UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRETT BABER, et al.,	)	
	)	
Plaintiffs	)	
	)	
v.	)	No. 1:18-CV-00465-LEW
	)	
MATTHEW DUNLAP, et al.,	)	
	)	
Defendants.	)	

DEFENDANT SECRETARY OF STATE'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELMINARY INJUNCTION

A week after nearly 300,000 Maine voters cast their ballots for candidates in the November 2018 general election for Congressional District 2, using the ranked-choice method of voting, incumbent Congressman Bruce Poliquin and three constituents who voted for him filed this lawsuit along with a motion for preliminary injunction seeking to retroactively invalidate the ranked-choice voting ("RCV") law as the method of determining the outcome of that election. Their motion seeks to prevent the defendant Secretary of State ("Secretary") from determining Jared Golden as the winner of the election based on the RCV tabulation prescribed in Maine statute, 21-A M.R.S.A. § 723-A, and instead – contrary to Maine law – to declare Bruce Poliquin the winner, as the candidate who received a plurality of first-choice votes. Granting this motion would disenfranchise over 15,000 voters who ranked the candidates on the expectation that their second or third-choice vote would be counted if their first choice was defeated in round one.

Plaintiffs assert a number of legal claims challenging the constitutionality of ranked-choice voting, none of which has any merit. Pursuant to Fed. R. Civ. P. 65(b)(1), therefore, the motion for preliminary injunction should be denied.

FACTUAL BACKGROUND

The voters of Maine adopted the RCV Act by citizen initiative in November 2016, thereby establishing RCV as the new method of voting and determining the outcome of elections for Congress, U.S. Senate, Governor, and the Maine House and Senate, as well as primary elections to select party nominees for all those offices, beginning in 2018. I.B. 2015, c. 3 (eff. Jan. 3, 2017). In May 2017, the Justices of the Maine Supreme Judicial Court advised the Maine Senate that implementing RCV in general elections for Governor and the Maine Legislature would violate the requirement in the Maine Constitution that candidates for those offices be selected based on a plurality of the votes cast. *Opinion of the Justices*, 2017 ME 100, ¶ 1, 7, 9, 57, 64-68, 72, 162 A.3d 188. In the fall of 2017, the Maine Legislature amended the RCV law to delay its implementation until 2021, and to then repeal it unless the voters had by that time amended the Maine Constitution to allow RCV in general elections for Governor and the Legislature. P.L. 2017, c. 316 (eff. Feb. 5, 2018). The delay provisions were suspended by the filing of a valid People's Veto referendum petition on February 2, 2018.

The Maine Senate tried unsuccessfully in April 2018 to block implementation of RCV in state court on a variety of state law grounds. *See Maine Senate v. Sec'y of State*, 2018 ME 52, 183 A.3d 749. Shortly thereafter, the Maine Republican Party filed suit in this Court, seeking to enjoin the Secretary from using the RCV method to determine the outcome of the Republican primary on June 12, 2018, arguing that to do so would violate the party's rights of association. This Court denied the Party's motion for preliminary injunction on May 29, 2018, *Maine Republican Party v. Dunlap,* 324 F. Supp. 3d 202 (D. Me. 2018), and ultimately entered judgment for the Secretary in August 2018.[1]

[1] Final judgment was entered on August 3, 2018. *Maine Republican Party v. Dunlap*, Docket No. 1:18-cv-00179-JDL (ECF No. 34). The Maine Republican Party appealed the preliminary injunction ruling,

Voters cast RCV ballots on June 12, 2018, to choose the Republican and Democratic Party nominees for Governor, the Democratic nominee for Congressional District 2, and the Republican nominee for House District 75. Because no candidate received over 50% of the first-choice votes cast in the Democratic contests for Governor or Congressional District 2, the winners were determined by RCV.[2] *See* Ex. C to Flynn Decl. (ECF-24-3) at 3, 4. On June 1, 2018, Tiffany Bond and William Hoar submitted nomination petitions with enough valid signatures to qualify for the general election ballot as non-party candidates for Congressional District 2. *See* Supplemental Declaration of Julie L. Flynn ("Flynn Supp. Decl.") ¶ 3.

