutions.” *League of Women Voters v. Sec’y of State*, 683 A.2d 769, 771 (Me. 1996). In other words, the Legislature “may enact any law of any character or on any subject unless it is prohibited, either in express terms or by necessary implication[.]” *Id.* This is why, in part, the standard of judicial review for legislative action is deferential.<sup>1</sup>

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<sup>1</sup> It is also why the 2017 advisory opinion of the Justices is so troubling. At the closing of their opinion, the Justices observed that, “For the first time in Maine’s history, the method by which the people of Maine vote for Governor, their chosen Senators, and their chosen Representatives has been substantially altered through the enactment of a statute rather

The revised RCV statute fits easily within this broad sweep. The law clarifies that a vote is not complete until all lawfully expressed preferences on the ballot have been tabulated in accordance with the statutory procedure. *See* LD 1666. Under the revised law, election officials must continue tabulation through successive steps until the counting process is complete and the candidate receiving the greatest number of votes is determined. Only at that point is the winner declared.

This clarification directly addresses the faulty premise underlying the Court’s earlier advisory opinion. In that opinion, the Court reasoned that a “winning candidate” of a so-called “first plurality” could exist after the initial tally of first-preference rankings alone, before the vote tally

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than through a constitutional amendment.” *Op. of the Justs.*, 2017 ME 100, ¶ 70, 162 A.3d at 211-12.

But the Legislature has long regulated not only how elections are conducted but how votes are counted and winners determined through ordinary legislation. Statutes governing recounts, voter-intent standards, absentee ballot inclusion, and certification all shape how ballots are aggregated into official totals. *See, e.g.*, 21-A M.R.S. § 696 (prescribing rules for counting ballots and determining voter intent), §§ 711–722 (governing the reporting, review, and certification of vote totals), § 737A (establishing recount procedures). Ranked-choice voting, though significant, is a change of degree rather than kind within this established framework, because it, too, affects tabulation, not voter participation. The method may be novel, but the Legislature’s authority to regulate vote counting is not.

Furthermore, this “worry” appears unmoored to any constitutional doctrine, text, or principle – and is contrary to the proper role of the Court vis-à-vis the Legislature. As some commentators noted, there is no free-floating “substantialness” prohibition on legislative action that does not otherwise violate the Maine Constitution. *See* Pildes & Parsons, 1818. It is also a particularly poor fit where the Legislature aims to improve the process of democratic self-government. *See infra* Section V.

had concluded. *Opinion of the Justices*, 2017 ME 100, ¶ 65 (2017). The Court observed that one candidate might receive more first-preference rankings than any other candidate and therefore appear to have the most votes at that first step in the counting process. From that premise, the Court concluded that continued tabulation could alter the outcome after that “first plurality” had already been determined.

The revised statute makes clear that the initial tally of first preferences does not determine the final vote totals. First-preference counts are an intermediate step in the tabulation process, not the completed count of votes required by law. A ballot that contains ranked preferences expresses the voter’s choices for the election as a whole. The statute directs that those preferences must be taken into account in the order specified by the voter until the counting process concludes. *See also* Richard H. Pildes & G. Michael Parsons, *The Legality of Ranked-Choice Voting*, 109 CAL. L. REV. 1773, 1784–90 (2021) (explaining that ranked choice voting determines a single winner based on the greatest number of votes after full tabulation rather than the initial preference count). There is no reason why this explicit clarification and articulation of the

process by the Legislature would run afoul of any constitutional limitation.

The 2017 Opinion conflated a “runoff election” with “tabulation rounds.” A runoff is a second legal event requiring voters to return to the polls, cast new ballots, and express new intent based on changed circumstances. The Constitution does not allow for this to take place, but RCV involves none of this. The voter casts a single ballot at a single time. The “rounds” are merely the mechanical steps of the counting process used to ascertain the voter’s final, fixed intent. Because there is only one vote, the final tally is, by definition, a plurality of the votes cast in that election. The Legislature has the power to define the method of voting and counting, and the Court should not mistake one election’s slightly extended tallying process for a series of separate, new elections.

Under this framework, there is no legally operative plurality until tabulation is complete. A candidate who appears to lead based on a count of first preferences has not yet received the greatest number of lawfully counted votes. That determination can be made only after all ballots have been processed according to the statutory rules. The Constitution

requires that the candidate with the greatest number of votes be declared elected. The revised statute specifies how that number is calculated.

In its earlier advisory opinion, the Court used an example of a candidate holding a “first plurality” after the initial count of the preferences. That example did not identify a constitutional problem; rather, it identified a stage in the counting process before the vote totals are final. Election procedures routinely involve intermediate counts that do not determine the outcome, including absentee ballot processing, provisional ballot verification, and recounts. The existence of a preliminary tally does not establish the winner of an election.

