No. 18-2250

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Brett Baber, *et al.*

Plaintiffs-Appellants,

v.

Matthew Dunlap, Secretary of the State of Maine, *et al.*,

Defendants-Appellees,

Jared Golden,

Intervenor-Defendant-Appellee,

and Tiffany Bond, *et al.*,

Intervenors-Defendants-Appellees.

PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

On Appeal from the United States District Court for the District of Maine
Case No. 1:18-cv-00465-LEW

Pursuant to Federal Rule of Appellate Procedure 8(a)(2), Plaintiffs-Appellants move for an emergency injunction pending appeal preventing the State of Maine from certifying a winner of the November 6, 2018 election for Maine's Second Congressional District pursuant to Maine's Ranked-Choice Voting Act, 21-A M.R.S. § 723-A ("RCV Act").

This was the first-ever general election for federal office in our nation's history to be decided by "ranked-choice" voting ("RCV"), or "instant runoff" voting. RCV unconstitutionally forces voters to cast several votes in hypothetical future runoff elections when they cast their first and only ballot, and discards certain cast votes in order to manufacture a faux majority for the runoff winner. While a handful of jurisdictions use RCV in local races, no federal appellate court has ever addressed RCV's use in federal elections. The Maine Supreme Court has barred the Act, enacted in 2016, from use in state elections because it violates the state constitution. *Op. of the Justices*, 162 A.3d 188 (Me. 2017).

The 2018 election results prove Maine's RCV Act violated all voters' Due Process and Equal Protection rights, the Voting Rights Act, and Article I of the U.S. Constitution. In denying Plaintiffs' requests for a preliminary and permanent injunction, the district court sidestepped the explicit questions presented, often casting the questions at a more superficial level of analysis. In the absence of injunctive relief maintaining the status quo, the State may certify the election

results before this Court can consider Plaintiffs' claims, thereby permanently depriving them of the ability to vindicate their constitutional rights to a constitutionally compliant election and election results. The impending certification makes seeking relief from the district court pending appeal impracticable. Fed. R. App. P. 8(a)(2)(A)(i). For the same reason, and in light of the impending holidays, Plaintiffs also respectfully request a ruling on this Motion by December 21 and urge the Court to expedite briefing to the fullest extent appropriate. *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 7 (1st Cir. 2012) (discussing this Court's issuance of an injunction pending appeal and expedited briefing in light of an imminent deadline).

QUESTIONS PRESENTED

(1) Do voters have a substantive due process right under the U.S. Constitution's First and Fourteenth Amendments to know which candidates are standing for election at the time they cast their ballots? Relatedly, does a law that denies voters such knowledge violate the Voting Rights Act by depriving them of an effective vote?

(2) Does a state election law under which certain voters, but not others, have the ability to shift their vote from candidate to candidate, thereby affording them a greater degree and different kind of electoral power, violate the Fourteenth Amendment's Equal Protection Clause?

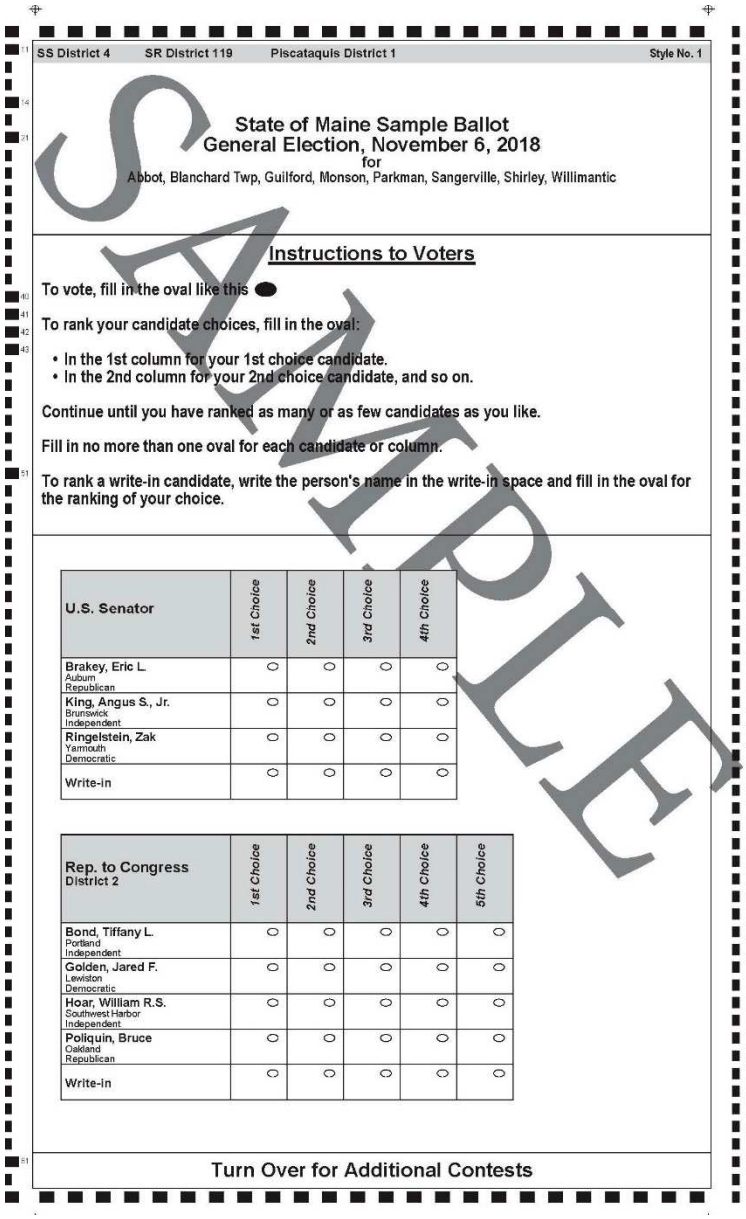
(3) Does an election law that dictates the outcome of a federal election by redistributing votes from one plurality winner to another, or by manipulating the electorate size to create an artificial majority winner, exceed a state's authority under Article I of the Constitution?

The district court sidestepped these issues by addressing fundamentally different questions, thereby committing reversible error. Plaintiffs respectfully submit that this case presents the type of serious legal questions that, combined with the requisite balancing of harms and interests, merit an immediate injunction pending appeal.

BACKGROUND

I. Maine's RCV Act and the November 6 Election

Maine's RCV Act purports to determine a winner by "majority" vote by collapsing initial and runoff elections into a single ballot. For an applicable office, voters vote for a first-choice candidate, a second choice, and so on:



SS District 4 SR District 119 Piscataquis District 1 Style No. 1

State of Maine Sample Ballot
General Election, November 6, 2018
for
Abbot, Blanchard Twp, Guilford, Monson, Parkman, Sangerville, Shirley, Willimantic

SAMPLE

Instructions to Voters

To vote, fill in the oval like this ●

To rank your candidate choices, fill in the oval:

- In the 1st column for your 1st choice candidate.
- In the 2nd column for your 2nd choice candidate, and so on.

Continue until you have ranked as many or as few candidates as you like.

Fill in no more than one oval for each candidate or column.

To rank a write-in candidate, write the person's name in the write-in space and fill in the oval for the ranking of your choice.

U.S. Senator	1st Choice	2nd Choice	3rd Choice	4th Choice
Brakey, Eric L. Auburn Republican	○	○	○	○
King, Angus S., Jr. Brunswick Independent	○	○	○	○
Ringelstein, Zak Yarmouth Democratic	○	○	○	○
Write-in	○	○	○	○

Rep. to Congress District 2	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice
Bond, Tiffany L. Portland Independent	○	○	○	○	○
Golden, Jared F. Lewiston Democratic	○	○	○	○	○
Hoar, William R.S. Southwest Harbor Independent	○	○	○	○	○
Poliquin, Bruce Oakland Republican	○	○	○	○	○
Write-in	○	○	○	○	○

Turn Over for Additional Contests

A candidate who receives an outright majority of first-choice votes in the first round wins. If none receives a majority, the candidate with the fewest first-choice votes is eliminated, and voters whose first-choice candidates are eliminated have their second-choice votes redistributed to "continuing" candidates. If a voter has not ranked a candidate who continues to the next round, the voter's ballot is "exhausted" and disregarded and the voter is discarded from the electorate. This

process repeats, eliminating candidates and reducing the electorate size until one candidate wins a "majority" of the undiscarded votes. *See* 21-A M.R.S. § 723-A; Me. Citizen's Guide to the Referendum Election, Nov. 8, 2016 at 50.[1]

Incumbent Representative Bruce Poliquin won a plurality of the votes on November 6 – besting his nearest competitor by more than 2,000 votes – in a four-way race against Jared Golden, Tiffany Bond, and William Hoar. Because Poliquin did not receive an absolute majority of first-choice votes, the Secretary of State ("Secretary") conducted a runoff vote tabulation under the RCV Act. In the runoff, the Secretary redistributed the votes of 23,427 voters who voted for Bond or Hoar as their first-choice candidates. Of those votes, 15,174 were transferred to either Poliquin or Golden based on the voters' second- or third-choice votes. In an outcome-determinative act, the Secretary then discarded the remaining 8,253 votes cast by voters who selected Bond or Hoar as their first-choice candidates, but whose ballots were "exhausted" in the runoff tabulation. *See* Sec'y Opp'n Ex. F-2 (Doc. 44-3).[2] After manipulating the vote count and culling the electorate in this manner, the Secretary declared Golden had won by a bare majority, even though Golden, like Poliquin, had earned only a plurality of the total votes cast in the election, as illustrated below:

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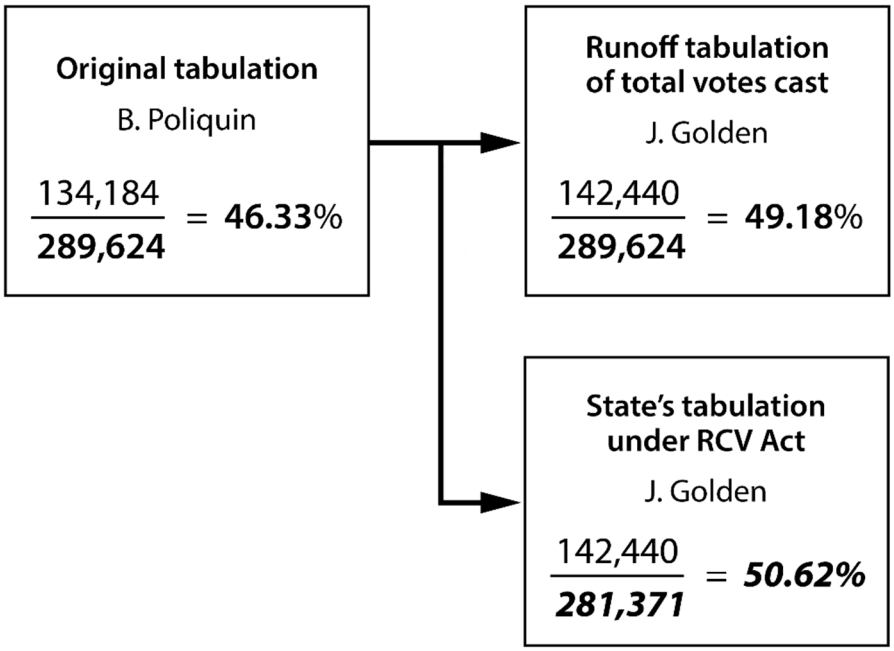
1 www.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf

2 All citations are to documents in the district court proceedings.



See id.

II. Procedural History

On November 13, 2018, Plaintiffs filed their Complaint challenging Maine's RCV Act as violating Article I and the First and Fourteenth Amendments of the U.S. Constitution and the Voting Rights Act. On November 15, the district court denied Plaintiffs' request for a temporary restraining order, observing that an equitable remedy "may be informed by the final tabulation of votes." The district court subsequently held a hearing on December 5, at which the parties agreed to consolidate consideration of Plaintiffs' request for injunctive relief with a final ruling on the merits. On December 13, the district court issued an order and opinion granting summary judgment for Defendants. Ex. A. This appeal immediately followed.

ARGUMENT

The Court considers four factors in granting an injunction pending appeal: (1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will be irreparably injured absent an injunction; (3) whether an injunction will substantially injure the other interested parties; and (4) whether an injunction is in the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Where, as here, the case is one of "initial impression wherein respectable minds might differ," Plaintiffs need only show there are "serious legal questions presented" if denial of an injunction will irreparably alter the status quo. *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979); *see also Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002) (equating test for stays and injunctions pending appeal). Plaintiffs satisfy these factors.

I. Plaintiffs Are Likely to Succeed on the Merits.

A. Maine's RCV Act Violates the First and Fourteenth Amendments and Voting Rights Act.

Maine's RCV Act triggers instant runoff elections when no candidate receives a majority vote in the initial election. This forces voters to vote in hypothetical future runoff elections when they cast their initial ballot without actually knowing the exact candidate matchup in the runoff – information critical to voter choice. The State conceded this at oral argument but contended – remarkably – that "[t]here is no constitutional right to know who's going to be in

the final round." Dec. 5, 2018 Hrg. Tr. at 87:21-22 (Ex. B). Plaintiffs expressly cited that concession as decisive to their Due Process claim:

> The state has argued… that there is no constitutional right to know who the candidates are on the ballot when you vote… We believe there is a constitutional right to know that, that it is critical to the effective right of the franchise, and we ask that a judge declare that act unconstitutional.

Id. at 102:22-103:4; *see also* Plaintiffs' Reply (Doc. 52) at 2-5, Mot. for P.I. (Doc. 3) at 8-13. The district court sidestepped this issue altogether and instead addressed other issues: e.g., "that RCV is susceptible to producing arbitrary or irrational election results," and that "a significant segment of the voting public cannot comprehend RCV sufficiently to cast a meaningful vote." Op. at 25. The court's failure to even take up the critical issue in Plaintiffs' substantive due process and Voting Rights Act claims is reversible error.

1. *The RCV Act Imposes a Severe Burden and Denies Voters an Effective Vote*.

Laws that impose "severe burdens" on voting must be "narrowly tailored to serve a compelling state interest." *Clingman v. Beaver*, 544 U.S. 581, 586 (2005). Even laws that impose "lesser burdens" on voting still must advance "important regulatory interests" and may not impose unreasonable, discriminatory restrictions. *Id.* at 587. In either case:

> A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments… against the precise interests put forward by the State as justifications for the burden

> imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Burdick v. Takushi, 504 U.S. 428, 434 (1992).

In determining whether a law imposes a "severe" burden, "[t]he judicial inquiry should be focused on the extent of [] obstacles, not merely technical, to casting an *effective* and *informed* vote," and should assess whether the law "minimiz[es]… voter confusion" and "maximiz[es]… [voters'] *appraisal of candidates*." *Walgren v. Howes*, 482 F.2d 95, 100 (1st Cir. 1973) (emphasis added). Laws that limit the choice of candidates and information presented on the ballot impose a "severe" burden. *See*, *e.g.*, *Norman v. Reed*, 502 U.S. 279, 282, 288-89 (1992); *Libertarian Party v. Scholz*, 872 F.3d 518, 524 (7th Cir. 2017); *Nader v. Brewer*, 531 F.3d 1028, 1038 (9th Cir. 2008); *Libertarian Party v. Blackwell*, 462 F.3d 579, 581-82 (6th Cir. 2006).

The First and Fourteenth Amendments guarantee "the right of all qualified voters to cast their votes *effectively*." *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 (1st Cir. 1994) (emphasis added). Voters cannot vote "effectively" when they cannot see or understand what is on the ballot. *See*, *e.g.*, *Puerto Rican Org. for Political Action v. Kusper*, 490 F.2d 575, 580 (7th Cir. 1973); *Hamer v. Ely*, 410 F.2d 152, 156 (5th Cir. 1969).

Maine's RCV Act severely burdens and deprives voters of an effective vote by forcing them to vote contemporaneously in both the initial and runoff elections

based on the entire initial field of candidates, without knowing whether a runoff will occur or the actual runoff candidate matchups. This knowledge is critical to exercise of the franchise.

First, as this election shows, the RCV Act caused the votes of more than 8,000 who voted for Bond and/or Hoar across their ballots to be "exhausted," and the Secretary discarded those voters from the electorate in the runoff. *See* Sec'y Opp'n Ex. F-2 (Doc. 44-3); Supp. to Gimpel Aff. Ex. A (Doc. 51). The district court speculated that these discarded votes were all "protest votes" of those who "did not want to vote for either Mr. Golden or Mr. Poliquin regardless of whether they believed they would be the run-off candidates." Op. at 26. However, more than 600 voters who ranked Bond or Hoar as their first- and second-choice candidates, and whose ballots were therefore discarded in the runoff tabulation, also voted for Poliquin or Golden in the fourth or fifth columns. *See* Supp. to Gimpel Aff. Ex. A (Doc. 51). That many voters marked runoff votes for Poliquin or Golden is strong, direct evidence that they desired to vote for Poliquin or Golden in a runoff scenario, but simply guessed incorrectly about which candidates would remain in which runoff round(s). And all of the more than 8,000 discarded voters *tried* to vote in the runoff election. It blinks reality to speculate, as the State and district court did, that over 8,000 voters intended their votes to be discarded, i.e., disenfranchised, in the runoff.

All this goes to Plaintiffs' more fundamental point: The RCV Act gives voters no means to know with certainty when they mark their ballots whether their votes in the runoff will be ignored and discarded. *See* Gimpel Aff. Ex. A (Doc. 51); Sorens Aff. (Doc. 4). And this patent infirmity in instant-runoff voting was exacerbated here by ballot instructions that did not even inform voters whether and under what circumstances their subsequent-choice votes would be disregarded, merely instructing voters to "rank[] as many or as few candidates as you like." *See supra* at 4. Without being told the significance or consequence of marking or not marking second-, third-, or fourth-choice runoff candidates, voters simply cannot make a meaningful, informed decision about whether and how they should vote in runoff rounds.

The district court acknowledged that voters must guess at "likely" runoff scenarios, Order on Pls' Mot. for TRO at 9 n.4 (Doc. 26), but ultimately dismissed this serious problem by proffering that "[t]he Constitution does not require an easy ballot." Op. at 27. This severely misidentifies the actual problem: The RCV Act forces voters to "guess" at who is on the ballot, which violates substantive due process. *See Jones v. Bates*, 127 F.3d 839, 859 (9th Cir. 1997) (invalidating a ballot that forced voters "to guess as to [its] very meaning and effect"), *rev'd on other grounds*, 131 F.3d 843, 846 (9th Cir. 1997) (en banc); *see also Burton v. Ga.*, 953 F.2d 1266, 1269 (11th Cir. 1992) ("substantive due process requires… that the

voter not be deceived about what [is on the ballot]"); *Sprague v. Cortes*, 223 F. Supp. 3d 248, 288 (M.D. Pa. 2016) (quoting *Burton*).

Second, when presented with alternative and narrowed candidate matchups, many voters have different preferences than when they voted initially. Voter data show that in a four-way race such as the one here, 15% of voters have such intransitive candidate preferences. Benjamin Radcliff, The Structure of Voter Preferences, 55 Journal of Politics No. 3, 715-716 (1993); Gimpel Aff. Ex. A (Doc. 51); Sorens Aff. (Doc. 4). The U.S. Court of Appeals for the Ninth Circuit, in ruling on San Francisco's RCV law, critically observed that instant runoff voting does not "allow[] voters to *reconsider* their choices after seeing which candidates have a chance of winning. In other words, voters must submit their preferences… even though they might have chosen differently with more specific information about other voters' selections, they are not provided an opportunity to revise their choices." *Dudum v. Arntz*, 640 F.3d 1098, 1105 (9th Cir. 2011) (emphasis in the original).[3] Although Plaintiffs repeatedly argued this issue, the district court did not address this severe burden on voting rights. *Walgren*, 482 F.2d at 100.

[3] The Ninth Circuit did not rule on this infirmity because the plaintiff did not raise the issue. *See id.* at 1106-07.

2. The RCV Act Fails the Strict Scrutiny or "Important Regulatory Interests" Standards.

Because the district court failed to acknowledge and address the RCV Act's severe burdens, it erroneously concluded strict scrutiny does not apply. Op. at 29. The district court also credited the Act with furthering two or three state interests.[4] Assuming these are even legitimate interests, they are insufficient to outweigh the Act's severe burdens.

First, the district court concluded the Act "was motivated by a desire to enable third-party and non-party candidates to participate in the political process, and to enable their supporters to express support, without producing the spoiler effect." *Id.* No authority was cited recognizing this as a legitimate state interest, much less a compelling one.[5] To the contrary, the Supreme Court has recognized "[b]allots serve primarily to elect candidates, not as forums for political expression." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997). Presumably, many who vote for "spoiler" candidates intend the spoiler effect. Because RCV merely nullifies those votes' effects, the claimed state interest

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[4] The district court did not identify all of these interests relative to the *Burdick* balancing framework. Plaintiffs have used their best efforts to discern and fairly present these interests from the court's opinion.

[5] The Minnesota Supreme Court specifically did not rule on this purported interest in considering Minneapolis' RCV law. *See Minn. Voters Alliance v. City of Minneapolis*, 766 N.W. 2d 683, 697 n.8 (Minn. 2009).

actually harms voter choice, negates voter expression, and achieves its objective by discarding thousands from the electorate.

Framed less charitably, this justification amounts to a state interest in favoring major-party candidates, which assuredly is *not* legitimate. *See*, *e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 787 (1983); *Libertarian Party*, 462 F.3d at 586-87. Therefore, the RCV Act fails even the minimal "important regulatory interests" review standard. Regardless, even if protecting major candidates against "spoilers" were recognized as a legitimate state interest for the first time here, the RCV Act is not narrowly tailored because this interest can be served by holding actual runoff elections on ballots presenting actual alternatives.

Second, the district court credited the RCV Act with "assur[ing] that the winner of an election is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections." Op. at 24 (quoting *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979). As discussed above (at 5-6), the RCV Act did not actually produce a "majority" winner here. The Secretary declared Golden the winner with only 49.18% of the total votes cast. Only by discarding more than 8,000 votes was Golden determined to have won a "majority."

The other state interest the district court identified – "giv[ing] voice to [voters'] varied perspectives," Op. at 24 – also is nonexistent here. Thwarting

"spoilers" and discarding more than 8,000 ballots of their supporters does not "giv[e] voice" to them. Relative to a conventional plurality-wins election, in which they have a greater chance at affecting the election outcome, the RCV Act actually gives these voters less voice. Relative to actual runoffs, the RCV Act also gives them no greater voice. Thus, the district court's articulated state interest is illusory.