The People's Veto referendum was sustained on June 12, 2018, by a vote of 149,900 (53.9%) to 128,291 (46.1%), thus triggering the requirement to apply RCV in the November 2018 general election for Congress and the U.S. Senate. *See* Order of District Court in *Maine Republican Party v. Dunlap*, Docket No. 1:18-cv-00179-JDL (ECF No. 34) at 3. Once the official results of the June 12 primary were submitted to the Governor on July 2, 2018, therefore, all four candidates whose names would appear on the general election ballot for Congressional District 2 were known, and it was clear that RCV would be the method of voting and counting votes in that race on November 6, 2018, as well as in the race for Congressional District 1 and for U.S. Senate. Neither Mr. Poliquin, nor any of the other plaintiffs, sought to challenge the RCV law prior to its application in the general election.

The Secretary's Elections Division staff prepared the RCV ballot design and instructions for both Congressional District offices and the U.S. Senate race in the summer of 2018, and

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but dismissed its appeal voluntarily before any briefs were filed. *See Maine Republican Party v. Dunlap,* First Cir. Docket No. 18-1609 (judgment of dismissal entered Sept. 25, 2018).

[2] In the other two primary contests where voters ranked candidates using RCV ballots, one candidate received over 50% of the first-choice votes, thereby avoiding the need to utilize the RCV method of counting.

prepared separate instructions on the back side of those ballots for the gubernatorial, legislative, and county races to be determined by plurality. Flynn Supp. Decl. ¶ 5. In compliance with federal law, ballots were made available to military and overseas voters beginning on September 22, 2018. *Id.* ¶ 7. All official and sample ballots were shipped to the cities and towns between September 27 and October 5, 2018. *Id.* ¶ 6. Between September 22 and November 6, 2018, over 71,890 voters cast absentee ballots in Congressional District 2 for this general election. *Id.* ¶ 9.

The Secretary adopted rules on May 11, 2018, describing in detail how the RCV tabulation would be conducted in the June primary. *Id.* ¶ 10. Because these were adopted as emergency rules, however, they expired in 90 days. 5 M.R.S.A. § 8054(3). On August 29, 2018, the Secretary proposed a permanent rule to be implemented in the general election and adopted it on November 2, 2018, with minor changes that were responsive to public comments. 29-250 C.M.R. c. 535 (eff. Nov. 7, 2018). The final rule is very similar in substance to the emergency rule applied in the June primary. Flynn Supp. Decl. ¶ 11.

Unofficial results of the November 6, 2018 election reported in the media the next day, indicated that no candidate in the Congressional District 2 race had obtained over 50% of the first-choice votes. The Secretary thereupon initiated the process of gathering ballots and memory devices from all municipalities in the district and delivering them to a central counting facility in Augusta in order to conduct the RCV count as described in the RCV rule. Flynn Decl., ECF No. 24 at ¶¶ 8-9 & Ex. A (ECF No. 24-1). The following week, on November 13 – after the Secretary's Election Division staff had worked for four days to process ballots and upload data on memory devices from 375 towns in Congressional District 2 – plaintiffs filed this lawsuit, along with motions for a TRO and a preliminary injunction. ECF No. 1, 3 & 13. When

the RCV tabulation was completed in the early afternoon of November 15, 2018,[3] the computer system reported the following tally of first-choice votes: 131,631 for Poliquin; 128,999 for Golden; 16,260 for Tiffany Bond; and 6,753 for William Hoar. *See* summary report attached to Flynn Supp. Decl. as Ex. F-1. Bond and Hoar were both eliminated after that round since it was mathematically impossible for either of them to gain enough second-choice votes from each other's voters to overtake either Poliquin or Golden. To the extent that voters who had selected Bond or Hoar as their first choice designated Poliquin or Golden as their second choice, those second-choice votes were added to the totals for Poliquin and Golden in round two. This process added 10,232 votes to Golden's first-round total, and 4,695 to Poliquin's total, with the end result being that Golden received a majority of votes in the final round (50.53%) with a total of 139,231 votes to Poliquin's 136,326 – a margin of 2,905 votes. Ex. F-1. The Secretary submitted the official tabulation for the general election to the Governor on Monday, November 26, 2018, pursuant to 21-A M.R.S.A. § 722. Ex. G to Flynn Supp. Decl.[4]

ARGUMENT

To prevail on a motion for preliminary injunction, plaintiffs must establish four factors: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in [its] favor, and (4) service of the public interest." *Maine*

[3] The RCV tabulation, using computer algorithms, took place approximately two hours after this Court denied Plaintiffs' Motion for TRO.

[4] The official tabulation shows somewhat higher vote totals for all the candidates and a margin of 3,509 votes for Jared Golden in the final RCV tabulation. The difference reflects correction of a processing error, discovered last week, which had prevented the digital Cast Vote Records for all of the ballots cast in six small towns from being extracted into the computer program before the algorithms were run on November 15, 2018. Flynn Supp. Decl. ¶ 13. Corrected Cast Vote Records have since been posted on the Secretary of State's web site, and are shown in the summary report generated on November 21, 2018 (Ex. F-2).

