STATE OF MAINE	SUPREME JUDICIAL COURT Sitting as the Law Court Docket No. Cum-20-227
DAVID A. JONES, *et al.* *Petitioners-Appellees,* v. MATTHEW DUNLAP, in his Official capacity as Maine Secretary of State, *Respondent-Appellant,* and THE COMMITTEE FOR RANKED CHOICE VOTING, *et al.* *Intervenors-Appellants*	AMICUS' OPPOSITION TO MOTION TO STAY THE MANDATE, FOR AN INJUNCTION PENDING RELIEF FROM THE UNITED STATES SUPREME COURT, AND FOR EXPEDITED CONSIDERATION

Introduction

Amicus curiae the Alliance Party, a rapidly growing national political party whose presidential and vice-presidential candidates have earned a place on the Maine ballot, submits this memorandum *amicus curiae* in opposition to those portions of Petitioners' motion seeking to stay the mandate and an injunction pending appeal.

Petitioners rest their motion for a stay and for an injunction on the familiar four part test of (1) irreparable injury to Petitioners; (2) harm to the other party as a consequence of the relief requested; (3) likelihood of success on the merits; and (4) adverse effect on the public interest. Pet. Mem. 3 (citing *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶14, 121 A.3d 792, 797). *Amicus curiae* defers to the responses of the Secretary of State and the Committee for Ranked Choice Voting on prongs (1)-(3) of this standard and incorporates those arguments by reference. Because the Alliance Party's unique insight[1] regarding the actual impact the requested relief would have on voters and candidates is likely to be the Party's most useful contribution to the Court, this memorandum will focus on the fourth prong – the harm to the public interest likely to result if the motion is granted.

The requested relief would erode the democratic process and profoundly impact candidates, political parties, and all the voting public. It would thwart the well-founded expectations of the entire state regarding the popular vote for president in Maine and the

[1] The unique interests of the Alliance Party are set forth in detail in the accompanying Motion for Leave to File, hereby incorporated by reference.

selection of Maine's electors. Compelling the state to use a plurality tabulation with ballots designed for ranked choice voting ("RCV") and imprinted with RCV instructions – which voters are legally required to follow – would unleash immeasurable confusion on the electorate. The predictable result would be an election where voters cannot be sure how to complete a ballot that captures their intention, or how their ballot (and all their fellow voters' ballots) will be tabulated.

Although voters will still mark and submit a piece of paper, the essential element of their "vote" – their intention to have their support recorded for the candidate(s) of their choice – will have been irretrievably lost due to the disjuncture between the way the Maine 2020 presidential campaign has been conducted in anticipation of this vote – including candidate activity as well as preparation and design of the ballot – and the system of tabulation.

Democracy depends on not only the right to vote, but the right to vote according to clear and consistent rules and instructions. It also entails the right to have the vote tabulated in the manner candidates and voters understand is applicable and are instructed to follow. In the absence of clarity and consistency, Maine may face incalculable damage

to its election process and profound harm to public confidence in any outcomes. The relief sought by Petitioners would substantially burden and impair the universally valued public interest in election integrity.

Petitioners' contention (Pet. Mem. 7) that "the election can still proceed with the current ballot, which precludes any harm to the broader public interest in the conduct of the general election" could hardly be more wrong.

Argument

The relief sought by Petitioners would deal a crushing blow to the public interest in an orderly and credible election. It would result in hundreds of thousands of Maine voters using a ballot and instructions that clearly direct the voter to rank their choices and that plainly communicate to the voter that the ballot will be tabulated according to the RCV method in Maine law which voters have seen on ballots since June 2018. Voters' reasonable reliance will prove ill-founded if Petitioners' order is granted and the State is prevented from using the RCV tabulation in the presidential contest. The severe misalignment between voters' natural and reasonable expectations of ranked choice voting, and the use of a plurality (or "first past the post") tabulation will

cause enormous harm to the public interest in an orderly and regular election the results of which the public and all stakeholders can understand and in which they may repose their complete confidence. As set forth below, the requested relief would confuse and disenfranchise voters who will be prevented from casting a ballot that accurately conveys their intentions; thwart the justifiable reliance of candidates on rules which told them to campaign in a manner calibrated to an RCV election; and risk a failed election in which the public cannot have confidence that the outcome reflects voters' will.

A. The Relief Requested Would Cause Extensive and Irremediable Voter Confusion and Therefore Profoundly Harm the Fundamental Public Interest in a Credible Election Outcome.