"Majority support" also is not a "compelling" state interest, given that such a voting requirement historically has been rooted in invidious discrimination, and the vast majority of American jurisdictions reject it. *See* Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 THE URBAN LAWYER 429 (1985); Reid Wilson, *Runoff elections a relic of the Democratic South*, WASH. POST, Jun. 4, 2014.[6] Regardless, the more narrowly tailored way to achieve this goal is, again, through actual runoffs, which eliminate the constitutional infirmities.

Moreover, "an interest in the 'preservation of the state's limited resources'" generally cannot justify abridging fundamental rights or unconstitutional discrimination, contrary to the district court's erroneous and opposite suggestion. *Plyler v. Doe*, 457 U.S. 202, 227 (1982); *see also Heller v. Dist. of Columbia*, 801

[6] https://www.washingtonpost.com/blogs/govbeat/wp/2014/06/04/runoff-elections-a-relic-of-the-democratic-south/?utm_term=.2e7c8fdee02b.

F.3d 264, 287 (D.C. Cir. 2015). Indeed, in the *Socialist Workers* case the district court cited for Maine's interest in reducing "the expense and burden of runoff elections," the Supreme Court held that states must "adopt the least drastic means to achieve [this] end[]." 440 U.S. at 185. Equally important here, the Court held that the Illinois law at issue – which purportedly furthered this state interest – violated the Equal Protection Clause by disproportionately harming non-party candidates. *Id.* at 176-77, 180, 186.

Notably, the State also did not assert any of these purported interests in prior litigation involving the RCV Act. *See Me. Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 212 (D. Me. 2018). These *post hoc* justifications cannot support severe or discriminatory burdens on the franchise. *See Libertarian Party v. Gardner,* 843 F.3d 20, 31 (1st Cir. 2016).

3. The RCV Act Violates the Voting Rights Act.

As discussed above, Maine's RCV Act deprives voters of their right to an effective vote, which is protected by the U.S. Constitution and the federal Voting Rights Act ("VRA"). *See* 52 U.S.C. §§ 10307(a), 10310(c)(1). The district court implicitly concluded that because Plaintiffs' claims do not involve racial discrimination, the VRA does not "ha[ve] any application to this case." Op. at 9. While the VRA indisputably was enacted to address racial discrimination, so was 42 U.S.C. § 1983. *See Ngiraingas v. Sanchez*, 495 U.S. 182, 187 (1990). Like the

broadly applied section 1983, the VRA provisions relied on here are not limited to racial discrimination and plainly protect "effective" voting for all Americans. The district court's holding to the contrary is reversible error.

B. Maine's RCV Act Violates the Equal Protection Clause.

Plaintiffs alleged the RCV Act violates Equal Protection by treating voters' ballots differently in the runoff tabulation and affording some more electoral choices and power than others. The basic "concept of equal protection… requir[es] the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Equal Protection is violated whenever voters are treated unequally absent a "compelling state interest." *See*, *e.g.*, *Hill v. Stone*, 421 U.S. 289, 295 (1975); *Dunn v. Blumstein*, 405 U.S. 330, 337 (1972); *Cipriano v. City of Houma*, 395 U.S. 701, 704 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969). Equal Protection applies to the disparate post-election treatment of ballots and votes as fully as it applies to ballot access. *See Bush v. Gore*, 531 U.S. 98, 103 (2000).

Under Maine's RCV Act, while all voters begin at the same starting line and cast one initial ballot, their ballots and votes are treated quite unequally thereafter. Specifically, in each runoff round, voters who voted for losing candidates can shift their votes to different runoff candidates, and their ballots are counted for multiple

candidates. Other voters are locked into voting only for their first-choice candidate, with no ability to shift electoral support to other candidates in runoff rounds. The discriminatory ability to shift one's vote, on one ballot, from candidate to candidate affords certain voters a greater degree and different kind of electoral power than others. This unequal treatment of voters, ballots, and electoral power violates the core Equal Protection requirement of "uniform treatment" of all voters in all aspects of election administration. *Reynolds,* 377 U.S. at 565; *Bush*, 531 U.S. at 104-09.

There is no compelling state interest to justify this differential treatment. The inability of voters whose first choice is locked in "to controvert the presumption" that they still wish to vote for that candidate in subsequent runoff rounds "imposes an invidious discrimination in violation of the Fourteenth Amendment." *Carrington v. Rash*, 380 U.S. 89, 96 (1965). Furthermore, if voters are "express[ing]" their candidate support through RCV, Op. at 4, 18, the RCV Act also violates Equal Protection by treating voters' expressive activity differently absent "an appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't v. Mosley*, 408 U.S. 92, 94-95 (1972). Again, the power to shift votes among candidates could be afforded all voters equally in an actual runoff.

The district court avoided addressing this serious legal challenge by noting superficially that Plaintiffs' ballots "remained and were counted" in the runoff tabulation, and therefore they did not receive fewer votes than those who were given do-overs when their first-choice candidates were eliminated and their votes were shifted to their subsequent choices. Op. at 22. The district court also concluded the Equal Protection Clause applies only to discrimination against a "protected class." *Id.* at 18. This is obvious reversible error. The Equal Protection Clause protects all citizens' voting rights. Even the parentheticals accompanying its cited authorities reveal the district court's erroneous view of the law, *see id.*, and multitudinous election law cases have found an Equal Protection violation absent any "protected class." *See*, *e.g.*, *Bush*, 531 U.S. at 103; *Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 690 (1989); *Hill*, 421 U.S. at 295; *Dunn*, 405 U.S. at 337; *Cipriano*, 395 U.S. at 704; *Kramer*, 395 U.S. at 627; *Reynolds*, 377 U.S. at 568; *Baker v. Carr*, 369 U.S. 186, 237 (1962).

C. Maine's RCV Act Exceeds the State's Article I Authority.

Plaintiffs alleged Maine's RCV Act violates Article I by requiring majority-vote elections for U.S. House of Representatives members, manipulating vote counts and electoral outcomes, discarding ballots from the electorate, and favoring certain candidates over others. *See*, *e.g.*, Plaintiffs' Reply Br. (Doc. 52) at 1-2; Dec. 5, 2018 Hrg. Tr. at 77-78. The district court focused exclusively on the

majority-vote requirement and ignored Plaintiffs' broader argument that the RCV Act exceeds Maine's authority to regulate the "Time, Places and Manner" of congressional elections. This was reversible error in both respects.

The district court concluded states have broad authority to regulate federal elections because "the powers delegated by the Constitution to the federal government were few and defined." Op. at 11. But "[t]he federal offices at stake arise from the Constitution itself. Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power had to be delegated to, rather than reserved by, the States." *Cook v. Gralike*, 531 U.S. 510, 522 (2001). To that end, the Constitution granted the states only limited authority to regulate the "Times, Places and Manner" of holding congressional elections. U.S. Const., art. I, § 4.

Of relevance here, "manner" "encompasses matters like notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns," and generally "the numerous requirements as to procedure and safeguards which experience shows *are necessary* in order to enforce the fundamental right involved[,] ensuring that elections are fair and honest and that some sort of order, rather than chaos, is to accompany the democratic process." *Cook*, 531 U.S. at 523-24 (emphasis added). Article I does

not permit state laws that "dictate electoral outcomes" or "favor or disfavor a class of candidates." *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995).

The RCV Act far exceeds Maine's limited Article I authority to prescribe ministerial laws regulating the "manner" of congressional elections. As the district court recognized, the Act purports to further major state policies wholly unrelated to what is "necessary" for "ensuring that elections are fair and honest" and "order[ly]," or for "prevention of fraud and corrupt practices." *Cook*, 531 U.S. at 523-24. The Act also goes far beyond merely "counting of votes" to treating ballots differently based on how voters' first-choice candidates performed and discarding certain ballots in order to achieve an artificial "majority" winner while, in reality, merely shifting the election results to prefer one plurality winner over another. As the district court also concluded, the Act is intended to stymie "spoiler" candidates and discard their voters from the election or redistribute their votes to mainstream candidates, while pretending voters have enhanced freedom to vote for minority candidates. In short, the RCV Act is precisely the type of law that "dictate[s] electoral outcomes" and "favor[s] or disfavor[s] a class of candidates" that states have no authority to enact under Article I. *U.S. Term Limits*, 514 U.S. at 833-34. The district court's failure to even address this serious constitutional infirmity in the Act is reversible error.

Separately, the district court erred in concluding Maine's limited Article I authority encompasses the RCV Act's majority-vote requirement. As the U.S. Court of Appeals for the Second Circuit has noted, Article I, section 2's provision that House of Representatives members are to be "chosen… by the People of the several States" "has always been construed to mean that the candidate receiving the highest number of votes at the general election is elected, although his vote be only a plurality of all votes cast." *Phillips v. Rockefeller*, 435 F.2d 976, 980 (2d Cir. 1970). Article I, section 2's requirement that representatives be "chosen . . . by the People" limits Maine's ability to engineer a "majority" as it has done here.

II. An Injunction Pending Appeal Is Needed to Prevent Irreparable Injury

Absent an injunction, the State will imminently certify the election results under the RCV Act's dictated outcome, and the winner will take office on Jan. 3, 2019. This impending deprivation of Plaintiffs' constitutional rights "unquestionably constitutes irreparable injury." *Sindicato Puertorriqueno*, 699 F.3d at 10-11. More specifically, the state's certification of this election, in which votes were treated unequally and more than 8,000 votes were discarded entirely, threatens "actual and imminent" injury remediable only by injunctive relief. *Hoblock v. Albany Cty. Bd. of Elections*, 422 F.3d 77, 97 (2d Cir. 2005). "Such an injury meets the standards for irreparable harm." *Id.*

III. An Injunction Pending Appeal Will Not Harm Defendants and Is in the Public Interest.

Plaintiffs request an injunction pending appeal for the same reason they sought temporary relief from the district court: to preserve the status quo while the Court adjudicates the parties' constitutional claims. Plaintiffs have no desire for delay and are prepared to present the merits of their claims for resolution as expeditiously as the Court may permit. *See, e.g.*, *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, No. 12-2171 (1st Cir. order filed Oct. 3, 2012) (treating party's emergency motion for injunction as its opening brief and setting expedited briefing schedule).

If this Court ultimately upholds the RCV Act, the Governor will certify a winner using the RCV tabulation, and Defendants will experience no injury other than a temporary delay in certification. This is common when election results remain contested. *See, e.g.*, Mike Lillis, *Hoyer: Dems won't seat Harris until North Carolina fraud allegations are resolved*, THE HILL, Dec 4, 2018. "[A]ny harm… from a slight delay in certifying the election results is minimal in comparison to the irreparable injury that occurs when an individual suffers the loss of his constitutional rights." *Awad v. Ziriax*, 2010 WL 4676996, at *5 (W.D. Okla. 2010).

If this Court instead finds the RCV Act unconstitutional, it can tailor a suitable remedy, whether that be a declaration of legal rights and remittal to the

state for appropriate conformity, *see Love v. Foster*, 90 F.3d 1026, 1031 (5th Cir. 1996), *aff'd*, 522 U.S. 67 (1997); a permanent injunction, *see Bush*, 531 U.S. at 103; or ordering a new election, *see Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978). Far from causing any harm, the Court's determination will instead serve the public interest by affording all Maine citizens the confidence of a constitutional election certification. *See Freeman v. Morris*, 2011 WL 6139216, at *4 (D. Me. 2011); *Miller v. City of Cincinnati*, 622 F.3d 524, 540 (6th Cir. 2010) ("it is always in the public interest to prevent violation of a party's constitutional rights."). By allowing an opportunity to determine the merits of the parties' constitutional arguments, the requested injunction also will allow all Maine citizens to attain much-needed clarity over the state's use of RCV in their elections for federal office.

CONCLUSION

For the above-stated reasons, Plaintiffs respectfully request this Court to enjoin the State from certifying an election winner pending appeal and to expedite appellate review of the merits.

Dated: December 18, 2018

Respectfully submitted,

/s/ Joshua A. Randlett

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 18th day of December, 2018, that:

1. This document complies with the word limit of Fed. R. App. P. 27(d))(2)(a) because, excluding the parts of the document exempted by Fed. R. App. 32(f), this document contains 5,185 words.

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/s/ Joshua A. Randlett

CERTIFICATE OF SERVICE

I certify that on December 18, 2018, I electronically filed the foregoing Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal with the U.S. Court of Appeals for the First Circuit using the CM/ECF system, and effected service by e-mail to the following:

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Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRETT BABER, et al.,	)	
	)	
Plaintiffs	)	
	)	
V.	)	NO. 1:18-CV-465-LEW
	)	
MATTHEW DUNLAP, et al.,	)	
	)	
Defendants	)	

DECISION AND ORDER ON MOTION FOR PRELIMINARY INJUNCTION

Although the Court scheduled the hearing on December 5, 2018 to address Plaintiffs' Motion for Preliminary Injunction, the parties agreed that the question of injunctive relief should be consolidated with a final ruling on the merits of the action. Therefore, pursuant to Rule 65(a)(2), this Decision and Order will be accompanied by a final judgment in favor of Defendants.

BACKGROUND

On November 6, 2018, the State of Maine held a general election at which races for federal office were governed by Maine's "Act to Establish Ranked-Choice Voting" ("RCV Act"). [1] This new manner of holding federal elections[2] is the product of a popular initiative,

[1] At the November election, the RCV Act also applied to the First Congressional District house race and senate race, but Senator Angus King and Representative Chellie Pingree obtained sufficient first choice votes to win a majority. The parties have not asserted any facts concerning the other congressional races in support of their respective positions in this case.

[2] In 2017, the Maine Supreme Judicial Court determined that the RCV Act, 21-A M.R.S. § 723-A, cannot be used in Maine's State Senate, House, and Governor's races, because the Maine Constitution, in Art. IV, pt. 1, § 5, Art. IV, pt. 2, § 4, and Art. V, pt. 1, § 3, expressly requires plurality voting. *Opinion of the*

the history of which has been set forth previously and is not repeated here.[3] *See*, *e.g.*, *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 204–06 (D. Me. 2018); *Maine Senate v. Sec'y of State*, 183 A.3d 749 (Me. 2018); *Opinion of the Justices*, 162 A.3d 188 (Me. 2017). Under the RCV system employed in Maine, when there are three or more candidates on the ballot, a candidate cannot be declared the winner of the election following tabulation of the votes without securing a majority of the ballots validly cast (i.e., excluding ballots invalidated due to overvotes (marking more than one candidate at the same level of ranking) or undervotes (failing to rank a candidate)). 21-A M.R.S. § 723-A.

Plaintiffs, Brett Baber, Terry Hamm-Morris, Mary Hartt, and Bruce Poliquin, are residents of Maine's Second Congressional District. Plaintiffs participated in Maine's November 6, 2018, general election, at which each cast a vote for Bruce Poliquin to continue serving as Representative of the Second Congressional District in the United States House of Representatives. They maintain that the RCV Act is unconstitutional, both

---

Justices, 162 A.3d 188, 209–11 (Me. 2017). The States, in exercising their Article I authority, are not required to conduct local and national elections in the same manner. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674 n.25 (2015) ("A State may choose to regulate state and national elections differently, which is its prerogative under the [Elections] Clause.").

[3] The fact that an election is conducted in accordance with the will of the people, as expressed through a popular initiative, is not inherently objectionable, for "the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power." *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. at 2674. "As Madison put it: 'The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people.'" *Id.* at 2674–75 (quoting The FEDERALIST No. 37, 223). In *Arizona Indep. Redistricting Comm'n*, the Supreme Court divided, 5–4, over a dispute related to the significance of the Seventeenth Amendment, which superseded Article I, section 3 by making it the law of the land that senators be elected directly by the people, rather than by state legislatures. The case presented an unusual claim asserted by the Arizona State Legislature concerning who had the ultimate authority within Arizona to determine the manner of drawing congressional districts (the People by popular initiative, or the Legislature if it disagreed), and whether the answer should turn on state law. Those issues are not litigated in this case.

facially and as applied, and that it violates the Voting Rights Act. They maintain that the ballot form and instructions were too confusing and that the manner by which Defendant Dunlap tabulated the votes diluted the votes cast by Poliquin supporters and otherwise disenfranchised too many Maine voters to withstand scrutiny.

The ballot for the Second District house race provided a choice among four candidates, a space to enter a write-in candidate, and a manner by which to rank the candidates, in the following form:

Rep. to Congress District 2	1st Choice	2nd Choice	3rd Choice	4th Choice	5th Choice
Bond, Tiffany L. Portland Independent	O	O	O	O	O
Golden, Jared F. Lewiston Democratic	O	O	O	O	O
Hoar, William R.S. Southwest Harbor Independent	O	O	O	O	O
Poliquin, Bruce Oakland Republican	O	O	O	O	O
Write-in	O	O	O	O	O

The ballot included the following instructions:

> **Instructions to Voters**
>
> . . .
>
> To rank your candidate choices, fill in the oval:
>
> - In the 1st column for your 1st choice candidate.
> - In the 2nd column for your 2nd choice candidate, and so on.
>
> Continue until you have ranked as many or as few candidates as you like.
>
> Fill in no more than one oval for each candidate or column.
>
> . . .

Plaintiffs each filled in the circle for Bruce Poliquin shown in the first-choice column of the ballot. They did not fill in any other circles. Many other voters took the same approach. Some voters expressed equivalent support for Mr. Poliquin, but filled in the Poliquin circle in every column of the ballot. These voters, in other words, elected not to rank any candidate other than their preferred candidate. Other voters expressed their support for the other candidates in the same fashion. Many other voters chose to rank every candidate. In all, given five potential candidates and five columns, there were 120 different orders in which to rank the candidates, assuming one nominated a write-in and then went on to rank every candidate. There were several other ways in which one might respond to the ballot. For example, 5,582 voters submitted their ballots without filling in any circles.

Following the election, Defendant Dunlap oversaw a process in which his office gathered the ballots and tabulated the election results. On November 7, Defendant Dunlap announced that, based on the tabulation of all "first choice" votes, no contestant in the race achieved victory by a majority. The results of the initial tabulation were as follows:

Candidate	Votes
Bruce Poliquin	134,184
Jared Golden	132,013
Tiffany Bond	16,552
William Hoar	6,875
TOTALS	289,624 [4]

[4] *See* Dunlap Ex. F-2, ECF No. 44-3. In the initial tabulation process, Defendant Dunlap eliminated, or "exhausted" 6,453 votes as invalid because the ballots contained overvotes or undervotes. The exhausted

Pursuant to the RCV Act, because no candidate achieved a majority, Defendant Dunlap was required to conduct a further tabulation of the votes. Because it was mathematically impossible for Ms. Bond or Mr. Hoar to be elected, Defendant Dunlap performed a "batch elimination" of those candidates. *Id.* § 723-A(1)(A). He then reviewed the ballots in which the eliminated candidates were named as first choice, to determine if those ballots indicated a preference between the remaining two candidates, Mr. Poliquin and Mr. Golden. If so, then those ballots were redistributed accordingly. [5] On November 26, 2018, Defendant Dunlap published and certified a final tabulation of the votes. The results were as follows:

Candidate	Votes	Percentage
Jared Golden	142,440	50.62%
Bruce Poliquin	138,931	49.38%
TOTALS	281,371 [6]	100%

ballots amounted to 2.28% of the ballots cast. "Overvote" means a circumstance in which a voter has ranked more than one candidate at the same ranking, while "undervote" means a voter has not indicated a preferred candidate at the applicable ranking. The majority of the exhausted ballots reflected undervotes. The exhausted ballots were not included to establish the mathematical denominator for achieving a majority victory.

[5] If the ballot left two sequential rankings blank before naming either Golden or Poliquin, it was exhausted, or invalidated. 21-A M.R.S. § 723-A(D).

[6] *See* Dunlap Ex. F-2, ECF No. 44-3. In the course of the second round of tabulation, Defendant Dunlap exhausted an additional 8,253 ballots. These exhausted ballots were not considered part of the total for purposes of calculating a majority, similar to the first-choice tabulation process. Combined with those ballots exhausted in the first-choice tabulation, a total of 14,706 ballots were exhausted, or 4.97% of all ballots cast. Of these, some 5,582 voters left the ballot entirely blank. *See* Dr. James G. Gimpel, Ph.D. Supp. Disclosure, Ex. A, ECF No. 51. Additionally, 3,957 voters indicated that Ms. Bond was their first choice, and they did not rank any other candidates. *Id.*, row 12. Some 1,939 Hoar supporters similarly failed to rank any alternative. *Id.*, row 25.

Because the Secretary of State certified Jared Golden as the winner of the RCV election, Plaintiff Bruce Poliquin requested a recount pursuant to 21-A M.R.S. § 737-A. The recount is under way at this time.

The matter came on for hearing on December 5, 2018. Before hearing oral argument, the Court permitted Plaintiffs to call to the witness stand Dr. James G. Gimpel, Ph.D., a professor at the University of Maryland – College Park. Among other areas of expertise, Dr. Gimpel is well studied in the area of voter behavior. Dr. Gimpel testified that alternative systems for conducting elections, such as RCV, are generally considered by their proponents to be "systems to enhance participation." According to Dr. Gimpel, interest in these systems is growing and, undoubtedly, will lead to more litigation like the litigation now before this Court. Dr. Gimpel has formed the opinion that RCV (or "instant run-off") systems do not offer advantages over a plurality system, or over a majority system that resolves close elections by means of an actual run-off. The primary flaw he sees in RCV is that, unlike ordinary elections and ordinary run-offs, voters are required to make predictions about who will be left standing following an initial tabulation of the votes. While Dr. Gimpel concedes that many voters have sufficient information to make reliable predictions, he believes that a portion of the voting public has insufficient interest and information to make a meaningful assessment about likely outcomes. In his view, RCV is "flat out unfair to the uninformed voter." He also maintains that the instructions Defendant Dunlap provided with the ballot leave such voters "clueless."

