State of Maine
Supreme Judicial Court

Docket No. OJ-26-1

In the Matter of Request
For Opinion of the Justices

Before the Justices of the Supreme Judicial Court
On Referral from the Maine Legislature

Reply Brief for Maine State Senate President and Maine State Speaker of the House

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Introduction

The Maine State Senate President and Maine State Speaker of the House submit this reply brief in further support of their view that this is a solemn occasion and the amendments to the ranked choice voting (RCV) law in L.D. 1666 satisfy the "plurality" requirements of the Maine Constitution.

Everyone who took a position on the issue agrees that this constitutional issue constitutes a solemn occasion. That includes the only two (out of 11) filers who contend L.D. 1666 is unconstitutional, the Republican National Committee (RNC) and the Attorney General (AG). *See* RNC Brief (Br.) 9–12; AG Br.19–20.

In evaluating the RNC's explication of the Maine Constitution, it is telling that no Maine Republican legislator or voter signed the brief (or filed separately), and the brief's lead signatory is the non-lawyer RNC Chief of Staff from DC. Notably, the RNC brief did not address the Maine RCV experience. Meanwhile, the AG proceeded from the position that "[t]he Justices already answered this question in 2017[,]" AG Br. 21, while failing to describe correctly Maine's RCV experience. That context contradicts their constitutional constructions.

Argument

I. Everyone Agrees that the "Plurality" Challenge to L.D. 1666 Presents a Solemn Occasion.

We begin with common ground. None of the various filers disputes that the Justices should issue an Opinion of the Justices whether the amendments to the

ranked choice voting law in L.D. 1666 conform with the "plurality" requirements of the Maine Constitution. *See Opinion of the Justices*, 2017 ME 100, ¶¶ 9–55, 162 A.3d 188 (*2017 Opinion*); Maine State Senate President and Maine State Speaker of the House (Presiding Officers) Br. 9–15. We, therefore, turn to the merits.

II. L.D. 1666 Conforms with the "Plurality" Requirements of the Maine Constitution.

Although both the AG and the RNC treat this constitutional question as a done deal based on the *2017 Opinion*, *see generally* AG Br. (citing it 9 times); RNC Br. (citing it 7 times), neither of them acknowledge the limitations on such Opinions that the Justices expressed in the *2017 Opinion*. *See 2017 Opinion*, 2017 ME 100, ¶ 9 (Opinions represent individual opinions that are not binding precedent on former or current Justices or even accorded *stare decisis* effect). Similarly, both the AG and the RNC gloss over the fact that the Justices were opining about a law that had not yet been used in Maine. The question today, of course, is whether the specific proposed law violates the specific plurality requirements of the Maine Constitution based on the actual operation of ranked choice voting in Maine.

In addressing that specific question, the AG starts on the right path: "Interpretation of the Maine Constitution begins with the text." AG Br. 20 (citation omitted). The AG recognizes that the Justices should rely on the "plain language" of the Maine Constitution. *Id.* (citation omitted); *see also State v. Coffill*, 2026 ME 18, ¶ 12 ("When interpreting a statute, we look first to the plain language of the statute

to determine its meaning if we can do so while avoiding absurd, illogical, or inconsistent results."). Unfortunately, the AG then abandons this well-trod path, ignoring the plain language of both the Maine Constitution and L.D. 1666.

Concerning the plain language of the Constitution, the AG does not even return to actual constitutional language for another five pages of the argument, which specifies only that the Secretary of State "shall determine the number of votes duly cast for the office of Governor, and in case of a choice by *plurality of all of the votes returned* they shall declare and publish the same." Me. Const. art. V, pt. 1, § 3 (emphasis added) (quoted in part in AG Br. 25); *accord* Me. Const. art. IV, pt. 1, § 5 (State Representative); Me. Const. art. IV, pt. 2, § 3 (State Senator).