Republican Party v. Dunlap, 324 F. Supp. 3d 202, 206 (D. Me. 2008) (quoting *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015)).

Like all state statutes whose constitutionality is being challenged, the RCV law is presumed to be valid. *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944). Plaintiffs bear the heavy burden of proving that the RCV law violates their constitutional rights.

As this Court noted in denying plaintiffs' motion for a TRO, "[t]he sine qua non of [the] four-part inquiry" is likelihood of success on the merits. *Order on Plaintiff's Motion for TRO* ("TRO Order"), ECF No. 26 at 5-6. If plaintiffs cannot demonstrate this, then the Court need not even address the other three factors. In this instance, plaintiffs have utterly failed to establish a likelihood of success on any of their constitutional claims.

I. Plaintiffs have demonstrated no likelihood of success on the merits of their claims.

A. Article I claims.

Plaintiffs make the novel argument that Article I, section 2, of the United States Constitution obligates the states to determine the election of members of Congress by a plurality of the votes cast – notwithstanding that no reference to "plurality" or, indeed, to any particular method of counting ballots is expressed in this or any section of the U.S. Constitution,[5] and notwithstanding that Article I, section 4 expressly grants authority to the states to regulate the "Times, Places and Manner of Holding Elections for Senators and Representatives" to

[5] U.S. Const. Art. I, § 2, cl. 1 provides in full: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The second "qualifications" clause provides: "No person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

Congress.[6] The sole legal authority on which plaintiffs base their argument is *Phillips v. Rockefeller*, 435 F.2d 976 (2nd Cir. 1970), which this Court has already determined does not stand for the proposition that plaintiffs claimed it did. "While it is true that it does not offend the Constitution if a state permits a candidate for federal office to win by a plurality – the actual holding of *Phillips v. Rockefeller* – it does not follow that Article I, section 2 mandates that all state elections be determined based on a plurality (in the absence of an outright majority)." *TRO Order*, ECF No. 26 at 7.

The Supreme Court, in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995), explained the meaning and historical significance of the phrase "by the People" in Article I, section 2, clause 1: "the Framers, in perhaps their most important contribution, conceived of a Federal government directly responsible to the people, … and chosen directly, not by States, but by the people … and they implemented this ideal most clearly in the provision, extant from the beginning of the Republic, that calls for the Members of the House of Representatives to be 'chosen every second Year by the People of the several States.'" (Emphasis added). The same ideal was incorporated in the 17th Amendment adopted in 1913, which changed the method of electing Senators from state legislatures to the people. *Id.* "The Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people." *Id*. How "the People" go about choosing their representatives, however, is a matter left up to the states. *See United States v. Classic*, 313 U.S. 299, 311 (1941) ("the states are given and in fact exercise a wide discretion in the formulation of a system for the choice by the people of representatives in

[6] U.S. Const. Art. I, § 4 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 [choosing] Senators."

Congress").[7] As this Court noted in denying the motion for TRO, "it appears that both majority and plurality standards have historical precedents in American politics." ECF No. 26 at 7. *See* Schouler, James, *History of the United States of America Under the Constitution*, Vol. I (rev. ed. 1880) at 95-96 (noting that most southern states elected Representatives by plurality while "New England clung long to the majority rule..."). Indeed, Maine elected its Representatives to Congress by majority vote until 1847. *See* P.L. 1823, c. 223, § 4; P.L. 1847, c. 23.

Article I, section 4, clause 1 ("the Elections Clause") is a "default provision" that gives States the authority and responsibility to provide the mechanics of Congressional elections, and yet grants to Congress the power to override those regulations if it wishes. *Foster v. Love*, 522 U.S. 67, 69 (1997). "Congress permissively allows the states to regulate, but only to the extent that Congress chooses not to regulate." *Fish v. Kobach*, 840 F.3d 710, 726 (10th Cir. 2016). The courts read federal and state election laws as part of a "unitary system of federal election regulation but with federal law prevailing over state law where conflicts arise." 840 F.3d at 729.