Dr. Gimpel contends that the data of voting behavior for this election (i.e., the ballots in this election) reinforce his opinion. He observes that thousands of voters cast ballots

that were invalid, and that the most logical inference is that those voters guessed wrong due to an information deficit. Dr. Gimpel presumes that the voters in this category are predominantly independent voters, meaning they have no party affiliation. By his reasoning, independent voters such as Ms. Bond and Mr. Hoar's supporters are, on average, less informed on the issues.[7] According to Dr. Gimpel, this information deficit is demonstrated by the fact that many of the voters who identified Ms. Bond or Mr. Hoar as their first choice neglected to rank another candidate. In his view, this is proof that they believed Ms. Bond or Mr. Hoar would be victorious. He finds it hard to believe that voters would "drop out like this" if they were presented with a simple choice between a Republican candidate and a Democratic candidate.[8] On the other hand, he also testified that independent voters, on average, are not as likely to turn out for elections in the first place. [9]

On cross examination, Dr. Gimpel testified that he did not interview or consider any interviews or studies of actual Maine voters, but that, remarkably, he would like to

[7] On the other hand, Dr. Gimpel testified that most independent voters "pretty consistently" lean toward either the Republican Party or Democratic Party, and that "every researcher in Maine" knows this.

[8] Dr. Gimpel's perspective, in my view, is built on the debatable premise that a two-party system has some intrinsic merit because it simplifies the choices that are presented to voters. In his sworn report, Dr. Gimpel asserts: "The great advantage of a two-party system with plurality voting is that participation and choice are straightforward and not burdensome." ECF No. 37 at 11. Presumably, Dr. Gimpel understands that a significant cohort of the electorate welcome alternatives. In any case, this is thin soup upon which to fortify a constitutional challenge to RCV.

[9] In his sworn report, Dr. Gimpel notes that "several dozen voters" failed to rank a first choice, but went on to rank second and subsequent choices. *Id.* The Court is not persuaded that voter error is unique to RCV ballots, or that such mistakes by several dozen voters warrants an inference that the instructions were inadequate.

develop a survey to evaluate what voters were thinking. When asked to articulate why the ballot and the voting instructions were confusing, Dr. Gimpel testified that the worst thing about the ballot and instructions is what was omitted from the instructions. In particular, Dr. Gimpel suggested the instructions should have explained the various ways in which a vote could be invalidated. Dr. Gimpel was asked to evaluate Plaintiffs' contention that RCV is flawed because it fails to produce "monotonic" results.[10] Dr. Gimpel testified that he did not detect a monotonicity problem in this particular election. Finally, Dr. Gimpel opined that when one considers Plaintiffs individually, the reasonable conclusion is that they were not disenfranchised by RCV, but rather were full participants in the election.[11]

[10] Plaintiffs have not adequately demonstrated the significance of their monotonic argument and will limit its assessment of this theory to this footnote. What I understand is that it is sometimes possible in a ranked-choice voting system to harm one's preferred candidate by ranking them higher on the ballot, and to assist them by ranking them second or lower on the ballot. In other words, it is statistically possible in some instant run-off elections that the winner is a person most voters do not prefer, which is referred to as a non-monotonic result. The 2009 mayoral election in Burlington, Vermont, is often cited as an example. Sworn Expert Report of James G. Gimpel, Ph.D., at 14. I am concerned, of course, with the November 2018 election, not with any and all statistical permutations that academics can conceive. As concerns the November election, Dr. Gimpel testified that the Second District house race did not involve a monotonicity problem. Moreover, Plaintiffs have not provided any evidence suggesting that the RCV Act is likely to produce this result in a statewide general election for federal office given the realities of modern electoral politics and the abundance of information that is generally available in advance of such an election. In short, I do not believe the desirability of a monotonic election result provides a justiciable standard for Plaintiffs to sustain a facial challenge. Nor do I find that the statistical possibility of a non-monotonic election proves that RCV does not provide a meaningful bulwark against the spoiler problem that can arise from third-party and non-party participation in elections, which is generally understood to be a primary feature of RCV systems. *See id.* at 15.

[11] Plaintiffs have provided additional expert opinion evidence through the Sworn Expert Report of Jason Sorens, Ph.D., ECF No. 4. The record also includes an affidavit concerning the conduct of elections in Maine. Decl. of Dep. Sec'y of State Julie L. Flynn, ECF No. 24. Although the information these witnesses provided is not recounted herein, the affidavits have been very informative and helpful to the review of this case.

DISCUSSION

A. Voting Rights Act

In addition to their constitutional challenges to the RCV Act, Plaintiffs allege that the Act deprived them of rights protected under the Voting Rights Act. The Voting Rights Act subjects certain states to "preclearance" oversight when they enforce a new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 494 (1992) (quoting 52 U.S.C. § 10304). Additionally, individuals can bring suit to prevent "any State or political subdivision" from imposing any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) [concerning language minority groups]." 52 U.S.C. § 10301(a). "The Voting Rights Act 'implemented Congress' firm intention to rid the country of racial discrimination in voting.'" *Hathorn v. Lovorn*, 457 U.S. 255, 268 (1982) (quoting *Allen v. State Board of Elections*, 393 U.S. 544, 548 (1969)). Plaintiffs have not alleged facts or otherwise shown that the Voting Rights Act has any application to this case.[12]

B. U.S. Constitution, Article I

Article I, section 2, clause 1 of the Constitution provides, in relevant part, as follows:

[12] Plaintiffs cited 52 U.S.C. § 10307, which provides that "[n]o person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote." Am. Complaint ¶¶ 6, 58. The facts, as alleged, do not involve any effort by Defendants or anyone else invested with state-delegated authority to deny Plaintiffs their right to vote or refuse to tabulate their vote.

"The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." Furthermore, Article I, section 4, clause 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Concerning section 4, clause 1, the Supreme Court has explained:

> It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . . All this is comprised in the subject of "times, places and manner of holding elections," and involves lawmaking in its essential features and most important aspect.

Smiley v. Holm, 285 U.S. 355, 366 (1932). *See also Arizona v. Inter Tribal Council of Arizona*, *Inc*., 570 U.S. 1, 8 (2013).

The First Article of the Constitution, in effect, assigns to the People of the several States the authority to choose their representatives to the national Congress, and directs that the States shall prescribe the times, places, and manner by which representative are chosen. Though Congress has the power to regulate state elections, "if there be no overruling action by the Congress" then suitable regulations "may be provided by the Legislature of the state upon the same subject." *Smiley*, 285 U.S. at 367. [13] This is one

[13] "The power of Congress over the 'Times, Places and Manner' of congressional elections 'is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.'"

example of the ingenious manner by which the framers divided sovereignty between the federal and state governments.

Plaintiffs argue that the force of history calls for the Court to interpret Article I as requiring a plurality or "first-past-the-post" standard for deciding election results. There is no textual support for this argument and a great deal of historical support to undermine it. As a practical observation, it is curious that states which still utilize a majority standard have managed to escape constitutional scrutiny under Article I. The American experiment in republican–representative government neither began nor ended with ratification of the Constitution. The values that informed Article I not only inspired the Revolution, but also continued a purposeful evolution in our national experiment in representative government. It is clear from The Federalist Papers and other public debates leading up to the ratification of the Constitution that federalism was its intellectual lodestar and was to act as a bulwark against the perceived threat of centralized political authority by allowing for political tolerance. Therefore, the powers delegated by the Constitution to the federal government were few and defined.

The delegates to the Continental Congress debated vigorously the wording of Article I. [14] When one considers the origins and objectives of our Constitution, and the

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Arizona v. Inter Tribal Council of Arizona, *Inc*., 570 U.S. 1, 9 (2013) (quoting *Ex parte Siebold*, 100 U.S. 371, 392 (1880)). While Congress has legislated in the area of voting standards, most notably through the Voting Rights Act and amendments, 52 U.S.C. §§ 10301 *et seq*., and the Help America Vote Act, 52 U.S.C. §§ 20901 *et seq*., it has not precluded ranked-choice methods. I am unaware of any precedent in which the House of Representatives addressed a similar contest in the context of the Federal Contested Elections Act, 2 U.S.C. §§ 381–396.

[14] There was significant debate over the Time, Place and Manner Clause during the first Continental Congress. Some Anti-Federalists voiced the concern that a faction in Congress would eventually regulate

principles of federalism that informed its text and structure, it is no accident that Article I does not set forth a comprehensive mandate for running federal elections, let alone dictate the plurality standard.

In the early days of the Republic, paper ballots were a new and welcome innovation in some states, and the secret ballot had not gained general acceptance. *John Doe No. 1 v. Reed*, 561 U.S. 186, 225 (2010) (Scalia, J., concurring). Only a subset of adult males were entitled to vote. There was no uniform election day. As the nation evolved, so too did the manner by which states conducted elections. Many states gravitated toward plurality systems. Others aspired to a majority and were willing to assume the burden of a run-off election to obtain that result. Gradually, the suffrage was expanded to unpropertied men, to women, and to minorities. In time, non-party candidates gained access to the ballot. Many of these changes were marked by considerable social upheaval, and many long-settled expectations were gradually, if not precipitously, undone by changes in popular sentiments.

Whether RCV is a better method for holding elections is not a question for which the Constitution holds the answer. By design, the freedoms and burdens of self-governance

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the manner of holding elections in an undemocratic fashion, such as by establishing a plurality standard nationwide. Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. Pa. J. Const. L. 1, 29 & nn. 123–128 (2010) (describing concerns of Anti-Federalists, including the "Federal Farmer"). "[D]uring the ratification debates, proponents of the Constitution noted: '[T]he power over the manner only enables them to determine how these electors shall elect—whether by ballot, or by vote, or by any other way.'" *U.S. Term Limits*, *Inc. v. Thornton*, 514 U.S. 779, 833 (1995) (5–4 decision) (quoting 4 Debates on the Adoption of the Federal Constitution 71 (J. Elliot ed. 1863) (Steele statement at North Carolina ratifying convention)). In any event, certainly the delegates to the Continental Congress declined to dictate either a majority or plurality standard, or preclude state variation in election procedure, for good cause. Natelson, *supra*, at 38–40 & nn. 183, 189.

leave normative questions of policy to be worked out in the public square and answered at the ballot box. To the extent that the Plaintiffs call into question the wisdom of using RCV, they are free to do so but for the reasons that I have indicated previously and upon which I elaborate presently, such criticism falls short of constitutional impropriety. A majority of Maine voters have rejected that criticism and Article I does not empower this Court to second guess the considered judgment of the polity on the basis of the tautological observation that RCV may suffer from problems, as all voting systems do. The proper question for the Court is whether RCV voting is incompatible with the text of Article I by giving the language its plain and ordinary meaning. *D.C. v. Heller*, 554 U.S. 570, 576 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.")).

Article I is perfectly silent as to a prescribed method by which the States must elect their representatives. Plaintiffs urge that I must fill this void because section 2, as they put it, "must mean something." This position is premised on the dubious notion that the framers could not have intended to reserve for the States so much freedom as to choose how they elect their representatives to the Congress. This is a peculiar argument for Plaintiffs to make and one which is deeply belied by the extensive historical record leading to the adoption of the Constitution. The argument also is faulty insofar as it assumes that section 2 cannot be reconciled or comprehended without grafting onto its plain language a mandate for states to employ a plurality standard of conducting elections. The framers knew how to distinguish between plurality and majority voting, and did so in other contexts

in the Constitution, which leads to the sensible conclusion that they purposefully did not do so in Article I, section 2. Plaintiffs' argument also overlooks the profound influence of federalism on the development and ratification of the Constitution, which is evident in its text and structure.

Exercising the power vested in them by Article I, "[t]he people, in several States, functioning as the lawmaking body for the purpose at hand, have used the initiative to install a host of regulations governing the 'Times, Places and Manner' of holding federal elections," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2676 (2015), and the people of Maine are no exception.[15] Plaintiffs contend that RCV is too exotic to fit within the meaning of Article I. Plaintiffs argue that over 100 years of wide-spread acceptance of plurality elections should not be undone by new ideas concerning the manner of holding elections. Plaintiffs attempt to prove the point through scholarly debate about the disadvantages of RCV. In my view, these arguments are policy considerations that the people and their representatives should weigh and assess when devising the best manner for holding elections. It is precisely why I find Dr. Gimpel's testimony to be unpersuasive in its entirety, at least as bearing on problems of constitutional magnitude. I have no doubt that Dr. Gimpel will contribute his enthusiasm and ability to the development of this area of political science and voter behavior to develop conclusions

[15] Hearkening to pronouncements on popular sovereignty that predated the founding of our Nation, the Supreme Court observed that governmental power is derived from the consent of the people, as reflected succinctly in the Preamble of our Constitution, which begins, "We the People." *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. at 2675. Thus, "the true principle of a republic is, that the people should choose whom they please to govern them." *Id.* (quoting *Powell v. McCormack*, 395 U.S. 486, 540–541 (1969) (quoting 2 Debates on the Adoption of the Federal Constitution 257 (J. Elliot ed. 1876))).

based on rigorous methodology, study, debate, and time. For now, given the authority vested in the People of Maine under Article I, section 2 to choose their representatives, and given the authority vested in the People and the State under Article I, section 4 to determine the manner by which representatives are elected, I fail to see how Article I lends support to Plaintiffs' cause to have a federal court invalidate the results of Maine's second district house race.[16]

Plaintiffs' appeal to historical practices of plurality voting is not, standing alone, enough to elevate their policy criticism of RCV to a constitutional crisis. First, there are historical antecedents for majority and plurality standards in American politics, including in New England.[17] Second, a positivist characterization of the plurality standard that Maine

[16] I am concerned that Plaintiffs' Article I challenge may present a nonjusticiable political question. *See*, *e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (recognizing the difficulty in articulating justiciable standards for resolving a claim of unlawful political gerrymandering). However, because Plaintiffs' Fourteenth Amendment claims raise justiciable issues related to Plaintiffs' individual rights, *Gray v. Sanders*, 372 U.S. 368, 374 (1963), the Court sees no advantage in attempting to address a justiciability question solely with respect to Plaintiffs' Article I challenge, especially where the parties have not pressed the issue. However, the Court is perplexed as to what standard it would fashion to assess the constitutionality of RCV other than the standards it will address in the context of Plaintiffs' Fourteenth Amendment claims. Assuming the Article I claim is justiciable, I find that RCV does not exceed the State's authority under Article I for the reasons outlined herein.

[17] In 1784, Matthew Griswold became Governor of Connecticut after obtaining a plurality of the votes cast, but not because he won by plurality. Instead, he ascended to the seat because the Connecticut assembly was empowered to decide the winner in the absence of a majority popular vote. This manner of election occurred five times in Connecticut in the 1780s, and on three of the five occasions, the declared winner was not the candidate with the most votes. Similarly, in 1785, James Bowdoin became the governor of Massachusetts after winning a plurality, but only because he received the vote of the Massachusetts legislature. Also in 1785, in a field of four candidates, George Atkinson won a plurality of the popular vote in the race for New Hampshire's governorship, but the New Hampshire Legislature gave the seat to runner-up John Langdon, as was its right in the absence of a majority victory. In 1787, in a reversal of fortunes, John Langdon won a plurality of the popular vote, but the New Hampshire Legislature this time gave the seat to another runner-up, John Sullivan. *See* Robert J. Dinkin, *Voting in Revolutionary America*, *A Study of the Elections in the Original Thirteen States*, *1776–1789*, 20–24, 105, 109 (1982).

has used for over 100 years does not lead to the ineluctable conclusion that any deviation from the practice is unconstitutional.

In the final analysis, RCV is not invalidated by Article I because there is no textual support for such a result and because it is not inherently inconsistent with our Nation's republican values. In fact, the opposite is true. In discussing the dangers of political factions to a "wellconstructed Union," James Madison made some observations that are worth considering when evaluating the bona fides of ranked-choice voting.

> Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority [and under plurality, a minority] of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked that [faction] is always checked by distrust in proportion to the number whose concurrence is necessary.

THE FEDERALIST No. 10. [18]

Madison's concern for a political system that checked the power of factions is as timely today as it was in the Eighteenth Century. Maine's RCV Act reflects the view of a majority of the voting public in Maine that their interests may be better represented by the candidate who achieves the greatest support among those who cast votes, than by the candidate who is first "past the post" in a plurality election dominated by two major parties. By requiring the concurrence of more than a plurality of voters, the People of Maine have

[18] In discussing faction, Madison spoke of "unjust or dishonorable purposes" where I have revised the quotation. To be sure, I do not regard any of the parties to be motivated by unjust or dishonorable purposes. The point, rather, is that a manner of election that requires a contestant for representative office to win over minority factions, when the contestant has not achieved an outright majority, is not inherently destructive to the virtues of a republican form of government and may, in fact, promote them.

not exceeded the authority vested in them under Article I, sections 2 and 4, and they have not violated any regulation issued by Congress under section 4.

C. Fourteenth Amendment

Although I find that the RCV Act is not incompatible with Article I, I must still consider whether Defendant Dunlap's implementation of RCV in the November 6, 2018 election deprived Plaintiffs of individual rights protected by the Fourteenth Amendment. These claims arise under the federal civil rights statute, which states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

42 U.S.C. § 1983. "Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Plaintiffs contend Defendant Dunlap's application of RCV to the Second District house race deprived them of rights guaranteed under the Fourteenth Amendment's Equal Protection Clause and Due Process Clause, and under the First Amendment, which is incorporated into the substantive protection the Fourteenth Amendment extends to citizens in their dealings with the state governments.[19]

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[19] The Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Am. XIV, § 1.

1. Equal Protection

When it comes to voting rights, the bedrock principle of the Equal Protection Clause is that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). A state violates the Clause where a manner of election is enacted that "impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters." *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (internal quotations omitted) (applying Section 2 of the Voting Rights Act); *see also Hunter v. Erickson*, 393 U.S. 385, 391 (1969) (equal protection affords all citizens the right to "vote, on an equal basis with others"). Most of what the Supreme Court has said on the topic of equal protection in the election context has related to concerns over balancing majority and minority interests, and much of that language is germane to the issue of whether the will of the People can be expressed through a ranked-choice election process that seeks to understand what, exactly, is the majority will. For example:

> Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative

> apportionment. Since the achiev[ement] of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.

Reynolds v. Sims, 377 U.S. 533, 565–66 (1964).

Citing *Bush v. Gore*, 531 U.S. 98 (2000), Plaintiffs maintain that the RCV Act will deprive them of equal protection under the law.[20] They recite:

> The Fourteenth Amendment's guarantee of equal protection of the laws means that a "State may not, by [] arbitrary and disparate treatment, value one person's vote over that of another." *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). "The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government." *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969) (brackets omitted)).

Motion for Preliminary Injunction at 14.

The "one person, one vote" principle is well established in the law. In *Gray v. Sanders*, 372 U.S. 368, 374 (1963), the Supreme Court declared as unlawful a state election system that weighed rural votes more heavily that urban votes, and votes from the smallest rural counties more heavily than those from the larger rural counties. *Id*. at 379. While the *Gray* Court recognized the one person, one vote concept, its point was that "equality of voting power" must be preserved. *Id.* at 381. In other words, the vote cast by each voter

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[20] In *Bush v. Gore*, the Supreme Court observed that there is a need for a consistent standard for assessing ballots and that it presents an unacceptable scenario when those who review ballots on behalf of a state apply varied standards for interpreting voter intent. 531 U.S. 98, 105 (2000) (describing varied interpretations of the significance of dimpled chads versus chads dislodge enough to permit light to show through). The record in this case does not reveal the application of inconsistent standards.

must have equal weight; no vote should be disadvantaged (or "diluted") because of the voter's membership in a demographic group or another arbitrary factor. *See also Moore*, 394 U.S. at 816 ("The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.").

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court invalidated a system of electing congressional representatives where congressional districts were of markedly different populations, such that one district's representative would represent two-to-three times as many people as another district's representative. The Court explained:

> Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:
>
> > '(A)ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.'
>
> It is in the light of such history that we must construe Art. I, s 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States * * * according to their respective Numbers.' It is not surprising that our Court has held that this Article gives persons qualified to vote a constitutional right to vote and to have their votes counted. . . . Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots . . . . No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right. In urging the people to adopt the Constitution, Madison said in No. 57 of The Federalist:

> 'Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. * * *'
>
> Readers surely could have fairly taken this to mean, 'one person, one vote.' *Cf. Gray v. Sanders*, 372 U.S. 368, 381.

Wesberry, 376 U.S. at 17–18 (some citations omitted). To the list provided by Madison, one might add, not the party-enrolled more than the unenrolled. The point is that "one person, one vote" does not stand in opposition to ranked balloting, so long as all electors are treated equally at the ballot. *See Hadley v. Jr. Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970) ("[A]s a general rule, whenever a state or local government decides to select persons by popular election . . . , the Equal Protection Clause . . . requires that each qualified voter must be given an equal opportunity to participate in that election, and . . . each district must be established [so] that equal numbers of voters can vote for proportionally equal numbers of officials.").

Plaintiffs insist that their votes received less weight. However, Plaintiffs have not demonstrated that their votes received less weight. They understood that a majority victory was the standard to avoid a second round of ballot counting. At round one of the RCV election, they cast votes of equal weight, but their candidate failed to achieve a majority victory. At round two, votes cast for the two trailing candidates were reviewed to see whether they expressed a preference for the remaining, viable contestants. Defendant Dunlap distributed those votes that were earmarked to either Plaintiff Poliquin or Intervenor Golden. Plaintiffs' votes were not rendered irrelevant or diluted by this process.

They remained and were counted.[21] Presumably for this reason, Plaintiffs' expert, Dr. Gimpel, testified that Plaintiffs participated fully in the election.

Plaintiffs go on to allege that there is something insidious about a majority vote standard. In their amended complaint, they allege:

> While most states use a single-ballot, plurality system to elect candidates for federal office, a minority of states – mostly in the South – have required candidates to win a run-off election if they do not exceed 50% of the votes cast on the initial ballot. *See, e.g.*, Nat'l Conference of State Legislatures, *Primary Runoffs*, at http://www.ncsl.org/research/ elections-and-campaigns/primary-runoffs.aspx (last accessed Nov. 12, 2018). Observers have noted that the "runoff system is a vestige of a time when white Democrats controlled Southern politics[] and manipulated election rules to make sure they stayed in power." Reid Wilson, *Runoff Elections a Relic of the Democratic South*, Wash. Post, June 4, 2014.

Am. Complaint ¶ 61. Contrary to Plaintiffs' allegation, there is nothing inherently improper about an election that requires a contestant to achieve victory by a majority.[22]

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[21] Other courts that have evaluated an equal protection challenge to ranked choice / instant run-off elections have agreed that ranked ballots do not dilute unranked ballots because an unranked ballot that supports a leading candidate continues to have equal weight in the subsequent round(s) of balloting. *Dudum v. Arntz*, 640 F.3d 1098, 1112 (2011) ("Each ballot is counted as no more than one vote at each tabulation step, whether representing the voters' first-choice candidate or the voters' second- or third-choice candidate, and each vote attributed to a candidate . . . is afforded the same mathematical weight in the election."); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 690 (2009) ("[I]t is only because votes for continuing candidates are carried forward and combined with subsequent-choice votes of voters for eliminated candidates that any candidate can eventually win."); *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 16 (Mass. 1996) ("Even a special election may be said to disenfranchise the prior voters to some extent in favor of those voting in the later one.").