Neither the AG nor the RNC points to *any* plain language that requires the election to be declared when someone reaches the "first plurality" or when someone is ahead "after one round of counting." *See* AG Br. 21–26 (citing *2017 Opinion*, 2017 ME 100, ¶¶ 64–66); *accord* RNC Br. 22–25; *contra Kohlhaas v. State*, 518 P.3d 1095, 1120–21 (Alaska 2022). The Justices will search in vain in the actual constitutional language to find that requirement. Although the AG dismisses the Alaska Supreme Court's criticism of the *2017 Opinion* on this front as a "foreign court interpreting a foreign constitution," AG Br. 7, Alaska is a U.S. State.

Beyond adding words and requirements to the Maine Constitution, the RNC and the AG ignore other plain language in the Constitution. Neither the RNC nor the

AG even cite—much less reconcile their argument with—the express delegation in the Constitution to the Legislature to determine how to count the votes: "The Legislature may by law … prescribe the manner in which the votes shall be received, counted, and the result of the election declared." Me. Const. art. IX, § 12 (ellipsis added).

Similarly, neither the RNC nor the AG attempt to square their repeated attacks on the use of machines to tabulate the ballots under RCV with the fact that the Maine Constitution has allowed voting machines since the days when Louis Brann was Governor: "Voting machines, or other mechanical devices for voting, may be used at all elections under such regulations as may be prescribed by law[.]" Me. Const. art. II, § 5. In short, the RNC and AG construct their constitutional arguments both using words that do not appear and ignoring words that do appear in the Constitution.

The RNC and the AG likewise refuse to acknowledge that the Legislature repeatedly made explicit in the amendments in L.D. 1666 that ranked choice voting only requires the winning candidates to receive a "plurality" of all votes cast. *See* Presiding Officers Br. 23 (citing 6 sections of L.D. 1666). The RNC and the AG dismiss this express legislative language in pejorative terms. *See* RNC Br. 14, 16, 17 (label, word substitutes, semantic changes, rebranding); AG Br. 7, 18 (wordsmithing, cosmetic changes, relabels). The explicit legislative language of L.D. 1666 is entitled to more respect than that. *See Dodd v. United States*, 545 U.S.

343, 357 (2005) ("We must presume that the legislature says in a statute what it means and means in a statute what it says there.") (cleaned up and quotation omitted).

The rhetoric of the RNC and the AG is belied by the theory and reality of ranked choice voting in Maine. The *Kohlhaas* court explained why as an immutable law of mathematics, the approach to RCV adopted by Maine and Alaska *does not* require a candidate to win a majority of *all* votes cast, and thus *is* plurality voting. *See Kohlhaas*, 518 P.3d at 1120–21. This mathematical theorem has been proven twice by Maine's RCV experience.

The RNC did not discuss Maine's RCV experience at all. Although the AG recognizes that "Maine's experience since 2017 has demonstrated that ranked-choice voting is a workable and reasonable way to decide elections," AG Br. 7, the AG misread key election results and thus failed to recognize that in actual operation RCV is a form of plurality voting.

According to the AG, in the 2018 Second Congressional District race involving Jared Golden, Bruce Poliquin, and two other candidates, Poliquin "was the plurality winner in the first round of tabulation," but after the two minor candidates were eliminated, "Golden achieved a majority of 50.6% of continuing ballots in the final round." AG Br. 16, 17. The "plurality winner" claim is based on the "first plurality" requirement that does not appear in the language of the

Constitution, while the "majority" claim is not based on the Constitution, which refers instead to a "plurality of *all* of the votes returned." Me. Const. art. V, pt. 1, § 3 (emphasis added). Rather, the AG's "majority" is limited to the "continuing ballots in the final round." AG Br. 17.

With this sleight of hand, the AG erases from the total of "*all* of the votes returned" the votes of every voter who returned a vote for a declared candidate but not Golden or Poliquin. When "*all* of the votes returned" are considered, Golden won the election with a plurality, but not a majority. *See Kohlhaas*, 518 P.3d at 1119; Presiding Officers Br. 25–26. Because the RNC and AG "must establish that there is no set of circumstances in which the statute could be read to be constitutional," *2017 Opinion*, 2017 ME 100, ¶ 59 (citations omitted), the Golden-Poliquin example alone eviscerates their constitutional claim.