If diligent and well-informed voters follow the written instructions on the ballot as it is now being printed, and a Court order results in a plurality tabulation, voters will cast a ballot that will be tabulated in a way that does not reflect the voters' true intent and which in fact may be antithetical to that intent.

A voter who reads and adheres to the instructions printed on the ballot is not only following the path trod by millions of voters through decades of Maine elections, that voter is also complying with the

express requirement of Maine law, which dictates that all voters "shall mark the ballot at a general election *as instructed in the directions on the ballot.*"). 21-A M.R.S. § 692 (emphasis added). The extraordinary and unprecedented step of providing a ballot "insert" or verbal instructions from clerks or wardens that is contrary to the printed instructions a voter sees on the ballot while in the voting booth would only add to the confusion of a conscientious voter intent on registering his or her choice of candidate(s) in compliance with § 692. The viability of this election depends on averting this result.

While the right to clear ballot instructions may not now be recognized as constitutional in nature, *see, e.g., Appeal of McDonough*, 149 N.H. 105, 113 (N.H. 2003) (assuming, without deciding, that voters have a constitutional right to understandable ballot instructions),[2] the relief requested implicates many other forms of cognizable harm. Indeed, the looming damage is far greater than difficulty with unclear instructions in *Appeal of McDonough*. Instructions that do not comport with the tabulation method will incorrectly record the voters' intent –

[2] In recognition of the significance of ballot instructions, Maine law requires those instructions to be translated to a second language which must be made available upon request. 21-A M.R.S. § 603(5).

the "polestar" by which to judge the process by which a completed ballot is recorded. *State ex Rel. League v. Herrera*, 145 N.M. 563, 570 (N.M. 2009). That an election which misreads, distorts, or converts voters' intent – or transfers a voters' selection to the wrong candidate – is detrimental to the public cannot be denied.

Two hypothetical cases illustrate how the requested relief will result in profound harm. Surely, instructions to "mark the oval above the name of the candidate of your choice" would be unacceptable in a system that records voters' choice based on the oval *below* the candidate's name. In the case of such a hypothetical mismatch between instructions and election processes, the "wrong" candidate could certainly be designated as the election winner. A band-aid remedy of verbal or even written instructions from an election official may help direct a number of voters to the right result, and no one could fault the State if that measure were adopted as a last resort. But equally certain, it would not suffice for countless other voters.

Another hypothetical illustration is a multiple-winner election in which a law allows voters to choose multiple candidates, but instructions on the ballot direct the voter to choose only one. The

violation of the voters' choice would be patently obvious by any such confounding and confusing arrangement.

An analogous problem would infect the current ballot and its instructions[3] in Maine if the motion is granted. And any change in the instructions at the 11th hour would be very difficult to communicate, as revealed by close inspection of the ballot, the official sample of which is provided in the link at n. 3. The presidential choice appears on the same side of one sheet of the ballot as choices for U.S. Senate and U.S. House of Representatives. One set of printed RCV instructions is given, and applies to all three contests. But *ranked choice voting will continue to be used in the race for U.S. Senate and U.S. House of Representatives – appearing on the ballot immediately adjacent to the presidential race, and relying on the same instructions – notwithstanding the relief Petitioners seek.* Thus, any corrective instructions would have to parse out the three different races to which the existing instructions apply,

[3] The Secretary of State has posted the sample ballot, including instructions to the voter: https://www.maine.gov/sos/cec/elec/upcoming/yorkRCV11-20geneleballotsample.pdf Entities such as the League of Women Voters have also posted the sample ballot. https://www.lwvme.org/elections While it is conceivable that election officials could devise a way to attempt to explain to voters that the printed instructions are erroneous and direct them to treat their ballots as a plurality choice, many voters – especially those with less experience or of lower literacy levels – foreseeably would not be reached by such measures. And even if a perfectly effective solution could be drafted, it would not reach many voters who will have already cast a ballot as of the date of any Court order.

leaving RCV in effect for voters as they complete the portion of the ballot for U.S. Senate and U.S. House.[4] Clearly, the ballot was designed to make voting clear by grouping RCV races together. This aspect of the ballot layout would further complicate any attempt to use supplemental instructions to alleviate chaos.

B. The Relief Requested Would Wreak Havoc in the Election by Upending Reasonable Campaign Assumptions and Decisions of Political Parties, Nominees, and the Voters with Whom they Communicate.