The layout of ballots and the method of counting votes form essential components of the "manner of" conducting an election. *See Cook v. Gralike*, 531 U.S. 510, 523 (2001), quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (the "manner" of elections "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'") (emphasis added). "The rules for counting and not counting ballots … are presumptively rules of state law under Art. I, sec. 4, cl. 1." *McIntyre v. Fallahay*, 766 F.2d 1978, 1085 (7th Cir. 1985). Congress may override these rules using its own power, but a federal

[7] Article I, section 2, clause 1 is most often cited as the constitutional basis for requiring congressional districts within each state to have equal populations, so that the vote of each citizen is not worth more in one district than another. *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964) (history of adoption of Art. I, § 2, reveals framers' intent that "no matter what the mechanics of an election, … population [must be] the basis of the House of Representatives").

election law preempts state law only when the two inevitably conflict. *Id.*[8] Even after the contested presidential election of 2000, which focused so much attention on the design flaws in Florida's butterfly ballot, Congress did not attempt to standardize the form of the congressional ballot. Instead, Congress directed each state to adopt "uniform and non-discriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State." Help America Vote Act, Pub. L. 107-252, Title III, § 301(6) (eff. Oct. 29, 2002), codified at 52 U.S.C. § 21081(6).[9] *See* 21-A M.R.S.A. § 696(6), and 29-250 C.M.R. 550 ("Rules for Determining Voter Intent" adopted by the Secretary to comply with federal law).

There is no doubt that Congress could, if it wished, enact a law requiring Representatives to be elected by plurality, but it has not done so. The states thus retain considerable leeway to experiment with different voting methods, such as RCV and the separate run-off elections currently required in the states of Georgia, Mississippi, and Louisiana between the two top vote-getters when no candidate receives a majority of the votes cast at the general election. If, as plaintiffs contend, Article I, section 2 of the U.S. Constitution truly meant that elections must be determined by plurality, then these states' laws would be unconstitutional – yet their validity has been upheld. *See Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D. Ga. 1993), *aff'd*,

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[8] For example, Congress enacted a law providing that "[a]ll votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law," 2 U.S.C. § 9 (emphasis added), yet left to each state the choice of ballot design and the types of voting machines to use. Federal law also establishes a uniform date for Congressional elections, in 2 U.S.C. § 7, and yet states remain free to allow early voting that concludes on that day. *Compare Foster v. Love*, 522 U.S. 67 (1997) (Louisiana's open primary law preempted because it allowed election to be decided before that date if one of the candidates received over 50% of the vote in October open primary), with *Millsaps v. Thompson*, 259 F.3d 535 (6th Cir. 2001) (Tennessee's early voting law not preempted because votes cast early were not counted until election day).

[9] In HAVA, Congress also established minimum requirements for voting systems used by the States, but did not prescribe the use of any particular voting system. *See* 52 U.S.C. § 21081(a).

992 F.2d 1548 (11th Cir. 1993) (state's decision to interpret plurality result as inconclusive and to require a run-off to determine the winner is not itself unconstitutional).

It is also clear that Maine's RCV law does not violate the prohibition on adding qualifications to serve in Congress.[10] As the court recognized in *Public Citizen, Inc. v. Miller*, *supra*, the candidate who won a plurality but not a majority in the first round of voting under Georgia law was "by no means precluded from obtaining the office he sought;" he continued to be a viable candidate even though he was forced into a run-off election against the person with the second-highest vote count. 813 F. Supp. at 832. The same is true of Maine's RCV law, since each of the four candidates who qualified for the ballot met the qualifications to be elected to Congress and had an equal opportunity to win that election. To win, they had to receive a majority of the votes tallied in the final round of the tabulation with only two continuing candidates. In contrast to a state law imposing term limits on members of Congress, Maine's RCV law does not affect a candidate's eligibility to seek election. It merely determines the method of voting for and selecting a winner from among all the qualified candidates.

In short, Article I of the U.S. Constitution does not implicitly contain a "substantive plurality provision" as plaintiffs claim. As a method of casting and counting ballots, Maine's RCV law falls squarely within the scope of authority assigned to the states to determine the "manner" of conducting Congressional elections.

B. First and Fourteenth Amendment claims.

Standard of review. The states have considerable latitude to determine the time, place, and manner of holding federal elections, including setting rules for "the registration and qualifications of voters, and the selection and qualifications of candidates." *Storer v. Brown*, 415

[10] The qualifications to serve in the U.S. House of Representatives are set forth in U.S. Const. Art I, § 2, cl. 2 and cannot be supplemented by federal statute or state law. *U.S. Term Limits*, 514 U.S. at 798, 827.