[22] There is an indication in the congressional record associated with the Voting Rights Act that some states adopted a majority standard for certain offices to prevent black citizens from obtaining victories under a plurality system. *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 520 & n.20 (1992) (Stevens, J., dissenting) (describing "white resistance to progress in black registration"). The Supreme Court has affirmed a district court order that required a city to remove a majority-vote requirement where the new requirement coincided with consolidation and annexation of neighboring political subdivisions in a manner that adversely impacted minority voting strength. *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982); *City of Rome v. United States*, 446 U.S. 156, 183 (1980). The fact that "eliminating [a] majority-vote requirement" can be "an understandable adjustment" to prevent dilution of a minority's voting power, *Port Arthur*, 459

E.g., *Fortson v. Morris*, 385 U.S. 231, 234 (1966); *Bond v. Fortson*, 334 F. Supp. 1192 (1971), *aff'd* 404 U.S. 930 (1971); *cf. Gutierrez v. Ada*, 528 U.S. 250 (2000) (considering 48 U.S.C. §§ 1421 et seq., in which Congress prescribed the majority standard and run-offs when needed in gubernatorial races in the territory of Guam); 48 U.S.C. § 1712 (specifying that delegates to Congress from Guam and the Virgin Islands must be elected by a majority of the votes cast); 48 U.S.C. §§ 1732, 1752 (permitting the legislatures of American Samoa and Northern Mariana Islands to establish primary elections for the election of a delegate to Congress, in which case the delegate "shall be elected by a majority of votes cast in any subsequent general election . . . ."). Nor is it unconstitutional for an election to be determined in more than one round, provided that the official election takes place on federal election day. *Foster v. Love*, 522 U.S. 67 (1997) (invaliding Louisiana open-primary because it provided the opportunity to fill congressional seats prior to election day).[23]

Maine has devised a manner of holding elections that seeks to realize the perceived

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U.S. at 167, does not call into disrepute all majority-vote requirements. Nothing in the record suggests that any discriminatory purposes or effects are at play here.

[23] In *Foster*, the Supreme Court noted that "a State may hold a congressional election on a day other than the uniform federal election day when such an election is necessitated 'by a failure to elect at the time prescribed by law,'" as occurs in states that require a majority winner and provide for run-off elections. 522 U.S. at 72 n.3. The Court did not rule on the issue, but cited Eleventh Circuit precedent that upheld an election result secured after federal election day through a run-off election. *Id.* (citing *Public Citizen*, *Inc. v. Miller*, 813 F.Supp. 821 (N.D. Ga.), *aff'd*, 992 F.2d 1548 (11th Cir. 1993) (upholding under 2 U.S.C. § 8 a run-off election that was held after federal election day, because in the initial election on federal election day no candidate received the majority vote that was as required by Georgia law).

benefits of a majority candidate, while avoiding the shortcomings of a run-off election.[24] The Supreme Court has observed that a state may well voice the "need to assure that the winner of an election 'is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (discussing ballot access claims) (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)). Has Maine not, in fact, done exactly that? Maine's two congressional districts are geographically large, and the political views of its citizens are diverse. A majority of Maine's voters have expressed their interest in a manner of election that gives voice to these varied perspectives, while also permitting representation by those candidates most voters regard as the best of the practical alternatives. Through RCV, as applied to the Second District house race, majority rights have been advanced, and no minority rights have been burdened unduly, if at all. [25] In

[24] Run-off elections are expensive and impose a significant burden on municipal and state officers. Run-off elections also impose an appreciable burden on the voting public, as is reflected by the fact that run-off elections commonly involve a significant drop-off in public participation, as conceded by Dr. Gimpel.

[25] I can conceive of RCV election results that might raise legitimate equal protection concerns, particularly if votes for one non-viable candidate were not distributed yet votes for another such candidate were. Based on this case, however, it appears that the administrative machinery that informs application of RCV in Maine calls for batch eliminations in which votes for all candidates who cannot mathematically win are redistributed. If a case should ever arise in which votes for a non-viable candidate are not redistributed, no doubt this Court or a Maine court would be able to iron out any error and provide appropriate relief. Thus, to the extent Plaintiffs advance a facial challenge to Maine's RCV Act, I consider the challenge overly abstract in the context of this litigation, and conclude it is better for a future court to handle any such claim based "on specific facts which present the issues with clarity, and not on the basis of theoretical impacts." *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 51 (1st Cir. 1998). *See also Sabri v. United States*, 541 U.S. 600, 608–09 (2004) ("Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks. Facial adjudication carries too much promise of 'premature interpretatio[n] of statutes' on the basis of factually barebones records." (quoting *United States v. Raines*, 362 U.S. 17, 22 (1960)); *but see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) ("But while the 1968 election is over, the burden . . . remains and controls future elections, as long as Illinois maintains her present system . . . . The problem is therefore capable of repetition, yet evading review . . . . The need for its resolution thus reflects a continuing

short, Maine has "attempted to allocate governmental power on the basis of a[] general principle" and has devised a manner of voting that is solicitous of the majority interest without imposing undue burden on any particular voter. *Hunter*, 393 U.S. at 395. Because RCV is "designed with the aim of providing a just framework within which the diverse political groups in our society may fairly compete and [was] not enacted with the purpose of assisting one particular group in its struggle with its political opponents," it does not violate the Equal Protection Clause.[26] *Id.* at 393.

2. Due Process

Plaintiffs argue that RCV is susceptible to producing arbitrary or irrational election results. In particular, they maintain that a significant segment of the voting public cannot comprehend RCV sufficiently to cast a meaningful vote.[27] Plaintiffs do not contend, however, that they are members of the allegedly disadvantaged class. They have not, therefore, demonstrated that RCV deprived them of due process in violation of § 1983. Nevertheless, I will consider the argument.

The Due Process Clause prohibits governmental activity that is "arbitrary" or "purposeless." *Bell v Wolfish*, 441 U.S. 520, 584 n.15 (1979) (citing inter alia *Socialist Wokers Party*, 440 U.S. 173). Moreover, "[i]f the election process itself reaches the point

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controversy in the federal state area where our 'one man, one vote' decisions have thrust." (citation omitted)).

[26] Citing *Hunter*, the Supreme Court has observed that "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (5–4 decision) (invalidating race-specific state bussing directive).

[27] Similar arguments were once advanced by those who sought to deny the vote to women and minorities.

of patent and fundamental unfairness, a violation of the due process clause may be indicated and relief under § 1983 therefore in order." *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). The crux of Plaintiffs' argument is that the ballot returns reflect that several thousand voters were disenfranchised during tabulation because they cast invalid overvotes or undervotes. Plaintiffs propose that these ballots likely were cast by those voters with the least amount of interest and/or access to reliable information.

To put it generously, Plaintiffs have not demonstrated persuasively that the inferences that they draw from the ballot data are more likely true than false. That is, Plaintiffs contend that the ballot was too confusing for the average voter of Maine's Second Congressional District to understand, as evidenced by those ballots in which the voter did not select either Mr. Golden or Mr. Poliquin as their down-ballot choices. There was no evidence produced to support that argument other than the conclusory testimony of Dr. Gimpel, which I have summarized and discount entirely. It is at least equally plausible that these ballots represent the political expression of the quixotic voter, who has equal right to be heard at the ballot box. In every election there are protest votes, whether by voting for a preferred, non-viable candidate, or by expressing a "none-of-the-above" vote. Plaintiffs have not shown that a similar volume of votes are not also invalidated in plurality elections or in run-off elections when there is a substantial number of voters who do not participate. The fortuity that some voters did not "guess correctly," as Plaintiffs put it, as to the run-off candidates is not evidence of voter confusion or disenfranchisement. It is just as likely evidence that approximately 8,000 voters did not want to vote for either Mr. Golden or Mr. Poliquin regardless of whether they believed they would be the run-off candidates. An

expression of political preference that does not, even under RCV, favor either one of the two major-party candidates is not evidence of voter confusion. To the contrary, it may as likely be evidence of voter clarity and conviction, which is no doubt what lead to the passage of the RCV Act in the first instance.

Further, I am not persuaded by Dr. Gimpel's testimony which attributes inherent virtue in the forced simplicity of two-party access to the ballot, thereby making easier the voters' choice. He testified to what he perceived as a troubling reality that Maine has a low threshold for non-party candidates to gain access to the ballot. His thesis, as I understand it, is that by allowing for choices among several non-major-party candidates, voter turnout is likely to be comprised of a greater percentage of low-information voters, which apparently makes more likely that those voters are cognitively unable to fill out a RCV ballot. In addition to being cynical, these conclusions are not grounded in anything approaching a reliable standard that may be informative of the constitutional questions. They are instead provocative reactions to a new system of selecting representatives to Congress, and such reactions often are the byproduct of change. Dr. Gimpel's testimony left me with the impression of a panel debate among political scientists in a nascent field of study. To his credit, Dr, Gimpel conceded that he has not discussed the RCV experience with a single Maine voter but would like to conduct such a study. In the meantime, I simply am unable to credit his testimony any weight on the constitutional issues before the Court.

Additionally, Plaintiffs have not demonstrated that the Due Process Clause imposes a lowest-common-denominator standard on the exercise of the suffrage. The Constitution does not require an easy ballot. *Griffin v. Roupas*, 385 F.3d 1128, 1133 (7th Cir. 2004). In

a Nation founded on the principles of republican–representative government, nothing is to be gained from an electoral system that caters to the uninterested and uninformed. The RCV system implemented in Maine is not so opaque and bewildering that it deprives a class of citizens of the fundamental right to vote. In fact, I find the form of the ballot and the associated instructions more than adequate to apprise the voter of how to express preferences among the candidates. Finally, I am not persuaded that it is unduly burdensome for voters to educate themselves about the candidates in order to determine the best way to rank their preferences.

3. First Amendment via Fourteenth Amendment

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) (quoting *Wesberry*, 376 U.S. at 17). At oral argument, Plaintiffs emphasized that the First Amendment entitles them to express their support for their candidate. They feel that Maine is giving other voters disproportionate expression.

The Supreme Court's first amendment jurisprudence teaches that nondiscriminatory regulations that "burden" the right of individuals to vote must be weighed against the "precise interests put forward by the State as justifications for the burden imposed by its rule." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 190 (2008) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). That interest must be "sufficiently weighty to justify" whatever burden befalls Plaintiffs. *Id.* (quoting *Norman v. Reed*, 502 U.S. 279,

288–89 (1992)).[28] As Judge Levy of this Court observed in an earlier challenge to the RCV Act, as applied to primary elections, "the . . . position that Maine's adoption of a ranked-choice primary ballot should be subject to strict scrutiny would, contrary to the warning in *Clingman*, interfere with the State's ability "to run efficient and equitable elections," and thus "compel federal courts to rewrite state electoral codes." *Dunlap*, 324 F. Supp. 3d at 210 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)). I agree with his assessment that the RCV Act is not subject to strict scrutiny under the First Amendment, and this assessment is especially sturdy in the context of a general election.

As I indicated in my order denying Plaintiffs' request for a temporary restraining order, there is no dispute that the RCV Act—itself the product of a citizens' initiative involving a great deal of first amendment expression—was motivated by a desire to enable third-party and non-party candidates to participate in the political process, and to enable their supporters to express support, without producing the spoiler effect. In this way, the RCV Act actually encourages First Amendment expression, without discriminating against any voter based on viewpoint, faction or other invalid criteria. Moreover, a search for what exactly the burden is that Plaintiffs want lifted is not a fruitful exercise. I fail to see how Plaintiffs' first amendment right to express themselves in this election were undercut in any fashion by the RCV Act. They expressed their preference for Bruce Poliquin and none other, and their votes were counted.

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[28] *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("Lesser burdens . . . trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." (quotations omitted)).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction and request for permanent injunctive relief are denied. The Clerk is directed to enter judgment in favor of Defendants.

SO ORDERED.

Dated this 13th day of December, 2018

/S/ Lance E. Walker
LANCE E. WALKER
U.S. DISTRICT JUDGE

Exhibit B

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRETT BABER, et al., Plaintiffs	)	CIVIL ACTION
vs.	)	Docket No. 1:18-cv-465-LEW
MATTHEW DUNLAP and PAUL LePAGE, Defendants.	)	MOTION FOR PRELIMINARY INJUNCTION

TRANSCRIPT OF PROCEEDINGS

Pursuant to notice, the above-entitled matter came on for MOTION FOR PRELIMINARY INJUNCTION before the HONORABLE LANCE E. WALKER, in the United States District Court, Bangor, Maine, on the 5th day of December, 2018, at 10:08 a.m.

APPEARANCES:

For the Plaintiffs:	Lee E. Goodman, Esquire Joshua A. Randlett, Esquire Joshua A. Tardy, Esquire
For Defendant Dunlap:	Phyllis Gardiner, Esquire Thomas A. Knowlton, Esquire
For Intervenor Golden:	Peter J. Brann, Esquire Michael E. Carey, Esquire John M. Geise, Esquire Eamonn R.C. Hart, Esquire David M. Kallin, Esquire James T. Kilbreth, Esquire
For Intervenors Bond, Wollstadt, and Michaud:	James G. Monteleone, Esquire

Julie G. Edgecomb, RMR, CRR
Official Court Reporter

Proceedings recorded by mechanical stenography; transcript produced by computer.

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(Counsel present in open court.)

THE COURT: Good morning, everyone. Have a seat, please.

Okay. We're here in the case of Baber versus Dunlap, Case No. 18-cv-465.

Before we begin this morning, I'd like to have counsel note their appearance for the record, starting with Mr. Goodman. Good morning.

MR. GOODMAN: Good morning, Your Honor. Lee Goodman, of Wiley Rein, for the plaintiffs.

MR. RANDLETT: Good morning, Your Honor. Josh Randlett, Rudman Winchell, on behalf of the plaintiffs.

MR. TARDY: Good morning. Josh Tardy on behalf of the plaintiffs.

THE COURT: Good morning.

MS. GARDINER: Good morning, Your Honor. Phyllis Gardiner from the Attorney General's Office, with my colleague Tom Knowlton, also from the Attorney General's Office, on behalf of Secretary of State Matt Dunlap.

THE COURT: Good morning.

MR. KNOWLTON: Good morning.

MR. KILBRETH: James Kilbreth on behalf of Jared Golden.

THE COURT: Good morning.

MR. BRANN: Peter Brann on behalf of Jared Golden.

MR. GEISE: John Geise on behalf of Jared Golden.

MR. MONTELEONE: Good morning, Your Honor. James Monteleone, from Bernstein Shur, on behalf of Tiffany Bond, Kaylee Michaud, and Rachel Wollstadt.

THE COURT: Good morning. Is that everyone? Okay.

MR. BRANN: Your Honor, with me is Michael Carey and Eamonn Hart of my office, who are also here on behalf of Jared Golden.

THE COURT: Welcome, good morning.

MR. KILBRETH: And, also, Your Honor, David Kallin is also here.

THE COURT: All right. I think we've accommodated everyone for introductions. We should probably get to the evidence sooner or later.

Before we do that, Mr. Goodman, is there anything from your perspective that needs to be brought to the attention of the court?

MR. GOODMAN: Yes, Your Honor.

THE COURT: Yes, sir.

MR. GOODMAN: The defense counsel suggested just before the hearing that we consolidate the plaintiffs' request for preliminary injunction with a request for permanent injunction.

THE COURT: Hm-hmm.

MR. GOODMAN: Plaintiffs' counsel has agreed to that

if the court is amenable to consolidating those -- those two procedures and reliefs.

Now, we still do have a -- we have, of course, alternative relief, including just a declaratory judgment --

THE COURT: Right.

MR. GOODMAN: -- but I think the court would have to cross that bridge in order to get to an injunction.

THE COURT: Right.

MR. GOODMAN: But I wanted to bring that agreement between counsel to present that to the court, to your attention before we began.

THE COURT: Is that the position of all defendants?

MS. GARDINER: It's the position of the Secretary of State, Your Honor, and just with the understanding that the declarations of Deputy Secretary Flynn that have been submitted to the court and those exhibits would be considered part of the evidentiary record of the consolidated hearing.

THE COURT: No objection to that, Mr. Goodman?

MR. GOODMAN: No objection, Your Honor.

THE COURT: Okay.

MR. BRANN: Golden consents, as well.

MR. MONTELEONE: As does Ms. Bond.

THE COURT: So that request is granted. Thank you.

MR. GOODMAN: Thank you, Your Honor.

THE COURT: Anything else we need to take up?

MR. GOODMAN: Nothing preliminary. Just ready -- prepared to get to the merits.

THE COURT: You may call your first witness.

MR. GOODMAN: Your Honor, before I call my first witness, just -- just an update.

THE COURT: Yes.

MR. GOODMAN: We filed an amended complaint, Your Honor, that updated factual circumstances. The Secretary of State certified a vote tabulation to the Governor's Office on November 26th.

THE COURT: Hm-hmm.

MR. GOODMAN: That vote tabulation showed that Congressman Poliquin won the first count and that Mr. Golden won the -- the RCV, or the retabulated count. That count is not finalized now because the -- a recount has been requested by the apparent loser of the RCV count, Mr. Poliquin, without waiving his right to -- to, nonetheless, raise the constitutional challenges he has to the count itself.

THE COURT: Right.

MR. GOODMAN: And we are -- we have been informed from public pronouncements by the Secretary of State that that recount could take approximately four weeks, and it's our understanding that the Governor will certify a winner based on the recount tabulation, not the original November 26th certification.

THE COURT: Hm-hmm.

MR. GOODMAN: And in the meantime, you know, Mr. Golden is attending orientation activities in Washington, D.C., as the apparent winner of the election.

Our amended complaint, Your Honor, updated those factual circumstances, added the Governor as a defendant in his official capacity, given his role of certifying the winner based on the eventual recount tabulation. It -- our amended complaint reflected -- reflects new evidence about the election that we've now all learned about as a result of the first tabulation. The amended complaint responds to issues that the court raised at the prior hearing and in the TRO ruling, and we have added an alternative relief, which is the call of a new election, which the court pressed us on.

So there are, effectively, four -- four potential or alternative requests for relief: One is the declaratory judgment. In some cases, courts reach declaratory judgment and never issue an injunction. They remand to the state to act in accordance with the constitutionality or the constitutional ruling.

Moving forward into injunctive relief, there are really two: One is to enjoin the State from determining a winner based on the recount count, the second count of votes.

The next one would go a bit further and enjoin the State by ordering the State to determine a winner according to the

first count. Those are nuanced, slightly different.

And the third would be the call of a new election under the First Circuit case that indicated that could be appropriate if the -- if the court deems an election so infected by irregularity or unconstitutionality.

So at this point, Your Honor, I'd like to call Professor James Gimpel to the stand.

MS. GARDINER: Your Honor?

THE COURT: Yes.

MS. GARDINER: May it please the court. Secretary of State objects to the relevance of Mr. Gimpel's testimony. There is nothing in his report which provides any basis for finding a consti -- likelihood of success on a constitutional or statutory violation, so we don't think that that testimony is relevant, and we don't think that having testimony, given that the court already has seen the report, that there's any need to take additional testimony, in any event, since it can't go beyond the scope of the report.

THE COURT: Mr. Goodman?

MR. GOODMAN: Any other?

Your Honor, Professor Gimpel has issued a report that we have submitted to the court, as well as to opposing counsel, that indicates voters were disenfranchised in this election in precisely the way that we were ruled to have theoretically predicted at the temporary restraining order phase. That his

report will go into how voters had to guess. His testimony will go into the lack of proper instructions on the ballot to voters. His testimony will indicate how voters attempted to guess at their votes in the runoff election, and that he will also testify to the other flaws we've identified in the ranked-choice voting system, such as nonmonotonicity, and that voters cannot express preferences knowledgeably when they move to the subsequent rounds, and that those problems actually manifested themselves in this election. The perfect storm did occur; it wasn't just a pre -- a weather prediction.

And we think those are highly relevant predicates to our argument that this election was conducted in an unconstitutional manner and actually disenfranchised over 8,000 voters in this election.

THE COURT: All right. I'm not going to categorically at this point preclude Mr. Gimpel's testimony. If any of the defendants want to make an objection to relevance on any other grounds, they're welcome to do that during the course of questioning.

THE CLERK: Could you please raise your right hand. Do you solemnly swear that the testimony you shall give in the matter now in hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: Yes, I do.

THE CLERK: Thank you. Please be seated. Could you

please state your name for the record and spell both your first and last name.

THE WITNESS: James Gimpel, so it's J-a-m-e-s, Gimpel, G-i-m-p-e-l.

JAMES GIMPEL, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GOODMAN:

Q Professor Gimpel, could you tell the court your occupation and title and your place of employment?

A I'm a professor of political science, or professor of government, at the University of Maryland in College Park.

Q And how long have you been a professor of political science at the University of Maryland?

A 27 years.

Q And can you explain your background, your educational background, where you received your degrees and which degrees you've received?

A Well, I'm originally from the Midwest, so I have a bachelor's degree from Drake University in -- in Iowa. I did a master's degree at the University of Toronto, not that far from here actually, and then finished with a Ph.D. at the University of Chicago.

Q And a Ph.D. in?

A In political science, yes.

Q And what areas of political science did you focus on?
A I focused on political parties and voting and elections.
Q Voting, does that include voting behavior?
A Yeah, it's voting behavior mainly, yes.
Q Does it include voting behavior in the context of voting systems and voting institutions?
A Yes, voting participation, you know, different types of -- of voting systems, election reform, innovation, such as early voting and absentee voting, and, yes, alternative voting systems, as well, as they've been adapted.
Q And in your work, have you been -- have you been the recipient of any honors or awards?
A Several. Most recently, I was a National Fellow at the Hoover Institution at Stanford.
Q And what was the subject of your work at Hoover Institution at Stanford?
A Voting and elections.
Q And have you been a member of any professional political science associations over the last 30 years?
A The usual ones. Most faculty in the profession are members of one, two, or more professional associations. So I'm a member of the American Political Science Association, also the Midwest Political Science Association, and there are other regional ones that I'm not a member of.
Q And have you been -- have you been a -- associated with

any political science journals?
A I was the editor of the journal American Politics Research for 11 years.
Q What years?
A From 2003 to 2011.
Q Approximately how many articles that were -- did you review or publish as editor for the American Politics journal?
A I would say between a thousand and 1,100 articles were reviewed, and we published probably a little over 200 of them during that time.
Q Hm-hmm. Now, in your field where you teach in research today, have you continued in the area of voting behavior and elections and voting institutions?
A Yes, yes, I have.
Q Okay. Can you describe the extent of your academic work in research on the -- in the area of voting and voting systems?
A Well, I have a lot of research and -- and teaching and -- on, you know, all of the -- the material covered in this area; I mean, this is what I do every day.
Q Did you --
A I mean, I don't -- I don't really know what you're asking. I mean, this is what I do every day, right? I mean, it's not like some segment of what I do; this is what I do every day.