And the Golden-Poliquin example is not an anomaly. In the 2022 Republican primary for State Senate District 16, there were three candidates. After the trailing candidate was eliminated, their second choices, if any, were allocated to the two leading candidates. The winner (who was also the leader after the first round) received the most votes, but, once again, only a plurality of *all* the votes returned:

Name	Final Vote	Percentage of Total Votes Cast
Michael Perkins	922	48.2%
Kevin Kitchin	845	44.1%
Exhausted ballots (contained votes for a candidate, but ranked neither Perkins nor Kitchin)	147	7.7%
Total Votes Cast	1914	100%

Secretary of State, *Previous Election Results* (2026), *available at* https://www.maine.gov/sos/elections-voting/election-results-data/previous-election-results. Maine's RCV experience proves the theorem. Twice.

Because the Maine Constitution requires only a plurality of all the votes returned and grants the Legislature the power to determine how to count the votes, the essence of the RNC and AG objection is that ranked choice voting looks different. Although it may represent a different way of clearing the bar, that, of course, does not mean that it is impermissible.

Indeed, the high jump analogy is apt. Although athletes went over the high jump by jumping and landing on their feet for nearly 80 years, in 1968 Dick Fosbury revolutionized the sport by jumping over the bar backwards:

Smithsonian, *The Fosbury Flop—A Game-Changing Technique* (2021), *available at* https://invention.si.edu/invention-stories/fosbury-flop-game-changing-technique. Because high jumpers could jump higher consistent with the rules, what was originally derided as the "Fosbury Flop" eventually was adopted by all high jumpers even though it looked initially alien to traditionalists. So, too, here.

III. The Justices Should Reject the AG's Throwaway Argument on "Sort, Count, and Declare."

In a couple of paragraphs at the end of his brief, the AG asserts that ranked choice voting also violates the "sort, count and declare" requirement of the Maine Constitution. *See* AG Br. 31. The AG does not even cite the relevant provision, much less provide its context and history. *See* Me. Const. art. IV, pt. 1, § 5; *cf.* AG Br. 8–13 (providing history of "plurality" requirements). Also, the AG does not suggest any meaning (or any limiting principle) for the terms "sort, count and declare." The Justices should not opine on this drive-by argument.

In his broad suggestion that any centralized tabulation would violate this requirement, the AG does not attempt to reconcile his position with the Legislature's power to "prescribe the manner in which the votes shall be received, counted, and the result of the election declared." Me. Const. art. IX, § 12. The AG likewise does not explain how his rigid application of this provision works today with the addition of constitutionally allowed voting machines. *See* Me. Const. art. II, § 5. If the AG was correct that all centralized tabulation is unconstitutional, that would appear to

invalidate ballots submitted under the Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA) because the Secretary of State—alone—issues, receives, and counts such absentee ballots. *See* 21-A M.R.S. § 783; 29-250 C.M.R. ch. 250, § 2(2) (July 2025) (UOCAVA regulations).

The lack of any developed argumentation and the possibility of collateral consequences demonstrate that this is a poor vehicle for an Opinion of Justices for many reasons. *See 2017 Opinion*, 2017 ME 100, ¶ 23 ("merely tentative, hypothetical and abstract"); *id*. ¶ 26 (not "sufficiently precise that we can determine the exact nature of the inquiry" and "resolution involves the determination of facts and the application of other provisions of law beyond those that have generated the inquiry"); *id*. ¶ 27 ("too complex to be answered in the absence of a case or controversy") (all footnotes and citations omitted). The prudent course on this two-paragraph argument fragment is to decline to issue an Opinion and wait to see if someone with standing files an actual case or controversy.

Conclusion

The Maine State Senate President and Maine State Speaker of the House respectfully request that the Justices opine that the "plurality" question presents a solemn occasion under the Maine Constitution, and that the proposed method of ranked choice voting, as amended, conforms with the "plurality" requirements of the Maine Constitution.

Dated: March 12, 2026

Respectfully submitted,

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