U.S. 724, 730 (1974). Moreover, the Supreme Court has long recognized that each regulation "inevitably affects – at least to some degree – the individual's right to vote and … to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). The constitutionality of a state election regulation must be evaluated according to a "flexible standard" of review, whereby "the rigorousness of [the] inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Only if the burden is found to be severe must the state demonstrate that the regulation is narrowly tailored to serve a compelling state interest. When the burden on those rights is less than severe, the State need only show an important regulatory interest to support a reasonable, nondiscriminatory restriction. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

Severity of the burden. Plaintiffs claim that RCV imposes a "severe burden" in various ways on "the right of all qualified voters to cast their votes effectively." *See* Plaintiffs' Motion ECF No. 3 ("Pl. Mot.") at 8, quoting *Ayers-Schaffner v. DiStefano*, 37 F.3d 726, 729 (1st Cir. 1994). Plaintiffs claim that voters cannot vote "effectively" when they do not know which candidates will continue to the final round of the RCV tabulation (Pl. Mot. at 9-11), and that having only one opportunity to rank all the candidates deprives voters of the ability to vote for the candidate they perceive to be "weaker" in the first round and remain free to vote against that candidate in a subsequent round (Pl. Mot. at 13).

Plaintiffs equate the ability to cast a vote "effectively" with having an opportunity to vote in a particular strategic manner that they have conceived for purposes of this lawsuit. None of the cases cited by plaintiffs (Pl. Mot. at 9, 12-13), nor any controlling precedent, supports a conclusion that these conditions impose a severe burden on voters' rights.

The election in *Ayers-Schaffner*, for example, is completely unlike Maine's RCV law. A local board in that case scheduled a second election to cure certain defects in the voting procedures at the first election, and then restricted participation in the second election to only those voters who had voted in the first election. The board thus deprived certain voters of the right to "cast their vote effectively" by barring them from voting in the second election, which was the only "effective" election held for the school board. Not surprisingly, the First Circuit held that this restriction imposed a severe burden on the rights of voters within the school district and that no governmental interest could justify the restriction. 37 F.3d at 728-30. The board contended that any burden on the excluded voters was slight because by not showing up to vote the first time they had voluntarily given up their opportunity to participate in the second election. The First Circuit rejected this argument, noting that "in the absence of any advance warning that failure to vote in the first election would preclude voting in the second, their lack of participation in the original balloting cannot in any respect be viewed as a waiver of the right to vote in the new primary." 37 F.3d at 728.

By contrast, the voters who participated in the November 6th general election for Congressional District 2 knew in advance that if no candidate won over 50% of the first-choice votes, there would be subsequent rounds of counting to replicate instant run-off elections between the candidates with the highest number of first-choice votes. All of the voters who participated in the general election thus had an equal opportunity to vote – at the same time and in the same election – for as many or as few candidates as they wished. Voters such as the plaintiffs, who chose to rank only one candidate, still participated fully in the election because

their vote for Poliquin was counted again in the second round of the tabulation.[11] RCV thus imposed no burden on their rights to cast a vote effectively – their votes were cast and counted in every round.

Plaintiffs' counsel suggested at oral argument on the motion for TRO that a separate run-off election would be preferable to RCV because the voters would know exactly which candidates they would have to choose from in that run-off, whereas with RCV there is a degree of uncertainty on election day as to which candidates will continue to a second round if none achieves a majority in round one. But having a preference for a different, allegedly better voting system, or a desire to have more information when voting, does not establish that the existing system imposes a severe burden on one's voting rights. It is also difficult to be "persuaded that the electorate, with reasonable diligence, could not inform itself as to who among the candidates was likely to survive the first round of the RCV process." *TRO Order*, ECF No. 26 at 9, n.4.

Plaintiffs' argument that RCV severely burdens their rights by depriving them of the strategic choice to vote for a "weaker candidate" in order to advance that candidate to a subsequent round and "in hopes that their actual preferred candidate will have a better chance of ultimately winning" (Pl. Mot. at 13) is equally unpersuasive. Every voting system – including the plurality system that plaintiffs want the Court to impose in this election – offers the opportunity for strategic voting in one way or another. In a plurality or "first past the post" system, voters may make a strategic choice not to vote for their most preferred candidate out of concern that the candidate will act as a "spoiler" – drawing just enough votes away from one of

[11] Plaintiffs contend that in the RCV system, voters who rank only one candidate are "severely burdened" because they are deprived of a vote in subsequent rounds (Pl. Mot. at 11), but this contention is simply incorrect as a matter of law. As explained in the rules governing RCV, 29-250 C.M.R.ch. 535, § 4(2)(A):

> In each round, the number of votes for each continuing candidate must be counted. Each continuing ballot counts as one vote for its highest-ranked continuing candidate for that round.