Q Yeah. Have you ever published a paper or edited a paper on ranked-choice voting?
A I have not actually published a paper on ranked-choice voting because it's a pretty narrow subject. There aren't many papers out there specifically on the subject.
However, one of the best papers that was published on the subject was published under my editorship at American Politics Research by Neely and Cook on the San Francisco ranked-choice voting system, and, you know, Neely and -- that paper is widely cited.
Q You edited that paper?
A Yes, hm-hmm. I --
Q At the American Politics journal?
A Right.
Q And approximately what year was that paper published?
A 2008. It's -- you can check the citation. It's in my bibliography.
Q Okay. And do you regularly, as part of your profession, keep up with professional reading and professional journals about voting behavior and voting systems?
A Right. I mean, again, that's a regular responsibility. I mean, that's like -- comes with the job description; that's what you do.
Q Have -- approximately how many journals do you keep up with?

A I keep up with probably over a hundred, and not just in political science.
Q And in your teaching, have you taught voting behavior and election systems?
A Right. That's -- in my teaching, I -- I teach courses on elections and voting behavior, and one of the standard subjects, again, you know, it's not an entire semester's worth of material because it's a pretty narrowly focused area, but certainly one of the standard subjects you deal with are alternative voting systems, various kinds of election reforms, to enhance participation, and so forth.
Q Have you -- have you taught ranked-choice voting in a classroom?
A Yes, I've presented it.
Q Have you taught voting behavior within the context of ranked-choice voting in the classroom?
A Yes.
Q And have you attended professional conferences where voting behavior and ranked-choice voting were discussed?
A Yes, that -- again, you're not going to find a lot of panels on this subject in any conference, right? It's -- you might find slightly more now as this reform spreads, there will be more interest in it, and you will have a lot easier time finding experts, I'm sure, in the future.
But there are a couple of panels usually addressing this

subject at every conference, and, you know, I -- I try to show up to -- to those panels when I'm there.
Q Have you attended such conferences --
A Yes, I have.
Q -- and panels?
A Yes.
Q Okay. Have you served as an expert in connection with any court cases in the past?
A Yes.
Q Have you ever been qualified as an expert in the field of voting behavior or voter -- voting institutions and testified in court?
A Yes, once in a California state case, also in a federal redistricting case, and I've consulted in a couple of other redistricting cases.
Q Have you ever been presented as an expert and disqualified as an expert?
A No.
Q Okay. In this case, did you prepare a report setting forth opinions about the voting behavior of voters in this election?
A Yes.
Q Okay. And did you rely upon any election data to draw those conclusions?
A Yes, yes, the election data from the Secretary of

State's Web site.
Q Okay. And did you rely upon professional literature in the field to inform your opinions in the report that you issued in this case?
A Yes, yes, it's not an extensive literature, but there is some literature. Much of it is cited in my bibliography, you know, the source list at the back of the report. There are a few other papers, and, incidentally, there are some important papers in the field of economics.
Q Now, the information we discussed about your education, your professional work, your research, is that reflected in your CV or --
A Yes.
Q And do you see a copy --
A Yes.
Q -- anywhere near you?
A I have a copy of my --
Q Could you take a look at what's marked up there Plaintiffs' Exhibit No. 1 and identify that document?
A Yes, this is -- this is my CV, yes.
Q Is that your CV?
A Yes.
Q Okay. And is that an accurate copy of your CV with your credentials?
A Yes, I think so, updated as of probably October. I

update it about every six months, yeah.
Q Okay.
A So --
MR. GOODMAN: At this point, Your Honor, I move Plaintiffs' Exhibit No. 1 into evidence.
THE COURT: Any objection to Plaintiffs' 1?
MR. KILBRETH: No objection.
THE COURT: Plaintiffs' 1 --
MS. GARDINER: No objection.
THE COURT: Plaintiffs' 1's admitted.
MR. GOODMAN: And at this point, Your Honor, I would like to tender Dr. Gimpel as a qualified expert in the field of voting behavior and the impacts of the RC voting process on voters and voting behavior under Rule 702.
THE COURT: Defendants wish to be heard?
MR. KILBRETH: Yes, Your Honor. I think that it was fairly clear from Professor Gimpel's testimony that he's, in fact, not an expert on voting systems. He may be an expert on election issues more generally and redistricting and things like that. But as he himself acknowledged, there isn't a lot to this field, and I don't think he's properly qualified.
THE COURT: Do any other defendants have anything new or different to add to that objection? No.
Mr. Goodman?
MR. GOODMAN: Your Honor, the principal purpose of

Dr. Gimpel is to assess voter disenfranchisement and voting -- voter behavior in the context of the ranked-choice voting system that was implemented here in Maine in this past election.

Now, there will be some predicates about how ranked-choice voting applies, the same predicates that we've already discussed here among lay lawyers, but the critical aspects of Dr. Gimpel's testimony are going to go to voting behavior and how voters reacted to the ranked-choice voting ballot that they were provided. That is squarely within almost 30 years of experience of Dr. Gimpel and voting behavior.

It is the voting behavior that is consequential, we think, constitutionally in this case because that's where disenfranchisement occurs.

THE COURT: Dr. Gimpel is accepted by the court as an expert witness for that purpose.

You may inquire, Mr. Goodman.

MR. GOODMAN: Thank you, Your Honor.

BY MR. GOODMAN:

Q Dr. Gimpel, in your written statement that you submitted that was filed with the court, you -- you referred to Maine's ranked-choice voting law as instant-runoff voting.

A Yes.

Q Can you explain what -- what instant-runoff voting is and -- and why you characterized it as instant-runoff voting?

A Well, the -- the best way to do that is to compare it to the standard temporally-sequenced runoff that is adopted by some states. For instance, there are a number of southern states. We recently had an election in Mississippi of this temporally-sequenced runoff-type, where there's a multicandidate election that occurs in -- in November on general election day for the rest of us, and then the top two candidates, if there's not a majority, the top two candidates go on to an election just against each other four weeks later, sometime later, at a date set later, usually a few weeks after the general. And so there's a new campaign that -- that is waged, and voters then can look at the -- the two finalists, one against the other.

The instant runoff is -- is different in the sense that there is one multicandidate election. If there is no majority -- okay -- if there isn't any candidate that reaches that 50-percent-plus-one threshold -- okay -- then trailing candidates are dropped and their second round, or second-preference votes, are then allocated to the leading candidates according to how those second-choice preferences are ranked.

And so in the Maine case, it's a little different in the sense that trailing candidates, if they've been mathematically eliminated, if there's no chance for them to -- to -- to win, can actually be batch-eliminated. Okay. In a typical instant

runoff, candidates are eliminated one at a time. Okay. But in the -- in the Maine case, trailing candidates can actually be batch-eliminated, and then, say, two candidates are eliminated and both of their second-choice preferences are then reallocated to the leading candidates in the race.

If in the case a third round is necessary because we still do not have a 50-percent threshold, then, again, a trailing candidate, the candidate that's come in last, say, of three that still remain, that candidate -- candidate is eliminated and their third-choice preferences are reallocated to the leading candidates, and perhaps at that point, we've reached the majority threshold.

And, of course, anytime in the counting process that that majority threshold is reached, then a winner can be declared.

Q And that's analogous to an actual runoff?

A Well, here's the -- here's the problem. In the -- the temporally-sequenced runoff of the kind that we just observed take place in Mississippi, for instance, the voters actually get a chance to see who the leading candidates are. They get a reset, if you will -- okay -- of -- of the campaign picture and of the choice set. They don't have to guess as to who might be leading after a round or two, and I -- I think that this is the fundamental defect of the infinite runoff system, or ranked-choice voting, is that voters are forced to make a

guess about who the leading candidates will be after the first round.

Okay. What's very helpful for voters in the standard runoff election is that they get the additional information provided to them by the three- or four-week campaign that is waged after the initial election and that provides voters with much more information and gives them a chance to assess the two leaders up against each other, which, of course, is a different choice than when those two candidates were mixed in with maybe five others.

Q And does political science show that that is knowing who the actual candidates are in the runoff election, is that important to voter choice and voters' ability to cast an eligible ballot?

A Well, it most certainly is, and, of course, we also know from years of survey research, and the proper province of this expertise is in the survey research field, that voter attentiveness and voter knowledge varies widely across the electorate.

Okay. And so, you know, undoubtedly, here in Maine, there were quite a few people who were very attentive to the news, watched the horse race coverage in the newspaper and on television, and could anticipate that -- that Mr. Poliquin and Mr. Golden would be the likely leaders coming out of the first round.

But, of course, we know, as I said, that voter interest and voter knowledge varies a lot across the electorate, as does voter preference, right? And so certainly there were voters who did not anticipate or had a different guess -- right -- about who the two leaders would be coming out of the first round.

Q So if the majority of voters made a proper guess, that in the runoff round of this election the leaders would be Poliquin and Golden, there would, nonetheless, have been a certain percentage of voters who guessed wrong?

MR. MONTELEONE: Objection, Your Honor.

THE COURT: Grounds?

MR. MONTELEONE: We're -- we're now going beyond relevancy considering that the plaintiffs in this matter are voters who have expressed a preference for Mr. Poliquin, who are analyzing the -- the preferences of -- of people that change their votes along the way.

Clearly, I'm -- I mean, as far as plaintiffs are concerned, they were in the final round. There wasn't a guessing, and -- and we're exploring essentially things that are unrelated to plaintiffs' alleged harm.

THE COURT: Overruled. Go ahead.

BY MR. GOODMAN:

Q So what was the ballot drop-off between the round 1 voting versus the runoff election count in -- in the Secretary

of State's certified result here? How many -- how many voters were eliminated from the pool of voters from round 1 to round 2?

A Well, I -- there -- I have some calculations on that. I think we're looking at over 8,000.

Q Approximately --

A Yeah.

Q -- 8,000 plus?

A Yeah, I'm trying to pin down from my memory the exact number. 8,000 and some change.

Q So in reviewing those ballots, is it fair to conclude that -- that those 8,000 voters guessed wrong as to who they -- who the runoff election would feature, the two candidates?

A Well, on --

MR. KILBRETH: Objection, Your Honor.

THE COURT: Speculation?

MR. KILBRETH: Speculation, exactly.

THE COURT: Mr. Goodman?

MR. GOODMAN: Your Honor, experts are allowed to answer hypotheticals and to provide their opinions as to what actually occurred in this election. I imagine that the defense is going to speculate about the intent of those voters, as well. I imagine -- I'm anticipating that the defense is going to speculate that those voters intended not to vote in the runoff election and --

THE COURT: So where does the sum total of speculation leave me exactly? Overruled. Go ahead.

MR. GOODMAN: Thank you, Your Honor.

BY MR. GOODMAN:

Q So how many voters were absented from the election, from round 1 -- did you say 8,000?

A One of the -- one of the fundamental things that -- that is taught in -- on the subject of voting systems when you're teaching a class is that every voting system has a -- a kind of theory of voters behind it. Okay. And ranked-choice voting comes with a theory of voters -- okay -- that -- you know, that these voters are calculating -- okay -- and guessing, you know, what comes next, right?

And, you know, certainly on the basis of the theory provided by ranked-choice voting -- you know, and -- and it may be a theory that's too demanding or not -- you know, we'll -- that's not -- we won't argue that right now -- but just on the basis of the theory of ranked-choice voting, you have to suppose that these people were guessing or calculating incorrectly.

Q Okay. You -- you compared this to an actual runoff, where voters are presented an actual choice of two last-standing candidates.

A That's exactly right.

Q And you said there they do not guess; is that right?

A No, much more helpful for the voter to not have to calculate or guess.
Q But the weakness in the -- in the instant runoff is that they have to guess at those two and some percentage will guess wrong.
A Absolutely.
Q Okay. If you will take a look at what's marked at your table as Plaintiffs' Exhibit No. 2. Did you consider Plaintiffs' Exhibit No. 2, which is titled State of Maine Sample Ballot General Election November 6th, 2018, in drawing your conclusions?
A Yes, this is a part of the sample ballot from the Second District.
Q And you understood this to be the sample ballot issued by the Secretary of State's Office?
A Yes.
Q Okay. And -- and you reviewed it and considered it in drawing your conclusions about voter behavior in this case.
A Yes.
Q Okay.
MR. GOODMAN: At this point, Your Honor, I would move to enter as evidence Plaintiffs' Exhibit No. 2 as a foundational document for Professor Gimpel's opinions.
THE COURT: Thank you. Any objection to Plaintiffs' 2?

MR. KILBRETH: No objection.
MS. GARDINER: None, Your Honor.
THE COURT: Seeing none, Plaintiffs' 2 is admitted.
MR. GOODMAN: Okay.
BY MR. GOODMAN:
Q I want to draw your attention, Professor Gimpel, to the instructions to voters on the sample ballot.
A Yes.
Q Okay. In your report, you mentioned that those were vague and unclear.
A Yes, I would not call them -- I would not call them by fault. You know, I -- I think they're correct as far as they go, but they're incomplete I think would be the way I would characterize it. So as -- as it stands right now, they're incomplete.
And -- and, of course, we know that the Secretary of State had a vision for what complete instructions would look like because there is a very helpful paper on their Web site detailing instructions that were much clearer, and that's not what we have here.
Q So when a -- a voter went into the voter booth with this ballot, did the instructions to the voter inform the voter of the significance of voting second, third, fourth, fifth choices?
A No, not at all.

Q Did the instructions inform the voter of the consequence of not voting for all candidates, for example?
A No.
Q So a -- under these instructions, you mentioned in your report that a voter was voting blind past the first election.
A Yes.
MR. KILBRETH: Objection, Your Honor.
BY MR. GOODMAN:
Q Do you have an opinion --
THE COURT: Hold on. We have an objection.
MR. GOODMAN: Yes.
THE COURT: Grounds?
MR. KILBRETH: Voting blind on the face of this ballot, which is absolutely clear in the instructions, is both a mischaracterization and calling for speculation.
THE COURT: And I'm certain that one of you will raise that on cross-examination. Overruled. Go ahead.
BY MR. GOODMAN:
Q In your report, you characterized the voting -- the position that the voter was placed in on this ballot as voting blind. Could you elaborate on what you meant by that?
A Well, it's -- again, you know, on the very theory that is behind ranked-choice voting, it expects the voter to guess, to estimate, to calculate who's going to wind up in the lead and who's going to wind up trailing. Okay. That's what it

presupposes the voter is able to do.

Okay. So -- so, yes, I mean, it is -- it is calling on them, you know, to, you know, make some -- some kind of a guess. Now, I don't doubt -- okay -- that, again, across the Maine electorate, people's interest and knowledge level vary widely, so I don't doubt for an instance that there are some people whose guesses were accurate and whose estimates were accurate. Okay. Others, you know, maybe middling -- okay -- and others not good at all.

Okay. But, you know, this is definitely going to go hard on the people who are a little less informed and a little less knowledgeable. It's just flat-out unfair to them.

Q And so it -- because it does not tell them about the significance of voting in a runoff election?

A This leaves them clueless.

Q Let me ask you, Professor Gimpel, you mentioned that the -- this instant-runoff system affected by this ballot as compared to an actual runoff, is -- does it provide the voters the same amount of information?

A Absolutely not.

Q Okay. How important is it for a voter to know, in -- in the field of political science and studying voting behavior, how important is it to voters to know the actual matchup of the actual voters in the election in which they are voting?

A The matchup, of course, is critical. You know, the --

in the case of a voter who has, say, intransitive preferences, A is preferred to B, B is preferred to C, but A might be preferred to C, everything depends on the particular matchup, right? And -- and so the particular matchup that you're anticipating is going to condition the vote.

Q And how common -- how common is intransitive voting, that is, A -- you pick A over -- if you know the matchups --

A Yeah.

Q -- you would pick A over B, you would pick B if you knew the matchup was between B and C, but if you knew the matchup was between A and C, how prevalent is that among voters?

A It can be, you know, as high as 20 percent, you know, 25 percent of voters, you know, might make their choices in that way.

Q And is that more or less prev --

THE COURT: I'm sorry, I'm sorry, Mr. Goodman. Let me interrupt. I didn't understand Dr. Gimpel's last statement. In -- in what way?

A Well, it's -- it's just that if there is a matchup between two voters, let's just put it this way -- sorry. If there's a matchup between two candidates -- okay -- the -- the choice might change -- okay -- if those two candidates differ, right? I mean, I mean, you might not prefer A -- some voters are going to prefer A no matter what the matchup is; some voters will prefer B no matter what the matchup is.

But there are some voters who, if it's a choice of A and B, they'll prefer A. But if it's a matchup between A and C, they won't prefer A anymore; they'll prefer C. Okay? And so that's the sense in which the context makes a big difference, the context makes a big difference.

So, you know, in a -- in a particular matchup, you know, it's true some people will choose A every time -- okay -- and that's one of the reasons why party identification is helpful because it gears us toward maybe A, if A is a Republican, every time. Okay. But for those voters, in particular, who are independent-minded, might be third-party voters, or, again, people who lean toward a party but are not committed to that party, then, you know, the -- that's where that 20 percent comes in, you know, the preferences might change if it's A versus B as opposed to A versus C. So I think that's a better way of -- of explaining it.

BY MR. GOODMAN:

Q And, Dr. Gimpel, is the -- what you call intransitive-voting preference, is that a phenomenon more prevalent among independent voters than party-identified voters?

A Sure, absolutely it is. And, again, the province of this expertise is survey research, and -- and from, you know, over 60 years of survey research, we know that independent voters tend to have less knowledge and less information than

partisans. It's one of the reasons why they're independent is because they tend to have less interest in politics. Okay. This isn't my opinion, by the way; this is the case in -- in years and years of survey research. We can give know -- political knowledge tests to voters -- okay -- in the context of doing surveys, and time and time again, we see that independent and third-party voters wind up, on average, less knowledgeable about politics and political institutions than partisan voters.

Okay. And -- and so, naturally, independent voters, you know, being less knowledgeable, less interested, you know, their preferences are going to be less stable. All right. Again, one of the advantages to party identification is that it tends to constrain and fix your preferences, it tends to constrain and fix your preferences. You're going to choose A every time because A is the Republican, and after all, you are a Republican.

Okay. But when it comes to independent-minded voters, they don't have that kind of cognitive constraint you see. And so independent voters are going to vary a lot, and context is especially going to matter for them; you know, the particular choice that they have before them will make a difference.

Q And in the Maine election of 2018, did you understand that when you looked at voter data in this election, that Bond

and Hoar were independent voters -- I'm sorry -- independent candidates?

A Yeah, independent third-party candidates, yes.

Q And, therefore, their support primarily came from independent voters?

A Yes.

Q And, therefore, there the voters who voted Bond or Hoar in the first election would be less stable and more sensitive to the actual matchups of candidates in a runoff election?

A Oh, that's most emphatically the case, yes. And, by the way, we know this from looking at other states, right? In other states, ballot-access requirements, of course, are much higher than they are here. Okay. And so that means you have Republicans and Democrats oftentimes the only choice that's present on the ballot -- okay -- because third-party and independent candidates can't get onto the ballot because there are too many signatures required.

Okay. So what that means is that independents in those states routinely stream into the polls by legions to vote for one of the two major-party candidates, and they do this routinely. Okay. And, you know, I -- I think that one of the things that we have observed, again, in years of survey research, is that independents, the number of true independents, is actually pretty small, the number of people who have absolutely no party leaning whatsoever. Many

independents lean towards one of the two major parties -- okay -- and that's because, for the very practical reason, that when they go into the polling place, oftentimes, there is no independent or third-party choice on the ballot, particularly in these states with the high ballot-access requirements.

And so that means that the independents, if they want to vote, they're forced to choose between a Republican or a Democrat. And, interestingly enough, what we've found is that many of them are pretty consistent. As you move from the top of the ballot down to the bottom -- okay -- many independents lean toward the Republicans consistently; others lean towards the Democrats very consistently.

Okay. And across election cycles -- '10, '12, '14, '16, '18 -- as independents go to the polls in these other states where there aren't many independent or third-party candidates on the ballot, they tend to line up their votes behind one party or the other. Okay. And that's why, of course, political scientists have not been satisfied with the three-point party identification scale -- Republicans, independents, Democrats -- but have separated it out into five, or even seven, points -- okay -- so that these leaners can be teased out -- okay -- and treated differently.

All right. And, you know, this is going to be the case with this very large block of independent voters in Maine. It's a fascinating state; it's a lovely state. I've only been

here twice; it's lovely. And you have this very large block of independent voters, but probably every survey researcher who specializes in Maine elections and politics knows that quite a few of those independents lean one direction or the other.

Q So those independent voters between Bond and Hoar, based on the opinion you just rendered, if they were given a ballot that gave them the choice between Poliquin and Golden, would the majority of them have a choice as between Golden and Poliquin?

A Yes.

MR. KILBRETH: Objection, leading.

THE COURT: Overruled. Go ahead.

A Yes, I'm convinced that, just as in other states, independents stream to the polls in large numbers to regularly support the two major-party candidates, one or the other, because that's -- those are the only choices they have in those states. That would almost certainly be the case here in a runoff and has been the case in the state when there have been no independent candidates on the ballot.

But do the independents suddenly drop out of the Maine electorate when there's only a Republican or a Democrat on the Maine ballot? That's preposterous; no one would think that. Where do your independents go, Mainers? Where do your independents go if there's only a Republican or a Democrat on

the ballot? Do they just drop out? I don't think so. I mean, we can check out some survey research on that from -- from some Democratic pollsters, if you'd like, and see what they have to say.

BY MR. GOODMAN:

Q Professor Gimpel, coming back to the issue of ballots -- I'm sorry -- coming back to the issue of ballots, can you review a voter's ballot and infer certain indicia of voter intent from looking at the voter's ballot?