Even beyond the Legislature’s general plenary authority, its authority to “prescribe the manner in which the votes shall be received, counted, and the result of the election declared” is explicit. Maine Const. art. IX, § 12. By clarifying that a vote is complete only after all preferences have been counted, the Legislature has ensured that the plurality determination occurs at the conclusion of the counting process, not at an intermediate stage. Nothing in the Constitution prohibits this approach. To the contrary, it respects the constitutional command that

the candidate receiving the greatest number of votes, once all votes are lawfully counted, must prevail.

The revised statute therefore eliminates the ambiguity originally identified by the Court. It confirms that ranked choice voting produces a single final tally of votes from which the plurality winner is determined. Because the candidate declared elected is the candidate with the greatest number of lawfully counted votes, the system complies with the plurality provisions of the Maine Constitution.

### **III. The History of the Plurality Provisions Shows They Were Adopted to Prevent Legislative Selection of Winners, Not to Prescribe Voting or Tabulation Methods.**

The historical background of Maine's plurality provisions confirms that they were adopted to prevent governmental actors from selecting election winners when no candidate received a majority, not to dictate how votes must be cast or counted. The initial 1820 Constitution required that the Governor receive a majority of the votes. If no candidate achieved a majority, the Legislature was empowered to choose the Governor from among the leading candidates. This system effectively allowed the Legislature to decide the outcome of an election even when one candidate had received more votes than any other.

By the late nineteenth century, that arrangement had become a source of political controversy and instability. In the election of 1879, no candidate received a majority, triggering the constitutional mechanism that transferred the decision to the Legislature. The ensuing dispute involved competing claims to office and intense political maneuvering and revealed the risks of allowing elected officials to override the voters' preferences when no candidate secured a majority. Civil unrest followed, culminating in a constitutional crisis in which rival factions mobilized militias and former Governor Joshua L. Chamberlain famously rode to the State House to prevent armed conflict and ensure the peaceful transfer of power. *See* RONALD C. WHITE, ON GREAT FIELDS: THE LIFE AND UNLIKELY HEROISM OF JOSHUA LAWRENCE CHAMBERLAIN 282-290 (2023). In response, the people amended the Constitution in 1880 to replace the majority requirement with a plurality rule. The amendment ensured that the candidate receiving the greatest number of votes in a single election would be declared elected without further action by the Legislature and without the need to hold a new, separate election.

Nothing in the text or history of the amendment suggests that the people intended to regulate the mechanics of voting or counting. The

problem they confronted was not ballot design or tabulation methods. It was the possibility that governmental actors could disregard the voters' choices and install a different candidate. *Id.* Interpreting the plurality provisions as prescribing a particular voting method would attribute to the framers a purpose wholly unrelated to the problem they sought to solve. The amendment was designed to limit legislative interference after the votes had been cast, not to limit the ability of future generations to determine how elections should be conducted in the first place.

Indeed, it would be an extraordinary conclusion that, in seeking to prevent the Legislature from manipulating election outcomes, the people simultaneously restricted their own ability to improve the electoral process. Nothing in the historical record suggests that the voters of 1880 intended to bind themselves permanently to a single ballot format or tabulation method. To the contrary, the amendment presupposes that elections will be conducted according to whatever procedures the law provides, so long as the candidate with the greatest number of votes ultimately prevails.

Reading the plurality clauses to require a single form of tabulation would transform an amendment intended to protect voter choice into one

that restricts it. Under such an interpretation, the people of Maine would be uniquely barred from experimenting with alternative methods of voting or counting even when those methods continue to produce a plurality winner. Nothing in the history of the amendment supports such a limitation, and it would be inconsistent with the amendment's purpose of strengthening democratic self-government.

#### **IV. The Plurality Provisions Constrain Government Interference with Election Outcomes, Not the People's Authority to Design Elections.**

The plurality provisions are best understood as structural safeguards within Maine's constitutional system. They limit the ability of governmental actors to disregard the outcome of an election once the votes have been cast and counted. They do not limit the authority of the people, acting through the Legislature or through direct democracy, to determine how elections will be conducted in the first instance.

This allocation of authority reflects the basic structure of Maine's Constitution. The Constitution establishes the governing principles of elections, including the requirement that the candidate receiving the greatest number of votes be declared elected. The Legislature, by contrast, is charged with implementing those principles by regulating the

mechanics of voting, ballot design, and tabulation. Title 21-A of the Maine Revised Statutes, which comprehensively governs election procedures, reflects that longstanding division of responsibility.

The plurality clauses operate at the final stage of the electoral process. After the legally prescribed procedures have been followed and the votes have been counted, the Constitution requires that the candidate with the greatest number of votes prevail. The clauses ensure that election outcomes are determined by voters rather than by officials exercising discretion after the fact. They are directed at preventing governmental manipulation of results, not at prescribing how votes must be cast or counted.