the other candidates to cause the voters' least preferred candidate to win. *See Dudum v. Arntz*, 640 F.3d 1098, 1103-1105 (9th Cir. 2011) (noting that all voting systems in elections with more than two candidates can be manipulated through strategic voting). No one has suggested that inducing voters to make such strategic choices in a plurality system imposes severe burdens on voters' constitutional rights even though that system may limit voters' ability to choose the candidate they prefer. No Supreme Court or First Circuit precedent holds that the types of "strategic" voting in which plaintiffs claim voters wish to engage are constitutionally protected.[12]

As this Court noted in denying the motion for TRO, plaintiffs' objections to RCV on due process and First Amendment grounds – including their expert's opinions about "non-monotonicity" and "intransitive voter preferences" – really are policy arguments about the pros and cons of different voting systems. *TRO Order*, ECF No. 26 at 12, n. 9 and 13, n. 11; *see* Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: the Right to Vote and the Choice of a Voting System*," 2006 Mich. St. L. Rev. 327, 338- 343 (2006) (comparing voting systems). Under this nation's form of federalism, such arguments should be debated and resolved through the legislative process within each state. *See Crawford v. Marion County Election Board*, 553 U.S. 181, 208 (2008) (Scalia, J., concurring in judgment upholding voter identification requirement) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class"). Acting as lawmakers, Maine voters considered the pros and cons and chose to adopt RCV as the method of selecting their representatives to Congress.

[12] Moreover, plaintiffs have utterly failed to explain how their rights as voters were burdened at all under any of these theories, since each of them ranked only one candidate, and that candidate continued to the final round.

RCV may present voters with different strategic options than other voting systems, but any resulting burden is slight. Under RCV, voters retain the ability to cast an effective vote – for as many or as few candidates as they wish. Moreover, RCV does not discriminate between or among candidates, parties, or groups of voters. *See TRO Order*, ECF No. 26 at 10 (RCV law "is party-blind").

Importance of governmental interests in RCV. Given the slight burdens (if any) imposed by RCV, the State need only show an important regulatory interest that is furthered by this system. Courts that have addressed challenges to RCV and similar voting systems have recognized a number of important interests, as did this Court in its ruling on the motion for TRO (ECF No. 26 at 12) and in *Maine Republican Party v. Dunlap*, 324 F.Supp.2d at 212-13. *See, e.g., Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 697 (Minn. 2009), and *Dudum v. Arntz*, 640 F.3d 1098, 1116 (9th Cir. 2011). For example, RCV allows voters to express more nuanced preferences among multiple candidates than is possible in a single-round plurality election, while avoiding the "spoiler" effect that minor candidates' participation can cause. RCV aims to encourage greater participation in the electoral process by voters and candidates, which furthers First Amendment interests. RCV also produces a winning candidate with majority support of all the voters who participated, while avoiding the inconvenience and cost to voters and taxpayers of holding a separate run-off election. These are sufficiently important interests to support a reasonable, non-discriminatory regulation defining the "manner" of conducting Congressional elections.

C. Equal Protection claims.

Contrary to plaintiffs' assertions, RCV does not "value one person's vote over that of another" and does not treat different groups of voters differently. Thus, plaintiffs cannot

demonstrate that it violates the Equal Protection Clause of the Fourteenth Amendment. *See* Pl. Mot. at 14-15 (quoting *Bush v. Gore*, 531 U.S. 98, 104-05 (2000)). Indeed, the example plaintiffs use to illustrate their claim, using hypothetical ballots cast by voters Doe and Smith (Pl. Mot. at 14-15) reflects a fundamental misunderstanding – or mischaracterization – of how RCV votes are counted. A voter such as Doe, whose first-choice candidate receives the largest number of votes in round one and thus continues to rounds two and three, has his vote for that candidate counted in each round. Doe's second and third-choice rankings are not counted precisely because his first-choice candidate is still in the running. The voter identified as Smith, whose preferred candidate got eliminated after the first round, has her second-choice vote counted in round two, and, because that candidate is eliminated in round two, her third-choice is counted in the final round between the last two continuing candidates. Both Smith and Doe's preferences are counted in each round of the RCV tabulation – Doe's vote counted for candidate A in each round, whereas Smith's vote counted for a different candidate in each round. That Smith had three different choices counted does not mean that she had two more votes than Doe.