It is difficult to imagine a clearer illustration of the adage "changing the rules in the middle of the game" than when voters are instructed to execute an RCV ballot and then election officials are ordered to ignore the actual rankings on the ballots those voters cast. Yet that is the natural consequence of the outcome Petitioners seek to impose on the Secretary of State. Simply put, tabulating ballots designed as a ranked choice selection under a single-tabulation plurality system would award some votes to candidates not in fact preferred by the voter, and in other instances would deny votes to candidates whom the voter intended to support. It would also upend the

[4] Where, as in the contest for U.S. House of Representatives, a race on the ballot has two named candidates and a space for declared write-in candidates, the RCV tabulation methodology may be utilized and thus the RCV instructions are applicable.

Alliance Party's (and others') reasonable strategic decisions in approaching the Maine electorate, and render meaningless much of the public discourse surrounding the presidential campaign in Maine – especially impacting the participation of new party candidates such as those of the Alliance Party.

Petitioners' suggestion that voters' full ranking can be ignored and that the voters' first choice equates to the single vote in a plurality contest is refuted by even a passing familiarity with RCV and voter behavior. As District Court Judge Lance Walker recently explained, changing a tabulation system from ranked choice to plurality in mid-stream "could deprive [numerous] voters of what they understood to be a right to be counted with respect to the contest between" the two candidates who continue to the final tabulation. 349 F. Supp. 3d at 78; *see also, Dudum v. Arntz*, 640 F.3d 1098, 1105 (9th Cir. 2011) ("Voters are more free to vote their true preferences, because they face less of a threat of having their votes entirely 'wasted' on unsuccessful candidates."); *Voters Alliance v. Minneapolis*, 766 N.W.2d 683 (Minn. 2009) (discussing strategic behavior of voters).

RCV is commonly understood to mitigate the "spoiler" problem inherent in multi-candidate plurality races. *See generally Baber v. Dunlap*, 349 F. Supp. 3d 68, 78 n.9 (D. Me. 2018) (referring to "spoiler" problem). RCV reduces the spoiler problem by allowing voters to choose in the first choice position a candidate to whom the voter is most intensely attracted, while shifting support to a second candidate in the event the more intensely supported candidate is not viable in subsequent rounds of tabulation. But in the absence of multiple rounds of tabulation, a voter could rationally cast a ballot for a candidate he or she supported less fervently.

Simply put, voters' first choice on an RCV ballot cannot be equated to voters' single selection in a multi-candidate plurality race. To do so would directly contravene the intent of at least some voters. This practical and behavioral difference is not merely an incidental effect of ranked choice tabulations, but in fact one of the main premises underlying this system. RCV allows a voter to rank as his or her first choice an underdog candidate without fear of losing their say in the final decision between two other candidates who are contenders in the final round. Thus, as noted above in regard to the "spoiler" issue, it may

commonly be a natural and strategic decision for a voter *not* to choose the same single candidate in a plurality format as that voter would rank first in an RCV format.

Specific to the presidential election in Maine, voters who have the understanding that the election follows "first past the post" plurality rules may rationally desire to cast their single choice for major party nominee Republican Donald Trump or Democrat Joe Biden. But if those same voters are provided a ranked choice ballot and RCV instructions, they may rank Alliance Party nominee Roque De La Fuente (or another candidate not affiliated with the Democratic Party or Republican Party) as their first choice. Granting Petitioners' motion would result in precisely this confusion, as some voters would vote on the basis of one understanding, while others would vote on the basis of the other, contradictory understanding.

The net result of blocking the use of RCV at the 11th hour is that candidates – particularly those associated with the Alliance Party or other emergent parties – will lose votes, depriving the Party of this measure of support. Notably, even if the Alliance Party nominee is not elected president, the number of votes its standard-bearer receives in

the election will be a factor in its ongoing recognition as an official party in Maine. 21-A M.R.S. § 302 (party qualification factors include whether the party's presidential nominee received five percent or more of the total vote cast in the most recent election). Disruption of this standard is not only detrimental to the Alliance Party itself, it thwarts Maine policy governing recognition of political parties and thus burdens the public interest.

As noted in *Baber*, candidates' decision to even enter a race for office may depend on the vote tabulation system in use, and thus a change in tabulation could render a ballot with candidates who themselves would not intend to run. *Baber*, 349 F. Supp. 3d at 76 (noting that at least one candidate may not have stood for election if aware that a plurality tabulation would be used). Conversely, the change could result in candidates opting not to run who, knowing a different system would be used, might in fact seek a place on the ballot.