A I think that you have to make an inference or a judgment based on the information in front of you.

Q And you --

A Yes.

Q Do you judge that within the context of election rules?

A Yes.

Q Okay. Have you been able to view and analyze the ballot-level votes cast by the Maine voters in the 2018 election?

A Yes.

Q What -- what did you review to -- to understand how Maine voters voted in the congressional district of -- the Second Congressional District of Maine?

A Well, I looked at the ballot-level data that was reported on the Secretary of State's Web site, and then I took that data and aggregated it up to look at the various

combinations across the five preference rankings. There are various combinations that occur more regularly and some less regularly.

There are over 1,500 combinations, you know, which is testimony in and of itself to the complexity of this election, folks. 1,500 combinations of rankings showed up -- okay -- when I aggregated the ballot-level data on the Secretary of State's Web site. It's there; feel free to do it for yourself.

Q You aggregated the data that was published by the Secretary of State that gave you actual ballot preferences that were marked in this election?

A Yes, yes.

Q Did you alter that data or change that data?

A No, I mean, what you -- what you might see in my Excel spreadsheet is that I then sorted it, just on an ordinary Excel spreadsheet, I sorted it from the most common rankings, the most common responses on the ballot, to the least common.

Q And then did you -- once you downloaded the data from the Secretary of State and you put it in your own spreadsheet and you sorted it, but you didn't alter the data?

A No, no.

Q Okay. Did you then use the data to draw conclusions about voter behavior in this ranked-choice voting system?

A Yes.

Q Okay. Could you take a look at Plaintiffs' Exhibit No. 3 that is in front of you, please, and could you tell the court what that document is? And if you -- first, if you recognize the document and what it is.

A So, yeah, I mean, this is just my aggregation. A row indicates just, again, a particular combination of response, right? So, for instance, row 1 was the most common response and that was the oval for first preference was for Poliquin; second preference was left blank; third preference was left blank; fourth preference was left blank; fifth preference was left blank.

It's important to note that where I've put undervote here, that should be understood as a blank or an oval that was not filled in.

Q Hm-hmm.

A So I could have called that a blank.

Q Okay.

MR. GOODMAN: Your Honor, at this point, I would move introduction of Plaintiffs' Exhibit No. 3 into evidence as a foundational document for the professor's opinions and -- and analysis.

THE COURT: Any objection to Plaintiffs' 3?

MR. KILBRETH: No objection, Your Honor.

MS. GARDINER: No.

THE COURT: Plaintiffs' 3's admitted.

BY MR. GOODMAN:

Q Okay. Professor Gimpel, when you looked at the aggregate election results certified by the Secretary of State in this election, how many voters or ballots did you count as having been dropped out of the first election to the runoff election?

A Well, that -- that was that 8,000 figure.

Q Approximately 8,000?

A Yeah, 8,250, I think, approximately.

Q Okay. And have you analyzed the voter preferences marked on ballots of the 8,250-odd ballots that were removed from the first election to the runoff election?

A Yes, I've looked at those.

Q And can you -- what -- what opinions or what conclusions did you draw about the voters or the ballots that constitute that 8,250 dropped voters or ballots in this election?

A Well, on the -- the basis of the -- of the theory of ranked-choice voting that guides the -- the very adoption and interpretation of the data, you read those preferences as very sincere preferences for Bond or Hoar or sometimes Ms. Bond or Mr. Hoar alternatively. It's -- again, there are a variety of -- of orderings, right, and -- and some are Bond all the way across, some are for Mr. Hoar all the way across, you know, some alternate them, some are peppered with blanks.

But these are people that, you know, vote for Mr. Hoar

or Ms. Bond pretty consistently. Incidentally, once in a while, by the time you get to the fourth or fifth, they might insert or color in an oval for Mr. Poliquin or -- or -- or Mr. Golden, but not until fourth or fifth. You know, the -- the first three, you know, are preferences for the third-party or independent candidate, and, again, you read that as those voters anticipating that those candidates will be leading.

Q Did -- did you draw a conclusion that a voter, for example, who voted for Bond -- Hoar or Bond intended to vote in the runoff election?

A Well, I certainly think that they must have anticipated that any subsequent rounds, they wanted their votes to go to Bond, right? And, you know, if -- same if you have votes for Mr. Hoar all the way across, these voters were anticipating that if there are subsequent rounds, they wanted their vote to go to Mr. Hoar.

Q So they tried to vote -- did they try to vote in the runoff election?

A Well, yes, absolutely. They -- you know, again, they were making a guess, an estimate consistent, you know, with the theory behind your system here that, you know, the leaders in the first round, second round, you know, would be their candidates.

Q Would it be fair to conclude that a Bond voter who voted for Bond in the first election and Bond in the second election

intended to leave the election, intended to spoil their ballot and not be present in the runoff election?

A No, I don't think --

MR. KILBRETH: Objection, Your Honor. How can he possibly answer what a voter intended in the abstract?

THE COURT: Mr. Goodman?

MR. GOODMAN: I'm asking based on voting behavior, what the ballots indicate to a political scientist about intent of a voter. Now, we have a predicate where the professor says you can infer intent given election rules and the markings of a ballot. Now I'm trying to ask an expert in the field to interpret voter intent from the markings on a ballot.

THE COURT: Overruled. I'll give the testimony all the weight I think it deserves. Go ahead.

A I think you have to assume, consistent with the theory behind ranked-choice voting, that these are sincere preferences to have the vote counted all the way through, absolutely. You know, they want Bond or -- or Hoar to be leading.

Look, there's no small amount of hope here in this estimate, right, or guess, right? There could be hope or aspiration, you know, as well, right? But you can't say that these people are insincere or just pretending something.

BY MR. GOODMAN:

Q Or can you draw the assumption that they intended to leave the election by --
A No.
Q -- voting for Bond or Hoar in the second or third column?
A No, I don't think you can infer that at all.
Q In fact, is it your conclusion that they intended to vote for a candidate that they guessed would be in the -- in the runoff election?
A Right, that's --
MR. KILBRETH: Same objection, Your Honor.
THE COURT: Yeah, understood. Overruled. Go ahead.
A Guessing, guessing and hoping, guessing, estimating, hoping, you know, a combination of all those things, you know, probably went into these sincere choices they were making to have their vote counted in the subsequent rounds.
BY MR. GOODMAN:
Q And how many voters did you count in this -- in this guessing game guessing wrong?
A Well, like I said, around 8,000.
Q And --
A 8,200.
Q And what was the vote margin of the election?
A About 3,900.
Q 35 -- I'm sorry -- what did you --

A 3,900.
Q Did you --
A 35? Okay.
Q Less than 8,000?
A Okay, yes.
Q Okay. Now, we've already covered this, but I just want to punctuate this point at this point. You have 8,000 voters who voted for Bond or Hoar in some constellation and, therefore, dropped out of the election in the runoff.
It's your -- it's your opinion that had you provided them knowledge of the actual candidates in the runoff, that they -- the -- some percentage of them would have chosen Poliquin or Golden?
A Well, of course, and -- and --
MR. KILBRETH: Same objection, Your Honor.
A And, you know, what -- what -- after all, what do Maine --
THE COURT: Well, hold on, hold on.
THE WITNESS: Yeah.
MR. KILBRETH: Could I just have a continuing objection -- it would be easier, Your Honor -- to these questions that ask him to speculate about voter intent? And then I won't keep objecting.
THE COURT: Phrased exactly that way that objection will stand, yes, and that objection will continually be

overruled. Okay. Thank you.

A Well, of course, it would be ideal to go and talk to them -- okay -- although post hoc, you know, I don't know, but it might be inconclusive.

But what we have to examine, for example, is, is what a regular, ordinary Maine independent to do whenever there are two major-party candidates on the ballot -- okay -- and those are their only choices? So what do they do? Do they all just drop out of the electorate? Again, I don't think that there's evidence for that. You know, Maine voters like -- Maine independents, just like independents in other states, show up and express a preference for the Democrat or for the Republican. You know, maybe it's not as strong a preference. Again, that's why we call them leaners, but oftentimes it tends to be pretty consistent, you know, up and down the ballot and across election cycles, as I said ten minutes ago.

And -- and so, you know, my presumption here would be that, of course, a lot of these 8,000 voters would loved to have had the chance to vote for the two leading candidates once they learned who they were.

BY MR. GOODMAN:

Q Based on your knowledge of the science of voting behavior, can you -- can you put an approximate percentage on how many would choose, if they were actually offered Golden and Poliquin --

A Well, it's --
Q -- versus how many would --
A You know, it's --
Q -- vote no -- no -- no candidate at all?
A Sure, sure. Yeah, it is true that independent voters do not have the high level of turnout that partisan voters do. They're less interested and less knowledgeable. Any political scientist who studies political behavior will know this; most pollsters will know this. Okay. But it's not a huge difference; it might be, say, 10 to 15 percent less, you know, independent -- a turnout of independents versus the turnout of partisans.

So, you know, you -- you have to presume that possibly turnout among those 8,000 would be, you know, 80 percent since they've already turned out in this election, you know, they have turned out already, and that maybe among partisans, it would be closer to 90. You know, there would be some gap; there usually is.

But -- but independent voters are quite accustomed to voting for one of the two major parties because time and time again, they see ballots where there are only two major parties and there are no independent or third-party candidates available.

Q Dr. Gimpel, this problem of losing 8,000-plus voters due to a guessing construct, can you compare that to, say, a

plurality election and whether that type of problem appears in a plurality election?
A It does not.
Q How about in an actual-runoff election?
A No, it does not.
Q Okay. Let me -- does the instant-runoff system change the results of an election as compared with a traditional plurality-voting system?
A Well, it certainly can. The -- the nice thing about the plurality system is that it is considered monotonic. That's the -- the technical, you know, jargon term coming out of statistics for the reliability -- okay -- of the tally. Okay. You just tally up the -- the candidate with the most votes. It's simple; it's easy to understand. Okay. And if the person has 48 percent or 56 percent or 39 percent and they have more votes than the other candidates, they're the winner. Okay. And I understand you've had a number of elections like this in Maine over the years, so this is a familiar outcome to you. So the -- just the winner, even if it is a majority, is the one with the most votes.
Okay. In the ranked-choice voting situation, you run into a somewhat paradoxical and hard-to-understand outcome where the -- the number of first-place preferences, the winner of those first-place preferences might wind up losing because a candidate running second, or even third, picks up more

second and third place than the leader does. Okay. And so, you know, there are instances where, you know, the person who's in the lead after the first round and has the most first-place preferences winds up losing because of the expression of the second and third and subsequent preferences.

And this is not, you know, just some abstract, you know, mathematical, statistical, economic, theoretical exercise. This has happened in municipal elections in Burlington, Vermont, and in Oakland, California, where, essentially, the wrong candidate won the election, a candidate with more second- and third-place preferences, instead of the one with the most first-place preferences because of the way the -- the election results were ultimately tallied.

Incidentally, in the case of Burlington, they repealed ranked-choice voting after this happened -- okay -- because they discovered, you know, gee, this isn't exactly the kind of system we want, and my prediction is that if this reform spreads, you will most definitely have more outcomes like this that are controversial and we'll see litigation.

Q Professor, this monotonicity failure, is it unique to the ranked-choice instant-runoff voting system?

A Well, I mean, compared to -- it's not present in the simple plurality system.

Q How about actual-runoff elections?

A And -- and -- and it's not in the -- in the standard

temporally-sequenced runoff.

MR. GOODMAN: Okay. No further questions by me right now, Your Honor. Thank you.

THE COURT: Thank you, Mr. Goodman.

Cross-examination.

MR. KILBRETH: Thank you, Your Honor. I have a few colleagues to consult with on this, but --

THE COURT: I gathered.

MR. KILBRETH: -- I'll try to get through it tout suite.

CROSS-EXAMINATION

BY MR. KILBRETH:

Q Good morning, Professor Gimpel.

A Good morning, sir.

Q I think you testified on direct examination that you've never actually personally conducted a study about ranked-choice voting; is that correct?

A No, that's true. I've never written a research paper on the subject.

Q And I think you mentioned that you have given expert testimony before, and you mentioned a case in San Francisco; is that right?

A No, I mentioned that I was involved in a case in California addressing at-large voting in municipalities.

Q Was -- was that in San Francisco?

A No.
Q No. You did give expert testimony in the Pennsylvania gerrymandering case, though, didn't you?
A Yes.
Q And isn't it true that you gave testimony in that case defending the 2011 Pennsylvania plan that the court struck down?
A That testimony, yes, was defending the 2011 plan, although that particular court did not strike down the map.
Q No, but --
A In fact, that particular court, that three-judge panel, went the opposite way.
Q But the Pennsylvania Supreme Court, which you also provided a report for --
A Yes.
Q -- did strike it down, correct?
A Yes, yes.
Q Now, just to ask you some more Maine-specific questions. Are you familiar with the Bangor Daily News poll that was taken after the election about how voters felt about ranked-choice voting?
A I'm not familiar with it.
Q So you -- you're not aware that 75 percent of the voters surveyed said it wasn't confusing?
A I was not aware of that figure. Can I comment further

on that or --
Q Pardon?
A May I comment further on that?
Q Well, your lawyer can ask you --
A Okay.
Q -- questions about that, if he wants to.
A Okay. Fair enough.
Q Now, you talked a little about this intransitive-voting phenomenon?
A Yes.
Q Voters are -- when you talk about that, don't you have to distinguish between actual preferences and indifference? Because there's such a thing as indifferent transivity, right?
A Well, I -- I think what you have to imagine voters fitting along is -- is a continuum, you know, between -- by strength of preference. So, you know, on one end, you have, you know, very strong entrenched preferences, and those would be typical of very strong partisans, loyal to one party no matter what.

Okay. And, you know, then there's a continuum of people in the middle who, again, lean consistently. There are people that, you know, are even less partisan than that -- okay -- who, you know, may split their tickets quite a lot, waffle back and forth, you know, vary.

Probably on one end over here, you will have entirely

indifferent voters, but, of course, what we've learned about people who are entirely indifferent, we've learned a lot about them, is that, for one thing, they invest very little in knowledge acquisition or information acquisition -- okay -- and, of course, they're indifferent. And -- and as a result, their participation levels are pretty low. You know, these are -- these are people who don't show up to vote at all many times. You know, the -- most indifferent people, of course, you know, would be people on the voter file who have very spotty voting histories; you know, they show up sometimes, but not others.

Q Well, before I get into this further, have you talked to any Maine voters?

A Have I talked to any Maine voters? A few, and I -- I met some in the back rows over here that are aspiring voters and future voters.

Q But did you interview any Maine voters about their voting preferences and decisions in this election?

A No, I haven't.

Q So in response to Mr. Goodman's question, your testimony about voter behavior is all theoretical; is that correct?

A Well, yes, but, you know, we would not expect Maine voters to be wildly different than voters that have been subject to study now for 60 years, and studies have certainly included Maine.

Q Well, let's -- let's look at the ballot that you were asked about by Mr. Goodman and --

THE COURT: That's Plaintiffs' 2?

BY MR. KILBRETH:

Q -- that's Exhibit 2, I believe. What exactly is confusing about this ballot?

A Well, I think, you know, what's very confusing in this ballot is what is not here as opposed to what is here.

Q Well, let's start with what is here.

A Okay.

Q What is here? Could you explain if there's anything confusing about that?

A Well, for one thing, the problem of response patterns or -- or ballot-completion patterns that would disqualify or invalidate your vote, those are not discussed. It would have been helpful for voters to know that if they overvoted, and what an overvote looked like, their ballot could be cast aside, invalidated.

Q Well, doesn't it say fill in no more than one oval for each candidate or column?

A Right. But, you know, again, there are a lot of ovals here, and, you know, just by looking at the response patterns, you know, you can see that there are a lot of voters -- okay -- who went right down the columns. I mean, I can understand, as someone who is studied on the subject, that you move down

and to the right -- okay -- that you read the choices, you know, down and to the -- and to the right.

But it was very clear from -- sorry -- from the response patterns that we saw in the aggregated vote totals from the Secretary of State's Office that that was not clear -- right -- to many voters who had their votes tossed out for overvoting, and, again, there were a lot of undervotes.

Q Well, do you have any evidence for the fact that -- for that assertion, that it's not clear? And let me just walk you through this. Go to Exhibit 3. That's your compilation of data, right?

A Hm-hmm.

Q And let's go down first preference, that column. And, basically, you have about 99.8 percent who validly marked a first preference; isn't that correct?

A Yes, most did, and I'll give you that.

Q So voters seemed to be able to figure out who they wanted to vote for first.

A Yes.

Q Right?

A Yes.

Q Now, you talked a lot about voter guessing. Voter preferences are not guesses, are they?

A Well, ordinarily they wouldn't be. Certainly in the -- the plurality election, they're not. You know, you don't have

to -- to guess. You walk in and you express a sincere preference.

Similarly, in the temporally-sequenced runoff, you know, there's a sincere preference expressed at each stage.

The guessing, the estimating comes in when you go to those second, third, fourth choices, and, again, according to ranked-choice-voting theory itself, you are called upon to try to anticipate, estimate, you know, with maybe a little hope stirred in, you know, as to who the leaders will be so that your vote will be efficacious then in supporting one of the two, or maybe three, left standing, as the case may be.

Q Well, isn't that true that that just means that you are allowed to vote for your second choice?

A Well -- again --

Q You don't have to.

A -- that's not the same, though, as having the second choice defined for you. Okay. That's -- it's not the same. Okay. When you have to estimate or guess who the leaders will be, it's not the same as actually having the two leaders again squaring off against each other in a campaign, election day is going to be three or four weeks hence -- okay -- and you'll have a chance to vote for one of those two. And -- and that's very clear -- okay -- and it doesn't require the same degree of speculation or guessing on the part of the voter as to who the leaders will be.

Q Well, if the voter knows that their first choice isn't going to be in a continuing round, they know who the remaining candidates are, and they can make a choice, can't they?
A Well, I -- I think that it's not altogether clear to me that the voters are either acting consistent with the theory of ranked-choice voting or are knowledgeable enough, you know, to know what's going to happen, you know, in the second, third, fourth rounds.
And, again, I would be very interested in designing a survey-research instrument that would tap just what voters understand themselves to be doing in the second-, third-, fourth-, and fifth-place rounds.
Q Well, let me ask you about -- you spent some time on the 8,000, I think, 250 votes Mr. Goodman was asking you about, which, as I understood it, were votes cast for either Bond or Hoar, but not in a subsequent round for Poliquin or Golden; is that right?
A Well, there were some of them that in the fourth and fifth places may have ranked Golden or Poliquin. But certainly in the first three rounds, they were Hoar and/or Golden -- sorry -- Hoar and/or Bond voters.
Q Okay. And so 8,250 is a little more than 2 percent of the total votes cast in this election?
A I haven't done the calculations, but I'll take your word for it.

Q And I think you said that in other elections, 10 to 15 percent of independents don't vote?
A Well, you know, there -- that -- there's -- yes, compared to partisans, independent participation lags 10 to 15 percent.
Q So you could explain the fact that Bond and Hoar voters didn't vote for Poliquin or Golden simply on the basis that they didn't want a party candidate, couldn't you?
A A small share, you know, probably would persistently choose against a major-party candidate, in which case if they were facing a traditional runoff, they would maybe put a write-in candidate, they might drop off at that point. There's a small share.
But I -- what I'm suggesting is that a majority of them would have liked to have had the choice of Poliquin or Golden and would have voted for one of the two, as -- as I think we can observe independents doing commonly in Maine and other states.
Q Well, if 10 to 15 percent of independents wouldn't have voted in an election involving just Poliquin and Golden, how can you speculate about what these voters were thinking by not --
A Well --
Q -- voting for Poliquin or Golden?
A Well, because these were not nonvoters, of course; you

know, these were not nonvoters. These were voters; these were independents who showed up. Okay. So that's --

Q And voted for independents.

A Right. And, you know, I'm -- I'm saying that they voted for independents hoping that those independents would be standing in the subsequent rounds, but might have chosen differently or decided differently if they had known that the choice was ultimately going to come down to Poliquin versus Golden.

Q Okay. Now, you talked to Mr. Goodman about monotonicity?

A Yes.

Q But isn't it true that you've misdescribed what monotonicity is? I think what you testified to was that monotonicity involved an election in which a leading candidate in the first round could be overtaken by a trailing candidate in a subsequent round and that reflected a failure of monotonicity.

A Right.

Q That's not accurate, is it?

A Right. Well, off the top of my head, you know, without -- without, you know, a few notes in front of me, it's a -- it's a -- it's a difficult concept.

What I would say is that -- that the person with the most first-preference votes -- and I might have

mischaracterized it as just first-round -- but the candidate with the most first-preference votes does not wind up winning. Instead, the candidate with the -- a combination of first- and second- and third-preference votes winds up winning. So I think that's a better characterization.

It's -- it's a difficult concept. Some of these paradoxes are a little hard to understand without a few notes.

Q Well --

A And they're -- and they're hard to explain, too, like without a blackboard or something.

Q Well, isn't it true that monotonicity has to do with a phenomenon of people voting for candidate A, more votes going for candidate A causes candidate A to lose the election.

A Yes.

Q That's a different point, isn't it?

A Well, no, it's -- it's not exactly a different -- it's not exactly a different point because it also has to do with the counting of the second preference and the third preference and how those add up.

Q Well, let's just put it this way. In this election, was there any nonmonotonicity problem?

A I don't -- I didn't detect one. It happens more frequently in cases where there are three or more candidates that are running close together.

Q Right. So it didn't happen in this election.

A No.
Q Now, are you familiar with the work of Kenneth Arrow?
A Somewhat familiar, yes.
Q He's the Nobel Prize winner, right?
A Yes.
Q Who's basically the father, or however you put it, of social choice theory?
A Yes.
Q And he describes various factors that should be considered in selecting an election system.
A Yes.
Q Are you familiar with that?
A Yes.
Q And monotonicity is one of them, correct?
A Yes.
Q But there are several others, are there not?
A Yes.
Q And one of them is independence of irrelevant alternatives, right?
A Hm.
THE COURT: Is that a yes?
A Yes.
BY MR. KILBRETH:
Q And that's -- in simpler terms, that's a so-called spoiler problem, right?