The Ninth Circuit in *Dudum*, and state courts in *Minnesota Voters Alliance* and *Stephenson v. Ann Arbor Bd. of City Canvassers*, No. 75-10166-AW (Mich. Cir. Ct. 1975), have considered and rejected similar equal protection claims brought against municipal voting systems that are equivalent to Maine's RCV law. As the *Stephenson* court noted, under this system "[i]t is the equal right to list preferences and the equal opportunity [of the candidate] to be eliminated or to stay in the running that accords each voter the same rights, not the possibilities of whose first or second preference may or may not stay in the counting." No voters' votes are "weighted more than others", and "no one person or voter has more than one effective vote for one office." Slip op. at 5, 6. "Only one vote, or candidate ranking, is counted for each ballot in each round of

counting votes." In *Minnesota Voters Alliance*, 766 N.W.2d at 687, the court rejected the plaintiffs' "weighting" argument on the same grounds, noting that "the vote for a continuing candidate is carried forward and counted again in the next round." No cases addressing equal protection claims in a RCV election support plaintiffs' contentions in this lawsuit.

D. Voting Rights Act claims.

As this Court found in denying the motion for a TRO, plaintiffs have failed to articulate any legal basis for applying the cited provisions of the federal Voting Rights Act ("VRA"), 52 U.S.C. §§ 10301 & 10307, to Maine's RCV law. They have presented no evidence that the RCV law was enacted with discriminatory intent, nor have they presented any facts to show an "effort by [d]efendant or anyone else invested with state-delegated authority to deny [p]laintiffs their right to vote or refuse to tabulate their vote." *TRO Order*, ECF No. 26 at 12-13 & n. 10. As discussed above, no eligible voters are precluded from voting under Maine's RCV law, and no votes of eligible voters are willfully not counted in the RCV tabulation. Plaintiffs have demonstrated no likelihood of success on these claims.

II. Denial of preliminary injunctive relief would not cause irreparable harm to plaintiffs.

Plaintiffs' failure to show likelihood of success on the merits obviates the need for the Court to reach this prong of the test for a preliminary injunction.

At oral argument on the motion for a TRO, plaintiffs' counsel tacitly admitted in response to the Court's questioning that the only irreparable harm that would be caused by allowing the RCV tabulation to proceed was that Jared Golden might prevail in the final round rather than Bruce Poliquin. Now that the RCV tabulation has been completed and the official tabulation has been submitted to the Governor confirming this result, it appears that certifying this as the official election outcome is the only irreparable harm that plaintiffs could allege.

Certifying Jared Golden as the winner of this election does not constitute irreparable harm. Plaintiffs' votes have already been counted, and the results of each round of counting have been recorded and preserved. Even if plaintiffs could demonstrate a likelihood of success on the merits of their claims, they cannot demonstrate that preliminary relief is needed to preserve the status quo until a final ruling on the merits by this Court. Moreover, the U.S. House of Representatives will be the ultimate judge of this election when it decides upon convening in January 2019, whether to seat Mr. Golden as the Representative for Maine's Congressional District 2. *See* U.S. Const. Art I, § 5 ("Each house shall be the judge of the elections, returns and qualifications of its own members."). *See also Opinion of the Justices*, 152 Me. 212, 142 A.2d 532 (1956) (state officials lack authority to determine validity of Congressional election and must issue election certificate to apparent winner).

III. The balance of harms tips strongly against plaintiffs, given their delay in filing this lawsuit, and the extent to which the relief they seek would harm the rights of voters who ranked candidates relying on application of the RCV method in Maine law.

Congressman Poliquin knew as of at least July 2, 2018 – more than three months before he and others filed this lawsuit – that voters would cast a ranked-choice ballot in the general election for Congressional District 2, and that the outcome would be determined by RCV unless he or one of his three opponents received more than 50% of voters' first-choice votes in the first round of counting. If he believed the RCV law was *facially* unconstitutional as he now contends, he should have filed a challenge long before November 13 – and well before voters started casting RCV ballots expecting that their second or third choice ranking would be counted if no candidate received a majority of votes in the first round and if their preferred candidate was

eliminated after the first round.[13] "A party requesting a preliminary injunction must generally show reasonable diligence." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam).

Plaintiffs rely on *Bond v. Fortson*, 334 F. Supp. 1192, 1194 (N.D. Ga.) (three-judge panel), *aff'd* 404 U.S. 930 (1971), to argue that a pre-election challenge to the constitutionality of Maine's RCV law would have been dismissed as non-justiciable, but the *Bond* plaintiffs had not decided in which races they intended to participate the following election year, and they had no way of knowing whether any of those races would result in someone winning a plurality but not a majority. The court in *Bond* was thus presented with a purely hypothetical situation. Here, by contrast, four candidates had already qualified for the general election by the end of June, and given the closeness of the race as reported by the news media in the months leading up to the election, it was reasonably predictable that the situation now before the Court would arise.