Maine voting is already underway. Election officials have received more than 200,000 absentee ballot requests. A substantial surge in voting is imminent, as Maine law provides for disbursal of ballots to municipalities on or about October 3rd and "immediate" distribution

from there to individual voters who have submitted absentee ballot requests. 21-A M.R.S. § 753-B(1), As noted above (n.3), the sample ballot including the RCV design and instructions is already in public circulation, and very soon municipalities will begin posting it for voters to examine electronically. Disrupting this process now would be certain to cause widespread chaos.[5]

C. Changing the Tabulation Method Now Would Introduce the Risk of a Failed Election Requiring a Second Statewide Vote.

Public confidence in the sure and regular function of the presidential election process is the bulwark of our national democratic heritage and the *sine quo non* of successful and credible elections going forward. Despite numerous challenges, Maine's Secretary of State has consistently managed the election process in a highly exemplary manner through all recent cycles including the implementation of RCV. Yet through no fault of the Secretary of State or any Maine officials, the relief sought by Petitioners would result in untold chaos and

[5] Changing the rules in the middle of the game as proposed by Petitioners not only burdens the public interest, but is likely a due process violation. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 80, 73, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000) (per curiam) (cited in *Baber*, 349 F. Supp. 3d at 76).

uncertainty. A failed election[6] – one in which the winner cannot be discerned with confidence – could result from the widespread confusion which would be the predictable consequence of any ruling which compels election officials to credit votes to candidates in a manner contrary to the voters' intent.

The public interest demands a democratic process that is orderly rather than chaotic. *Storer v. Brown*, 415 U.S. 724, 730 (1974). The public has a powerful interest "in avoiding confusion, deception, and even frustration of the democratic process . . . . " *Munro v. Socialist Workers Party*, 479 U.S. 189, 194 (1986). That the "integrity, fairness, and efficiency of . . . ballots and election processes," *Timmons v. Twin Cities Area New* Party, 520 U.S. 351, 532 (1997), quoted in *Me. Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 213 (D. Me. 2018), is a weighty public interest is beyond serious dispute.

Remedial stickers, flyers, and verbal instructions reeducating voters from one election tabulation system to another could, on the margins, help an unknowable number of people, but could not come close to alleviating the overall impact on the public interest. Even well-

[6] The problem of failed elections is discussed in Steven F. Huefner, *Remedying Election Wrongs*, 44 Harv.J.Legis. 265 (2007).

informed voters "rarely" follow written voting instructions. *Big Spring v. Jore*, 326 Mont. 256, 277 (Mont. 2005) (dissenting opinion). Presumably, their compliance would be even lower when navigating two sets of directly conflicting instructions. Moreover, conflicting instructions "cause not only uncertainty about the status of particular voting procedures, but also general frustration with and distrust of an election process changed on the eve of the election itself." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 253 (4th Cir. 2014) (dissent). The problem leads to the specter of a failed election because "a ballot cannot rightly be counted" when it is impossible to ascertain the voter's intent. *Coughlin v. Election Commission of Lowell*, 294 Mass. 434, 436 (Mass. 1936).

While 21-A M.R.S. § 752 requires ballots to be distributed to municipal officials 30 days prior to Election Day and then disbursed immediately, a separate provision of Title 21-A provides that some overseas voters – including some uniformed service members deployed abroad – receive their ballots even earlier – 90 days before Election Day, or nearly two months before the date of the motion at issue. 21-A M.R.S. § 752(1)(A) ("At least 3 months before the election to which they

pertain, the Secretary of State shall furnish each municipality with a reasonable number of blank write-in absentee ballots for use by uniformed service voters or overseas voters . . . . .”). These service members surely have an equal right to vote without confusion, and to have their vote counted pursuant to the lawful system of tabulation upon which they relied when executing their ballot.

Finally, should there be a failed election, the federal deadline for naming presidential electors[7] would severely constrain any possibility of conducting an additional statewide vote to remedy the chaos sure to result from the relief requested. For this final reason, the motion is a direct threat to the public interest in an orderly and credible election, and should be denied.

Conclusion

The public interest here is best served by enforcing the law as it has been enacted and applied for the duration of this election cycle. “An award of injunctive relief setting aside RCV for the 2020 election would

[7] 3 U.S.C. § 7 (“Meeting and vote of electors. The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.) (June 25, 1948, ch. 644, 62 Stat. 673) In the current cycle, that date will fall on December 14, 2020.

undermine rather than safeguard the most relevant public interest." *Hagopian v. Dunlap*, 1:20-cv-00257-LEW, at *17 (D. Me. Aug. 14, 2020).

For the forgoing reasons, the Court should deny Petitioners' motion to stay and for an injunction.

Dated at Falmouth, Maine this 28th day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the date written below I served a copy of the preceding memorandum on all counsel by email and by U.S. Mail at the following addresses:

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