A Ah, well, yes.
Q Now, in a plurality election, you have many opportunities for a spoiler problem, correct?
A It -- it can occur, yes.
Q So in terms of Arrow's factors, the independence of an irrelevant alternative, the plurality system is the worst, isn't it?
A It does -- it does happen. I'm not altogether sure that the ranked-choice-voting system solves the spoiler problem, however. So, you know, it -- it may be a fault of plurality voting -- all right -- but you -- you have to also consider the pluses of plurality voting and its simplicity and -- and how easy it is to grasp, you know, doesn't burden voters.
And, you know, you also have to consider, you know, the weaknesses of ranked-choice voting, including the fact that it can lead to outcomes, you know, that are nonmonotonic, for instance, and --
Q Well, that's a --
A -- you know, not really resolving the spoiler problem.
Q That -- that just says that there are problems with any system, correct?
A Well, this is true.
Q Now, I think you testified a lot about runoffs as a -- one alternative system.
A Hm-hmm.

Q But some of the disadvantages of runoffs, wouldn't you agree, involve the drop-off in turnout?
A There can be, you know, some drop-off in turnout. Also, you know, some people cite the administrative cost of, you know, of running the second election as -- as a defect.
Q Now, in terms of -- I just want to focus a little about voter confusion.
A Yes.
Q Have you looked at -- and you spent some time in your report and with Mr. Goodman talking about undervotes, and I think you defined that as a blank ballot.
A Right.
Q Have you looked at the history of undervoting in the Second Congressional District?
A I've not looked at the -- the history of -- of undervoting specifically in the Second District in previous elections, no, I have not.
Q So let me give you some statistics --
A Okay.
Q -- and I'll see how you respond. In 2014, there were 11,532 voters in the district who did not vote for the Congressperson. In 2016, there were 12,703 voters who didn't make a vote for the candidate in the Second Congressional District. This year, there were 6,000 undervotes.
That doesn't suggest that people were confused more this

time, does it?

MR. GOODMAN: Objection, Your Honor. The -- those statistics would have to be presented as a hypothetical, at best, because there's no foundation for those statistics.

THE COURT: Counsel?

MR. KILBRETH: Well, I think I'm asking -- he's --

THE COURT: Just ask it.

MR. KILBRETH: Yeah, thank you.

A You know, it would be interesting to study those -- those data in additional detail.

I agree with you that there is drop-off in standard elections; I mean, that's well-known. You know, sometimes people don't want to cast a ballot in a particular race perhaps because they're not knowledgeable. I think it's more common in like local elections where the candidates are -- can be pretty obscure and -- and perhaps have not run very visible campaigns.

So, you know, there are various reasons why, you know, people drop off the ballot at lower levels, and so, you know, I -- I agree that you're going to see those in general elections, you'll see those voters not participating in certain races, yes.

BY MR. KILBRETH:

Q Well, take -- take this year's, we had two interesting comparatives. And what would you conclude if it turned out

that there were fewer undervotes in the U.S. Senate race this year, which was a ranked-choice race, than there were in the gubernatorial race, which was a plurality race?

A Hm-hmm, hm-hmm. Well, there are -- you know, it's a very good question, and there are some alternative explanations.

You know, one of the things that determine drop-off is familiarity with the candidate, and so, you know, again, if, in the case of -- of the U.S. Senate race, the voters felt familiar with the candidates and knowledgeable of the candidates, there would have been less drop-off.

And the same would be true then, you know, conversely with an election in which maybe there were no incumbents or it was an open-seat race or -- or multiple candidates who were not very well-known, you might find more drop-off in -- in that case.

So, you know, when you -- boy, when you're dealing with these outcomes, like drop-off and turnout levels, you know, you also have to, of course, consider overall turnout for each of the years when you look at the drop-off figures. There are alternative explanations.

MR. KILBRETH: I'd like to mark, Your Honor, as -- I guess what are we calling this, Exhibit -- Defendants' Exhibit 1?

THE COURT: Defendants' Exhibit 1. Share it with

Mr. Golden -- Goodman.

MR. KILBRETH: Can I hand it to the witness, Your Honor?

THE COURT: You may.

THE WITNESS: Thank you.

BY MR. KILBRETH:

Q Professor Gimpel, this is --

THE COURT: Mr. Kilbreth, hold on just a moment. I want to make sure Mr. Goodman has had an opportunity to review the proposed exhibit.

MR. KILBRETH: I was just going to say, Your Honor, it's a little hard to read; it's small print.

THE COURT: I gathered by plaintiffs' table; they're squinting.

MR. KILBRETH: And it's -- I'm not going to ask Professor Gimpel anything substantive about this.

THE COURT: Go ahead.

BY MR. KILBRETH:

Q Professor Gimpel, this is a snapshot from a Facebook screen. And you see where it says, protect your Maine vote?

MR. GOODMAN: Objection, Your Honor. Counsel is testifying to what this document is. It's not been authenticated in any way by the witness.

THE COURT: Yeah, let's do that first.

MR. KILBRETH: Okay.

THE COURT: Go ahead, Mr. Kilbreth.
MR. GOODMAN: I'm not sure the witness can authenticate it.
THE COURT: Well, we're going to find -- I'm waiting with bated breath. We'll find out.
BY MR. KILBRETH:
Q Let me just ask you. So I think you testified that you were -- you have not talked yourself to any Maine voters about their intent or their voting --
A Right.
Q -- decisions.
A Yes.
Q Were you aware of an effort by the Republican National Committee to find voters who were, quote, confused, quote --
A I --
MR. GOODMAN: Objection as to relevance, Your Honor.
A I -- I --
THE COURT: Hold on, hold on, hold on.
THE WITNESS: Okay.
THE COURT: There's an objection. Why do I care?
MR. KILBRETH: Excuse me?
THE COURT: Why do I care what the answer to that question is?
MR. KILBRETH: Well, I think there -- this just goes to the fact that they've made a point about voter confusion

and they haven't produced a single voter, notwithstanding significant efforts --

THE COURT: Despite efforts --

MR. KILBRETH: -- to find one.

THE COURT: -- to the contrary? Overruled. Go ahead. Let's not camp out on that too long, though. Go ahead. The witness can answer.

A I'm sorry. Can you ask -- restate the question?

BY MR. KILBRETH:

Q Yeah. So, I mean, have you had discussions about efforts to find voters who you could talk to?

A I have not. I've not.

Q So you're not aware that the Republican National Committee spent almost $50,000 trying to find such voters?

A I was not aware.

Q Now, I have one other thing to do.

MR. KILBRETH: But, Your Honor, could I have a minute to consult with --

THE COURT: Take your time.

BY MR. KILBRETH:

Q So the last thing I want to ask you about, Professor Gimpel, is, in your report, which I now seem to have misplaced -- there it is -- you talk a lot about voter preference, and I think you also talk about how certain voters, particularly voters who are strongly tied to a political party, might

choose to just vote for their party preference; is that right?
A Yes, consistently -- more consistently.
Q And I just want to read -- this is on page 12 of your report -- it says, voters whose first preference turns out to be one of the leading candidates and knowledgeable enough to rank all candidates or confident enough to make a guess at how to rank them will have their ballot counted repeatedly until a candidate obtains a simple majority. Unlike the voters whose first preference winds up lagging behind, these voters will be full participants in the instant-runoff system. Do you remember that?
A Yeah, I mean, I -- I don't doubt that I said that.
Q That's true, right?
A Yeah.
Q So when Mr. Baber, one of the plaintiffs, and Mr. Poliquin, another one of the plaintiffs, say in their affidavits that they were disenfranchised because they only cast their ballot in the first round, that's incorrect, isn't it?
A Well, my understanding is that, you know, if you cast your ballot and wound up casting your ballot for one of the leading candidates, then, yeah, you continued.
Q It continues to count --
A Right.
Q -- and you're not disenfranchised, are you?

A No, that's right.

MR. KILBRETH: Thank you. I have no further questions, Your Honor.

THE COURT: Thank you.

Mr. Goodman.

REDIRECT EXAMINATION

BY MR. GOODMAN:

Q Professor Gimpel --

A Yes.

Q -- did counsel ask you about confused voters and the fact --

A Yes.

Q -- that you hadn't talked to any --

A Yes.

Q -- confused voters?

Did you, from viewing ballots actually cast in this election, did you determine that there were confused voters from viewing the actual ballots cast in the election?

A Well, you know, with the wide variety of -- of combinations, you know, over 1,500 combinations, it was apparent to me that people at least did not understand the theory of ranked-choice voting very completely or very thoroughly. You know, the -- you know, many of them didn't rank -- you know, there were voters whose -- whose preferences just seemed to be all over the place, and, you know, it seemed

to speak to at least being less knowledgeable or less informed about the -- the theory of ranked-choice voting and, you know, how to, you know, have your ballot count in the second subsequent round by -- by perhaps studying and trying to anticipate, you know, correctly, you know, who the two leading candidates would be, you know, to -- to put more of an investment in.

Now, again, I understand that, you know, not every voter wants to put that kind of investment into studying who's running, and, you know, not every voter has the time to do that, but my impression was is that, you know, same with Jerry Brown, you know, when he vetoed ranked-choice voting in California, he said the system is just too complex; it's -- it's too complex; it's burdensome on voters. And that's my impression, you know, from looking at the figures.

Now, can I say something about the survey?

Q I'm sorry. Which survey?

A The survey --

THE COURT: The Bangor Daily News survey.

A -- by the Bangor paper that said 75 percent were -- said that it was not confusing. Can I say something about that?

Q Let me ask you --

MR. KILBRETH: Is there a question?

THE COURT: Attorney Kilbreth promised that you would ask him about that.

BY MR. GOODMAN:

Q Professor Gimpel --

THE COURT: So go ahead and ask him about that.

BY MR. GOODMAN:

Q -- may I ask you a question, please? You were asked about a Bangor, Maine survey --

A Yeah.

Q -- of voter confusion. Do you have any response to or ideas about that survey that you'd like to express?

A Yeah, I mean, you know, in survey research, again, the relevant expertise is in the field of survey research, there -- there is something called socially desirable responding, socially desirable response. Okay. When you talk to a stranger on the poll -- in a phone poll or in some of these online surveys they're doing now, you know, when you're reporting your responses, you know, to someone who's going to read them and tabulate them online, respondents are often very sensitive to revealing weaknesses.

Okay. For instance, one of the big problems that survey researchers have is studying racism -- okay -- because, naturally, people don't want to reveal to a stranger that, you know, they might have racist preferences in a particular election, and so it's very sticky and difficult, you know, to tease out racially-based voting when, you know, the respondent's usually reluctant, as you would understand, you

know, to report that they might have some level of racial prejudice.

Well, I'm suggesting that you're going to get a lot of underreporting of something like confusion -- okay -- or -- or knowledge levels or interest levels because, of course, people don't want to admit, you know, to a stranger over the telephone that -- that they were confused, that they didn't understand, that they misunderstood.

And the second thing that I would say is is that some people may have thought that they understood the ballot -- okay -- but in reality wound up being wrong about that. In other words, their understanding of what they were doing, you know, is -- is itself incorrect.

Okay. So, you know, there are -- there are some reasons why we might have only 75 -- only 25 percent saying that the ballot was -- was confusing and 75 percent not. I -- I do think that in the survey research field, you know, they are working on ways of asking these questions in an unobtrusive, careful way that does not put the respondents on guard about revealing a weakness or revealing that they might be confused or they might be prejudiced or they might not be knowledgeable. So that would be my response.

Q Professor Gimpel --

A And I wouldn't be surprised, adding to that, I wouldn't at all be surprised that if, you know, the NRCC or RNC or

somebody was trying to find confused voters, that they'd have a hard time finding them because, again, you know, who wants to step forward and say I'm confused. You know, this is not something people usually want to admit to.

Q Professor Gimpel, in your analysis, did you identify approximately 8,000 voters --

A Yeah.

Q -- who were -- based on your analysis of actual ballots as a test for voter confusion, were confused in this election as opposed to some Bangor, Maine poll after the fact?

A Well --

MR. KILBRETH: Objection.

THE COURT: Overruled. Go ahead.

A They were not -- you know, they were not sort of acting in accord with the demands of ranked-choice-voting theory, that's for sure. Now, if we want to call that confusion, that's fine.

BY MR. GOODMAN:

Q Is -- is it your opinion then that in this universe of 8,000 voters, who were Bond and Hoar voters, whose ballots were either undervoted or exhausted and, therefore, thrown out of this election, that the cause of their -- that they tried to vote in the runoff election?

A Yes.

Q And that the cause of their being thrown out of this

election altogether was because they had to guess at the candidates in the runoff election?
A Yes.
MR. KILBRETH: Objection.
THE COURT: Overruled.
MR. GOODMAN: Okay.
BY MR. GOODMAN:
Q And you were also asked about what is confusing about Plaintiffs' Exhibit No. 2, the sample ballot.
A Yes.
Q Okay. You said there were two types of confusing aspects: One is what it says; and one is what it doesn't say.
A Yes.
Q Let me ask you, does the -- did the instructions to the voters instruct them that there would be a runoff election if there was no candidate who reached 50 percent?
A No, there's nothing about that.
Q Did the ballot inform them who the candidates would be in the runoff election?
A No.
Q Did the ballot inform them of the significance of guessing at a candidate who would be in a runoff election if no candidate got the contingent 50 percent?
A No.
Q Did the instructions then tell the voter what the

consequence was of failing to rank all the voters so that they could, at some point, get the guess right?
A No.
Q And, finally, were there -- you were asked about ballot drop-off, from a senate race to a Governor's race to a congressional race. You were also asked data about prior elections and this election, and you were asked to compare the drop-offs.
A Yes.
Q Is it your opinion that there was an 8,000-plus voter drop-off from the first election to the runoff election on November 6th here?
A Yes.
Q And what was the cause of that drop-off?
A Well, again, it was, you know, to the -- the misestimate of who would be leading after the first round, you know, by these voters.
Q And do you -- is it your opinion that we would have seen an 8,000-voter-disenfranchisement total if those voters had been given a ballot that said the runoff election is between Golden and Poliquin?
A I don't think it would have been 8,000, no.
MR. GOODMAN: No further questions. Thank you, Your Honor.
THE COURT: Thank you.

Anything else for this witness?

MR. KILBRETH: No, Your Honor, but I think at this point we just renew the initial motion. I move to strike his entire testimony. I appreciate where you're likely to go, but just to make the record. We don't think it's relevant; it's entirely speculative; there's not a single Maine voter involved in his testimony; and it's just not helpful.

THE COURT: Understand. That objection's overruled.

MR. GOODMAN: Thank you.

THE COURT: May the witness be finally excused? Yes? Thank you, Dr. Gimpel.

THE WITNESS: Thank you.

(The witness left the witness stand.)

THE COURT: We have, Mr. Goodman, one more witness -- how many more witnesses?

MR. GOODMAN: I have no more witnesses, just argument, Your Honor.

THE COURT: Just argument. Why don't we do this then. Let's take 12 and a half minutes, come back at noon, and I'll hear argument.

Okay. Court's in recess.

(Court recessed from 11:49 a.m. to 12:03 p.m.)

THE COURT: Okay. Have a seat, folks. Mr. Goodman, I'll hear from you.

MR. GOODMAN: Thank you, Your Honor, and thank you

for taking us on a Day of Mourning. I started my career working for Vice President Bush in 1986, and it's been a sad -- a sad week, so thank you for taking us on this day, and I'll try to do dignity to the former president. He was such a decent man.

THE COURT: Thank you.

MR. GOODMAN: Your Honor, based on the -- the -- the Sorens report that is in the record and supplemented with Dr. Gimpel's report and Dr. Gimpel's testimony here today, we believe the -- both facially and as applied in this election, the ranked-choice-voting system violated the Constitution in several respects, as well as the Voting Rights Act, and I know Your Honor is well-apprised with the papers. We will rely on our papers principally, and -- and the court has heard us now a second time, so I'll try to be brief.

Your Honor, all voters in this election were, in fact, denied a constitutionally-compliant ballot and a system that informed them of the candidates they were to vote for in a runoff election and that violated the Due Process Clause.

In addition, over 8,000 voters, who tried to vote blindly in the runoff election, were disenfranchised from voting in the runoff election, in an election decided by approximately 3,500 votes.

We believe that the Voting Rights Act can be -- can protect and be invoked by nonminority voters and not just

minority voters, especially those provisions that -- that do not, on their face, say they apply solely to voter discrimination based on race.

And in the equal protection field, Your Honor, voters in this election were inherently discriminated against. I understand that's an issue that has been debated and ruled on in past rulings, and probably the best analysis is the 1975 Michigan Court decision. We believe that those defenses of the disparate activity that goes on in an election conclude the equal protection analysis at too high a level. Yes, each voter goes in and votes a ballot on the same basis as every other voter.

Bush v. Gore told us -- taught us that what happens after that, how the election machinery and vote-counting occurs can disenfranchise people and treat people disparately and their votes differently, and we believe that what happens here is it is a -- it is a bit of a -- of an equal-opportunity lottery, that when you enter the voting booth, your vote will subsequently, based on contingent events that nobody can predict, certain voters' votes are going to be shifted around to exercise greater voter power for that voter than others. And we -- we submit to the court that that does violate the Equal Protection Clause on how those votes are counted, recounted, shifted from candidate to candidate, and that some voters end up having additional or a disparate amount of voter

power to shift votes, and we think there's something in the nature of being able to shift your vote that violates the Equal Protection Clause.

Your Honor, under Article 1, Section 4, we still contend that Article 1, Section 2 means something and that the Second Circuit got it right that it means something, it means plurality, and that the Article 1, Section 4 powers of the State do not authorize the State to change from plurality to majority, to manipulate majority votes the way the State had to do here by throwing 8,000 ballots cast in the first election out of the second election in order to manipulate the majority, and without throwing those 8,000 votes out, then Mr. Golden wins by plurality, which is not the question that was put to the voters of Maine when they elected ranked-choice voting. The question put to them was, do you choose a system that will elect a candidate by majority?

We do not believe that under Article 1, Section 4, time, place, manner, that the State has the authority to manipulate, to require the majority, or then manipulate votes in that manner to determine a preferred plurality winner, or to manipulate votes to then divine or produce the majority.

The State tells -- tells us, for the first time in opposition, that it enacted ranked-choice voting to disfavor spoiler candidates. We don't think time, place, manner gives the State authority to change the voting rules to prefer or

unprefer certain types of candidates in an election.

And the case called Cook v. Gralike, 531 U.S. 510, and the Thornton decision both say the states were delegated authority by the Constitution. There is no inherent authority for the State to enact substantive rules of election like this under their inherent authority when the Constitution came into being, and that it goes no farther than the mechanics of an election.

So we contend, Your Honor, that the State has exceeded its authority to manipulate this majority vote and has done so in violation of Article 1, Section 2.

To sum up our argument, Your Honor, there is a fundamental infirmity lurking in this system because it requires voters to cast votes in a future runoff election based on contingencies that may or may not materialize when they cast their ballot, and we think that problem that lurks within this system is unavoidable, it is inherent, it is problematic, and that no one can deny the problem exists and its impact on voters.

And the Ninth Circuit in Dudum spotlighted this problem and did not resolve it, and it has not been resolved by any court to date. The problem manifested itself in this election. 8,000-plus voters guessed wrong; some voters got it right. And I -- I agree with the sentiment in the questions on direct, a lot of voters got it right. But the fact that

the -- the -- a decisive number of voters guessed wrong, given a ballot that forced them to make a guess we believe makes this system unconstitutional, and the question, Your Honor, for the court, that we submit to the court is, do the -- does this problem of trying to collapse a runoff election with a Maine election, does it rise to constitutional significance? We submit it does.

We submit it violates the Due Process Clause in -- in both facial and as applied in this election respects, and we -- we believe that it violates Article 1, Section 2 and the State is without authority to do it under Article 1, Section 4, and we request that the court declare it unconstitutional and fashion relief to remedy the unconstitutional election that was actually conducted on November 6th, in contravention of the constitutional rights of my clients, the plaintiffs, who are both voters in the system and the candidate whose election result was determined in this unconstitutional election.

And that's my presentation. I'll be happy to take any questions you have, Your Honor

THE COURT: Thank you. Appreciate it.

MS. GARDINER: Thank you, Your Honor.

Nothing really has changed since this court ruled on the temporary restraining order, except we do, of course, know that Mr. Golden prevailed in the election under the rules of

ranked-choice voting.

But the plaintiffs have not presented any legal theories, legal arguments, or facts that undermine the conclusions that this court reached in the temporary restraining order. They have offered nothing new on Article 1, Section 2 beyond the Phillips v. Rockefeller case, which, as Your Honor noted, does not stand for the proposition that they would like it to stand for.

There is no basis for saying that the manner of -- that -- that ranked-choice voting is not a manner of conducting an election any more than Georgia and Mississippi conducting runoffs is a manner of conducting an election. So I think the Article 1, Section 2 problem has long ago been resolved.

There is no equal protection problem, no disparate impact on a group of voters. There is simply no indication of any severe burden on voters' ability to cast a ballot, and cast a ballot effectively.

We have been listening to, in reviewing the experts' reports, which, by the way, Mr. Sorens' report I don't believe is in evidence. It was attached to -- to their complaint. But, in any event, Professor Gimpel's testimony simply adds to what Your Honor noted already in the TRO ruling. It's an interesting academic debate; there are lots of theories based on a lot of speculative -- speculation about what voters may or may not have had in their minds when they were casting

their ballots. Interesting academic -- interesting discussion for academic symposia on what kind of election system best represents the will of the voters, but none of it rises to the level of anything of constitutional significance.

I want to address a few points that the plaintiffs are relying on very heavily apparently in their due process claim and perhaps also in their equal protection claim.

They're focused on -- heavily on this -- these 8,253 voters whom they claim tried to participate in a runoff election and were not -- and were denied that opportunity. That is a bizarre interpretation of what those voters did. These are voters who chose Mr. Hoar or Ms. Bond as their first -- or one first and one second choice. They did not choose other candidates; that was their choice. We can conclude their intent from what they marked on their ballots. They filled in ovals for Bond and Hoar, and they did not fill in other ovals.

The purpose -- they did not participate in the so-called second round, which is really all a continuous ranked-choice voting process under a set of rules. They did not participate -- they did not choose other candidates because they did not prefer those candidates. That is the obvious conclusion from the way they marked their ballots. The only two candidates --

THE COURT: Or another way to put it is we don't know.

MS. GARDINER: We don't know all of their thinking, that is correct, Your Honor. We do not know. But what we do know is who they chose and who they didn't choose.