Reading the plurality provisions as mandating a particular method of tabulation would invert that structure. Instead of limiting governmental interference, such an interpretation would limit democratic choice. It would treat a provision designed to protect the voters' decision as a restriction on the voters' ability to shape the electoral process itself. It would lock Maine into a single voting method and prevent future reform even when the constitutional rule that the

candidate with the greatest number of votes prevails is fully honored. Nothing in the constitutional text supports such a transformation.

The revised RCV statute illustrates the proper relationship between constitutional command and legislative implementation. By clarifying that a vote is not complete until all lawfully expressed preferences have been tabulated, the Legislature has specified how votes are to be counted in order to determine which candidate ultimately receives the greatest number of votes. The statute does not alter the constitutional rule. It implements that rule.

#### **V. Democratic Self-Government Strongly Supports Allowing the People to Experiment with Election Methods**

The design of elections lies at the core of democratic self-government. Decisions about how ballots are structured, how votes are expressed, and how those votes are counted determine how the will of the people is translated into public authority. For that reason, American constitutional practice has long entrusted the details of election administration to the political process, subject to only limited constitutional constraints.

Ranked choice voting represents one such democratic choice. The people of Maine approved its use through referendum, and the

Legislature has refined the system in response to experience and to the concerns expressed by this Court. The revised statute reflects an effort to ensure that the electoral system accurately captures voter preferences while remaining faithful to the constitutional requirement that the candidate receiving the greatest number of votes be declared elected.

Allowing the people to experiment with voting methods unless the state constitution clearly forbids such experimentation, serves important democratic values. Different electoral systems shape campaign incentives, voter participation, and the perceived legitimacy of election outcomes. No single method has been universally adopted across the United States, and states and municipalities have long employed a variety of systems. This diversity reflects the understanding that election design is properly a matter for democratic deliberation rather than constitutional prescription.

Interpreting the plurality provisions to forbid such experimentation would impose a rigid rule where none is expressed in the constitutional text. It would prevent the people of Maine from adapting their electoral system to changing circumstances even when the fundamental constitutional requirement that the candidate with the most votes

prevails remains fully satisfied. Courts should hesitate to read constitutional provisions in a manner that disables democratic institutions from addressing issues central to governance unless the text clearly compels that result.

Even if the constitutional text were less clear than the foregoing analysis demonstrates, principles of democratic self-government would counsel strongly in favor of deference to the people's choice. Election design and vote tabulation are not peripheral matters. They are the mechanisms through which democratic authority is created. When the Constitution does not unmistakably prohibit a particular method, the decision how best to structure elections should rest with the people and their elected representatives.

As the Alaska Supreme Court stated in unanimously upholding RCV under a similar "greatest number of votes" provision in the Alaska 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 on the very provisions of the Constitution which prohibit it." *Kohlhaas v.*

*State*, 518 P.3d 1095, 1100 (Alaska 2022) (quoting *Johnson v. City of New York*, 274 N.Y. 411, 9 N.E.2d 30, 38 (1937)).

Ranked choice voting advances democratic participation by allowing voters to express their preferences more fully. A voter who supports a candidate unlikely to win can still indicate alternative choices without fear that doing so will render their ballot ineffective. Ignoring those additional preferences once they have been lawfully expressed would elevate form over substance and discard information that voters have chosen to provide. The revised statute ensures that these preferences are taken into account before determining which candidate has received the greatest number of votes.

Prohibiting ranked choice voting would therefore do more than invalidate a particular statutory scheme. It would significantly narrow the range of electoral reforms available to the people of Maine and place the Constitution in opposition to democratic innovation. Nothing in the plurality provisions requires such a result. To the contrary, those provisions were adopted to ensure that election outcomes reflect the will of the voters.

Respecting the people’s decision to adopt ranked choice voting is consistent with that objective. The Constitution should not be read to disable the people from governing themselves in the very domain where self-government matters most. So long as the electoral system ultimately identifies the candidate who receives the greatest number of lawfully counted votes and declares that candidate elected, the constitutional requirement is satisfied.

## **CONCLUSION**

At first glance, this case may appear to be about the constitutionality of a single voting method – RCV. But it is about more than that. It is about whether the plurality provisions of the Maine Constitution lock Mainers into one particular election method. Across the country, jurisdictions are experimenting with a variety of election methods, including ranked choice voting, cumulative voting, and single nontransferable vote systems. Each differs in ballot design and tabulation methodology, but all share a common feature: the winner is the candidate who receives the greatest number of votes once all lawfully cast ballots are counted under the governing rules. Nothing in the text, history, or structure of Maine’s Constitution suggests that the

people intended to forbid all such alternatives and require first-past-the-post tabulation alone. To read the plurality provisions in that manner would transform a rule designed to ensure that elections are decided by voters into one that restricts how voters may express their preferences. The Maine Constitution safeguards election outcomes, not particular election mechanics or ballot designs. The Constitution requires that the candidate with the most votes prevail. Ranked choice voting satisfies that requirement. The Justices should therefore answer the question propounded by the Legislature in the affirmative.

Respectfully submitted,

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