In many prior election cases, this Court has found that the balance of equities disfavored parties belatedly seeking injunctive relief, and it should do so here as well. *See Dobson v. Dunlap,* 576 F. Supp. 2d 181, 188 (D. Me. 2008) (no constitutional right to procrastinate); *Respect Maine PAC v. McKee,* 622 F.3d 13, 16 (1st Cir. 2010) (claimed emergency was largely of plaintiffs' own making); and *League of Women Voters v. Diamond*, 923 F. Supp. 266, 275 (D. Me. 1996) (plaintiffs' delay contributed in significant part to request for somewhat urgent preliminary injunction). Moreover, none of these cases involved a post-election challenge.

As this Court recognized, granting plaintiffs the relief they request would disenfranchise over 15,000 voters who selected one of the non-party candidates as their first choice, and ranked

[13] Plaintiffs Baber, Hartt and Hamm-Morris presumably knew in advance of the election that they wanted to vote for Mr. Poliquin and only Mr. Poliquin, so their constitutional claims of vote dilution could have been brought before the election as well.

one of the major party candidates second.[14] The affidavits submitted by defendant Golden in opposition to plaintiffs' TRO motion demonstrate that these voters would not have ranked Bond or Hoar first, but would have chosen Golden instead if they had thought the election might be determined by a plurality of first-choice votes. *See* ECF No. 18-1, 18-2, 18-3. One of the unenrolled candidates, Tiffany Bond, has represented that she would not have run as a candidate without the RCV method of voting. ECF No. 23 at 2.

IV. Granting plaintiffs' motion for a preliminary injunction would harm the public interest.

Disenfranchising over 15,000 voters, as discussed above, would significantly harm the public interest, as would changing the outcome of an election after it has occurred, by invalidating the law on which candidates relied when they decided to run for office, and on which voters relied when they cast their ballots.

CONCLUSION

The voters of Maine have voted twice, by significant margins, to adopt ranked-choice voting as the method for determining elections to Congress where three or more candidates have qualified for the ballot. Using this method, the voters have now elected Jared Golden as their Representative to Congress for the Second Congressional District. There is no constitutional basis for rejecting this electoral result. Accordingly, the Secretary urges the Court to deny plaintiffs' motion for preliminary injunction. Jared Golden should be free to present his credentials to the incoming Congress, which has the ultimate authority to decide whether to seat him as the Representative of Maine's Congressional District 2. U.S. Const. Art. I, § 5.

[14] In its TRO Order (ECF No. 26 at 11), the Court referenced 20,000 voters, which is the total number of voters who ranked candidates Bond or Hoar as their first choice, but the RCV results show that only 15,174 of those voters ranked Poliquin or Golden as a second choice. *See* Ex. F-2 (showing votes "transferred" in Round 2 of RCV).

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Respectfully submitted,

/s/ Phyllis Gardiner

PHYLLIS GARDINER
Assistant Attorney General
Office of the Attorney General
Six State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8830
Fax (207) 287-3145
Phyllis.gardiner@maine.gov

Counsel for Defendant Secretary of State Matthew Dunlap

THOMAS A. KNOWLTON
Assistant Attorney General
Thomas.a.knowlton@maine.gov
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this, the 28th day of November, 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

JOSHUA A. TARDY
tardylaw@roadrunner.com

ANDREW G. WOODSON
awoodson@wileyrein.com

ERIC WANG
ewang@wileyrein.com

JOSHUA A. RANDLETT
jrandlett@rudmanwinchell.com

LEE E. GOODMAN
lgoodman@wileyrein.com

PETER J. BRANN
pbrann@brannlaw.com

DAVID M. KALLIN
dkallin@dwmlaw.com

ELISABETH C. FROST
efrost@perkinscoie.com

JAMES T. KILBRETH
jkilbreth@dwmlaw.com

JOHN M. GEISE
jgeise@perkinscoie.com

MARC E. ELIAS
melias@perkinscoie.com

MICHAEL E. CAREY
mcarey@brannlaw.com

JAMES G. MONTELEONE
jmonteleone@bernsteinshur.com

PAUL J. BRUNETTI
pbrunetti@mb-law.com

/s/ PHYLLIS GARDINER

PHYLLIS GARDINER
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8830
Fax (207) 287-3145
phyllis.gardiner@maine.gov