THE COURT: And so the First Amendment -- I take it your argument is that the First Amendment, it doesn't necessarily ineluctably draw the conclusion that the voters that Dr. Gimpel referred to made a mistake. Your argument, I take it, is it's as likely the case that the First Amendment protects quixotic voters. They may have voted for their preference and expressed their preference, and this wasn't -- whether or not -- the indicia of whether or not the vote was effective is not revealed by whether or not folks, those voters who were referenced by Dr. Gimpel, voted in previous rounds, subsequent rounds, either for Mr. Golden or Mr. Poliquin. In other words, they made their preference, ranked their preference, and as a matter of constitutional analysis, that's enough. Is that your contention?

MS. GARDINER: Yes, Your Honor, and I think that is all that one should -- that the court should infer from these ballots is that these voters made a choice.

There's absolutely -- the -- the reference to voting effectively that shows up in -- in the court cases is always in the context of whether that voter can get to the polls, whether the candidate -- the ballot-access requirements are unduly onerous. Do they actually have a choice of candidates

on the ballot? Those are the kinds of things that go to effective voting. Effective -- being able to cast a vote effectively has nothing to do with the strategies that academics like to decode or infer or posit about different combinations of choices on the ballot.

The purpose of ranked-choice voting is -- is not to see whether voters can guess correctly who are the final two candidates in the final round of the tabulation. The purpose of ranked-choice voting is to allow voters to express their true preferences and allow them to choose a candidate, that they may prefer Ms. Bond in this case or Mr. Hoar, who ends up with a very small percentage of the vote, and then they get an opportunity to indicate another preference. It gives the voters more choices, and that's what they're -- that's what they're doing. They're not guessing at who's going to be in the final round. They're deciding, this is my preferred candidate. If this candidate gets eliminated, is there someone else in this group of four that I would -- that I would have as my second choice?

I think it's also important -- there's a -- there's a minor technical issue that the plaintiffs and their expert, I think, confused a bit. They talk about a first and a second round as if your first oval that you fill out on the ballot is the first round and the second oval is the second round, and I hope the court understands that's not the way this works. If

you vote for Bond and Hoar as -- in position 1 and 2, and you even skip a third preference, and you write Poliquin or Golden in as No. 4, the Poliquin or Golden vote will count. So I won't belabor that. I -- obviously, the court gets that.

The notion that the -- that the system or that they suggest that the Secretary of State manipulated the denominator in the round -- in the final tabulation round by declaring that -- when they declared that Mr. Golden had -- had gained more than 50 percent, they claim that we've tossed out these 8,253 ballots and did not count those in the denominator.

Well, they're not counted in the denominator because they were no longer -- they no longer had a vote for a candidate who was continuing into that final round and that is indeed the way the rules of ranked-choice voting work, and the denominator shrinks in that final round because it's -- the denominator represents all of the votes that are cast in that final round. It's not a faux majority; it is a majority of that round.

And as -- as we already touched on, this -- there's nothing about ranked-choice voting that forces voters to guess at who's going to be in the final round. Really what determines who's in the final round are the choices of all the other 289,000 some-odd voters who participate in that election. Just as when you're voting in a plurality election,

you have -- a voter may gauge in deciding whom she wishes to vote for, may gauge where the candidates are, their relative strengths and weaknesses coming into the election. In deciding in a plurality election whether they want to cast their vote for a candidate who may likely be less well-known, perhaps a nonparty candidate who may be in the race for the first time, they have to decide whether they're going to cast their vote for that person because that's the candidate they really prefer, even though they know that some other candidate may -- may easily knock them out in a plurality race.

The plaintiffs don't see any constitutional infirmity in a plurality system where voters are faced with that kind of a choice; that apparently is fine by them. But they don't think that it's constitutional to have a ranked-choice voting system where you actually get to say who'd you prefer if that other -- if that nonparty candidate, who may be less well-known, doesn't prevail.

THE COURT: I think the distinction the plaintiffs were trying to make -- and, frankly, it's one -- one of their stronger arguments -- is that in a traditional runoff, if you begin with the predicate that we are going to have a majority requirement in elections, that a traditional runoff, at least voters know in a runoff election who the candidates are so that they can choose between those two actual candidates as opposed to the instant system, where those batch of voters --

let's assume that there is also a batch of voters who are going to just express their preferences regardless of how they think the race is going to shake out, who the top two vote-getters are going to be at the end of the first count, first tabulation.

There's another category of voters, or at least it's reasonable to conclude there's another category of voters, who will vote much in the same way that they voted in plurality systems, meaning they do have an interest in trying to figure out who are going to be the top two vote-getters. In-between those two candidates, who do I want to vote for?

If you just limit the analysis to that category of voters, don't the plaintiffs have a point, that those voters are going to have a very difficult time figuring out how to rank their choices if the goal is to be able to cast an effective ballot for one of the two top vote-getters? Which is different from a --

MS. GARDINER: Yeah.

THE COURT: -- from a traditional Mississippi-style runoff -- traditional runoff.

MS. GARDINER: Well, it -- it is different than a traditional runoff, and scholars and advocates can debate --

THE COURT: It doesn't have a constitutional --

MS. GARDINER: -- until the end of the day.

THE COURT: -- dimension is what you're saying.

MS. GARDINER: It does not have a constitutional dimension.

THE COURT: Okay.

MS. GARDINER: There are -- there are pros and cons. In a -- in a ranked-choice voting race, the voters only have to show up on one day; they know who all the candidates are; they have a ballot that clearly lays it out; they can vote for as many or as few as they wish; and -- and they're done, and the -- the system processes the ballots, as -- as we know.

And in the separate runoff, there's a significant period of time; there's a significant cost involved; the same voters may or may not show up the second time. That's a huge issue that gets debated in the literature. But, again, it's not imposing an unconstitutional or severe burden on the voters' rights to express a preference for candidates by saying we're going to do this all on one day as opposed to two separate -- you know, a separate runoff election.

And that -- it's really purely a -- an academic debate, and there's absolutely no case law that supports a different conclusion. The plaintiffs have not found any; we have not found any. There's no constitutional right to know who's going to be in the final round. That's just an argument for whether that's a better system or not a better system.

There is no evidence of voter confusion in this case, as you've already heard. They're hypothesizing that voters were

-- they're attributing various theories, as we -- as we spoke about a moment ago, of why voters mark their ballots, but it is -- it is all speculative.

So I just don't think they have presented anything to -- and -- and I guess I would point out that I think that Plaintiffs' Exhibit No. 2, the sample ballot, is actually a model of clarity. It -- it defines, in very simple terms, to the voters what their options are and how they can fill it out, and that's their choice, and there was more information available to them on the Secretary of State's Web site and in other articles if they wished to -- to pursue it.

But there's no -- I believe the plaintiff suggested an argument that there's some sort of constitutional ballot requirement to have a long explanation of various ways in which choosing to fill out one or more ovals is going to play out in the election. There is absolutely zero legal basis for that, and I think if the Secretary of State were to put that kind of argument and discussion on a ballot, it would probably generate an issue of voter confusion, not relieve one.

So I think, given that there is no evidence of severe burden, the court doesn't need to address the governmental interest. I think the court correctly identified governmental interest in the TRO order. We addressed that in our brief. I don't think I need to add, except to point out that it's the plaintiffs' burden to negate any conceivable basis that might

support the ranked-choice-voting regulation. It is not the burden of the State to show that every one of its governmental interests is best served by a particular election regulation or a different election regulation, and that's what their -- how their brief attempts to -- to frame it.

I guess just speaking briefly to the relief that they're seeking, it's been a little bit difficult to follow the requests for relief as they have evolved in each stage of these proceedings, but I'll address what Mr. Goodman described this morning as the four types of relief. I don't, again, think that we are even going -- the court should even get there, but, obviously, it would disenfranchise the voters who did choose Mr. Bond -- I mean, Mr. Hoar or Ms. Bond and then chose Golden or Poliquin if they -- if the -- if the court were to direct the Secretary of State to simply have the election determined based on a plurality of first-choice votes. That would be an extraordinary remedy that I don't think, as the court is well aware, courts don't change the rules of elections after the fact, and this is not a case where there is any basis to order a new election either. The Griffin v. Burns case I think points out that distinction very clearly.

So I think that -- I can speak to any more of that if the court has questions, but I won't prolong things. I think we covered it in our brief. Unless the court has questions, I

will --

THE COURT: I don't. Thank you.

MS. GARDINER: Thank you.

THE COURT: Mr. Brann?

MR. BRANN: May it please the court, Peter Brann for Jared Golden.

There is -- in our view, there's no need to cart coals to Newcastle, to go through the merits in great detail. The court explained in the TRO order why it was that Poliquin and the other plaintiffs are unlikely to prevail in this case. The AG has further explained why it is that as a legal matter they don't -- are not likely, that the claims lack merit.

And, indeed, there's nothing, as -- as the Attorney General said today, there's nothing new that came to light today. What we had, at best, was testimony from a political scientist who is, you know, certainly able in the ivory tower to debate whether this is a good system or a bad system or some other system might be better, but that's, of course, not the issue. The issue, of course, is whether or not it is constitutional.

And, indeed, what we heard even further was that this is an emerging area. This is actually -- we need a lot more research. We don't have a definitive answer even today, even in -- if you were to go down to your -- your polysci convention in, you know, Miami or wherever you might go. And

so -- but that is not -- obviously not what's on the table here.

And, indeed, as the court alluded to in one of its questions, the -- what we have is speculation from the -- from the professor as to why it is that people made the choices that they made. It is -- and the court -- as the court alluded to, the Constitution protects the quixotic voter. That there is a -- there -- the Constitution doesn't make a value judgment that I have to vote for the winner of the election; you know, I -- I really need to know that.

I'm sure I'm not the only person in this room who's voted for people who are clear losers. You know, that guy's not going to win, but I'm going to vote for him anyway because I like him, he's my next-door neighbor, I used to -- I went to high school with him or whatever. It doesn't matter. That's -- that's not a value judgment certainly that the Constitution imposes here and on -- on this circumstance. And, indeed -- and it's -- we do not want to make a -- turn voter education into the decision of, well, you've got to make sure you pick the winner.

Exhibit 2 tells us the answer, if you go to it. It says, instructions to voters. In the first column, for your first-choice candidate, in the second column for your second-choice candidate. You can make a choice as to which one you want. It doesn't say, make sure in your second choice you pick --

you guess right, that you've got the right guy or the right girl to make sure that you're going to have a winner. You could say, you know what? I am going to vote for Mr. Hoar and I'm going to vote for Ms. Bond because I don't like the major-party candidates. That -- those are your 8,000 votes that they're talking about.

And so there's nothing new that came out today that tells -- that leads to any different conclusion than what we had in the TRO order.

Now, I want to just touch briefly on a couple of the other factors. If there's no likelihood of success, it's over. But, nevertheless, there's no harm to the plaintiffs. There's no claim of harm in their affidavits, and, indeed, the sort of vague generality, jeez, we're harmed, they say, well, we're disenfrancised. Well, actually, as we heard from their -- their own expert, because not just Mr. Poliquin and Mr. Baber, who submitted affidavits, but if you look at the complaint, all of the plaintiffs said we only voted for Mr. Poliquin. And guess what? That means, according to their own expert, these voters will be full participants in the instant-runoff system. The plaintiffs are not -- were not disenfrancised. They're not -- and so -- and so they then show up here and say, well, we're really worried about these other people who we're guessing were -- you know, were confused or whatever. But, yet, they show up with zero, not

one voter who says, I was confused or I -- jeez, I was left out of the system.

The -- and even if there was a claim there, the plaintiffs aren't in a position to bring it. And just to reiterate briefly the laches argument. Plaintiffs sat this out and Mr. Poliquin sat this case out when they went to the opinion of the justices, when they went -- when they -- which was brought by the Maine Legislature; they sat it out in the Maine Republican Party case, which had to do specifically with this race, in part; and they sat out the case in the Maine -- brought by the -- the Maine Senate, by their allies in the Maine Senate. It was a facial challenge. They knew as of June, when the voters said, once again, this is the system, guys, this is how we're going -- these are the rules of the game that we're going to play by. They knew then, sat on the sidelines, did nothing.

There was -- and, indeed, if what the real complaint of this case is, in the evolving theory from the plaintiffs, is we really think the ballot design was wrong, well, when the sample ballot was released, why not run into court and go, we've got a problem here? This is not -- this is going -- this is going to confuse the voters. Sat that out, didn't file it then. They didn't file anything until you get the -- start to get the results and the handwriting's on the wall and you're going to lose the election. That is not irreparable

injury by any stretch.

In contrast, let's look at the harm to the -- to the defendants and the voters. Now, in -- as opposed to the speculation about why -- why some people only marked ballots for Ms. Bond and Mr. Hoar, we know that there are 15,000 voters who said my first choice is either Mr. Bond -- Mr. -- Ms. Bond or Mr. Hoar, but my second choice is either Poliquin or Golden. There are 5 -- roughly 5,000 of them who said, I've read the instructions; my second choice is, my second choice is Poliquin, or my second choice is Golden.

And what the plaintiffs' case would do is to say those 15,000 votes don't count. You -- you listened to the rules, you voted, you did it according to the instructions, and you said if my -- basically, those voters who said my -- if my first choice doesn't make it, the -- my second choice is one of the major candidates. Those would be the 15,000, and we know for a fact, unlike speculation, as to why people only voted for the minor-party candidates, we know the ones who marked their ballots for the second one, in accordance with the very directions given by the Secretary of State, those folks are out of luck if the -- if Poliquin wins this case. And that -- a retroactive change of the rules after the election is inappropriate.

And so -- and so that in the bottom line here, we have, you know, a shifting series of arguments made, and the first

one is, well, just declare me the winner, even though everyone -- the rules say that we're going to go through the entire system. That was the first request in the original complaint.

Then the second one, in the amended complaint, says, order a new election. As the Attorney General explains today, absent invidious, serious discrimination, that's not even on the table and there's no allegation of that. That certainly isn't anything that we heard from the -- from the professor today.

And then the third thing in the reply brief is, well, you don't have to issue any relief, just maintain the status quo, that is, don't let anyone declared -- be declared the winner in this race, leaving all of the voters and all of the people in the Second Congressional District without any representation in Congress while we litigate this case for -- for some long period of time.

And the theory is, if I can't have it, no one can, and that is -- we would submit is inappropriate, and even if they were to get beyond the claims on the merits that they had a legal theory to stand on, which we think they do not, for precisely the reasons the court identified in the TRO order, they still would not be entitled to an injunction.

Thank you.

THE COURT: Thank you.

MR. MONTELEONE: May it please the court. Maine

voters repeatedly recognized ranked-choice voting as -- as their preferred manner of election, recognizing that it -- it offered an opportunity to voice support for a candidate more broadly, more deeply, in other words, beyond these -- this traditional plurality notion, that a measure of secondary support was of critical importance to understand who Maine wanted to elect by the people.

Now, plaintiffs' expert today described that scenario as the wrong winner. In effect, that is actually the winner that Maine voters recognized as their intended preference. In doing so, they also recognized the administrative values of doing an election once, rather than multiple steps.

Now, those are two examples of -- of many interests that the State may have in adopting ranked-choice voting as its election -- as its manner of election. However, in order to demonstrate that plaintiffs have -- have suffered a constitutional burden, they need to show that that burden was severe, and where it wasn't severe, the court will apply -- or the First Circuit certainly will apply -- a rational-basis test, where so long as there's any conceivable rational basis for the State's interest in creating ranked-choice voting, then that will be deemed constitutionally sufficient and that regulation, and here ranked-choice voting, will be permitted to go forward.

Now, plaintiffs here have alleged a couple types of

injuries that are far from the type of burden that is even severe and certainly have not been recognized by any courts elsewhere as being severe or -- or really even a burden.

Without reiterating points already addressed by the codefendants, I'd like to very briefly walk through a couple of the cases that demonstrate that we don't get to the broad level of a burden here. For example, in the claim that voters were confused and, therefore, 8,000 voters were disenfrancised because they chose not to participate in -- in subsequent rounds, no case that plaintiffs have identified or that -- that the defendants can identify suggests or -- or holds that to not vote is the equivalent of a disenfranchisement.

An effective example of that is in the case of -- of Burger v. Judge, which has been discussed by -- by both parties. Burger v. Judge was ultimately affirmed by the Supreme Court, and it involved an inquiry in a -- in a constitutional referendum in the state of Montana on whether 7,000 voters who decided not to vote yes or no, what they meant by their decision not to vote yes or no. They alleged that they were -- they were essentially misled into believing that.

The court ultimately held that there are many reasons why voters choose not to vote, and they certainly had the ability to vote their position on it if they chose. The fact that they failed to do so won't be reassessed retroactively to --

to analyze what they -- what they really intended. They had the opportunity to cast a yes or no vote; they chose not to. What happened here is -- is analogous, where you have a number of voters that had the chance, they certainly had clear instructions in front of them; they chose not to.

Now, this ballot certainly is not more confusing than some of the ballots that have been assessed in -- in other cases evaluating potential misleading information. For example, in Griffin v. Roupas, the Seventh Circuit looked at a ballot and essentially a claim by -- by working mothers that said the -- the length of the ballot, the confusing nature of the ballot meant that it took them more time, and because it took them more time, they weren't able to participate in the process as they would have preferred to. In that case, they looked at a ballot that was maybe 20 pages long and it had more than 400 candidates. Certainly a ballot with that many candidates can be confusing. The court ultimately held that the confusion is consistent across the board. It affects -- the challenge of working with a ballot like that applies to all voters, not just that small group of working mothers.

Similarly here, if there was confusion about how this process worked, it applied even-handily and consistently for everyone. In order to demonstrate a constitutional burden rising to the level of an equal protection challenge or other Fourteenth Amendment claims, they would need to demonstrate

that this was, in fact, discriminatory, that it singled out these -- these plaintiffs, and they failed to do that here.

Briefly, one final example in -- in the case of Kohler within Louisiana, that case involved 41 proposed constitutional amendments on the ballot with very minimal information about what they were -- what those amendments were about, just essentially a three- or four-word summary. The court said that there the voters had the opportunity to prepare beforehand and the fact that there -- there might be something to be confused of when you're sitting there that day voting on 41 different constitutional amendments, that in -- you have an obligation to do your homework, and if you fail to do your homework, then the court isn't going to recognize that as a -- as a -- a unique burden.

Regarding the claim that the inability to know which candidates will be paired in a final matchup, that that constitutes guessing, preventing an effective ballot. Similarly, there has been -- there's no case that plaintiffs have cited to -- to demonstrate that not knowing who the final pairing of -- of candidates in a -- in a runoff matchup is a constitutional harm.

More importantly, the testimony from the expert today was that this ranked-choice voting is, in fact, a -- one election. Now, it's repeatedly been referred to as -- as a -- you know, a first election and a -- and a secondary runoff election, as

-- as plaintiffs describe it that way. But, in fact, there's one ballot and there's one election.

Now, voters have the right to understand the candidates on the ballot and express their -- their preferences for those candidates on that day and have those preferences ultimately tabulated. Plaintiffs don't assert that that did not happen here. In fact, it's quite clear that they had the opportunity to cast their vote; if they intended to vote for Poliquin, that vote ultimately went forward to the final tally.

However, to say that they would have the right -- that they might change their mind weeks down the road in a secondary election is really a separate issue entirely because additional information can come in the meantime. You can learn something new about the candidate that yesterday you supported and maybe tomorrow you won't because of something you've learned. It requires all sorts of speculation about how behavior might change in the future. We don't have that here. What we have is one ballot and a right to have that ballot reflect preferences and ultimately tallied.

Finally, I'd like to very briefly address the VRA -- excuse me -- the Voting Rights Act issues. This is -- this is compared -- the effective ballot issues are compared to the Voting Rights Act cases that reference special protections for voters that are blind, special protections for voters that are severely handicapped, special protections for voters that --

for a particular subset of voters that don't speak -- speak English.

There is no -- there's no case law that suggests that the Voting Rights Act should be opened up beyond that in terms of the right to cast an effective ballot. Effectively, those are cases where, but for some assistance, it is -- it is a wild guess. You can fill in a balloon, a bubble on a -- on a piece of paper, but it means nothing for people that can't read, that can't see. By contrast, the only claim here that's -- that required guessing is predicting the future, which is consistent regardless of what that election is and it's consistent regardless what party you represent.

In total, these issues represent modest burdens at best. Where we have a modest burden, any legitimate, conceivable, rational basis for the State to implement its regulation, its choice that ranked-choice voting is its choice of election is sufficient to overcome these claimed -- these claimed burdens.

In turn, we respectfully ask that the court deny preliminary injunction.

THE COURT: Thank you.

MR. MONTELEONE: Thank you, Your Honor.

THE COURT: Mr. Goodman.

MR. GOODMAN: Briefly, Your Honor.

THE COURT: Hm-hmm.

MR. GOODMAN: It was at the TRO hearing where the

State told us this was a runoff election, effectively a runoff election, and today we hear argument, well, it's really just a preference poll at the first election, and that's not the purpose of ballots and votes, to just take preference polls and -- and if it is a preference poll, Your Honor, a voter still has a right to do what many preference polls do. What's your preference if it's Trump v. Clinton, what's your preference if it's Bush v. Clinton, what -- Trump v. Sanders, those -- those -- all the evidence shows that matters critically.

We are accused of speculating. Actually, we have actual ballots cast in this election that show precise numbers of voters who were exhausted and put out of the election, and we have expert evidence that -- that indicates that these voters would have chosen but -- but for the fact that they had to guess. The type of confusion that we are featuring on the ballot is not the traditional vanilla, oh, it was a confused ballot. It's that the ballot didn't inform people of all the contingencies and who their choices would be.

And there, Your Honor, I think we end with the fundamental issue joined particularly on the issue of due process, and that's where I'll end my argument. The State has argued that today, and I'm going to come pretty close to a quote, if not a paraphrase, that there is no constitutional right to know who the candidates are on the ballot when you

vote no. We believe there is a constitutional right to know that, that it is critical to the effective right of the franchise, and we ask that a judge declare that act unconstitutional.

Thank you, Your Honor.

THE COURT: Thank you.

Counsel, thank you very much for the presentation of evidence and your arguments and your exceptional briefing of the issues. It's been a great assistance to me. I'm going to take the matter under advisement and will have a decision to you next week, if that's not impermissibly vague to say that. It won't be tomorrow like last time.

Court will stand in recess.

(Proceedings concluded at 12:49 p.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Julie G. Edgecomb
Julie G. Edgecomb, RMR, CRR
Official Court Reporter

December 6, 2018
Date