UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BRETT BABER, et al.,	)	
	)	
Plaintiffs,	)	
	)	**Case No.: 1:18-cv-00465-LEW**
v.	)	
	)	
MATTHEW DUNLAP,	)	
	)	
Defendant,	)	

TIFFANY BOND, KAYLEE MICHAUD AND RACHAEL WOLLSTADT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Bruce Poliquin, as a voter and candidate for Maine's Second Congressional District Representative seat, asks this Court to recount the November 6, 2018 election in a manner that favors his election. Mr. Poliquin has requested that only voters' first-round candidate selections now be tallied, effectively casting out the votes of about 20,000 Maine voters who voiced support for an independent candidate in reliance on Maine's voter-endorsed Ranked-Choice Voting law, 21-A M.R.S. § 723-A (hereinafter "RCV") that provides an opportunity to ultimately choose between candidate Poliquin and candidate Golden. Before and on Election Day, no legal challenge of Maine's RCV law was pending in any court. No legal challenge was even threatened. Voters reasonably relied on the fact that the RCV laws that were twice affirmed by Maine's citizen legislators as the State's chosen manner of election for its congressional representatives. Laches bars Mr. Poliquin's efforts to disenfranchise thousands of RCV ballots after failing to timely act to present these facial and foreseeable challenges to the RVC law. Nonetheless, Mr. Poliquin's constitutional challenges to Maine's RVC must fail as a matter of law, because (i) the Constitution, Article 1, Section 4, Clause 1, gives Maine the authority to

lawfully employ RCV as its manner of electing Maine's congressional representatives, (ii) the Voting Rights Act does not supersede RCV based on claims that RCV ballots are inadvertently confusing; and (iii) RCV imposes a minor burden on Plaintiffs, and Maine has an important state interest implementing RCV.

FACTUAL OVERVIEW

Plaintiffs initiated this litigation by filing their six-count complaint on November 13, 2018, seven days after the 2018 general election, seeking (1) a declaration that Maine's RCV law violates the U.S. Constitution, the Voting Rights Act, and 42 U.S.C. § 1983, and (2) a preliminary and permanent injunction preventing the State from fully implementing the requirements of RCV in relation to Maine's Second Congressional District or in any election thereafter. Compl. ¶¶ 3, 40-72.

Maine voters have twice approved use of RCV as their preferred manner to conduct the State's federal elections. Most recently, on June 12, 2018, Maine voters sustained a People's Veto and ensured that ranked-choice voting would apply for the election of Maines's federal representatives in the November 6, 2018, general election. Compl. ¶ 23. Also on June 12, 2018, Plaintiff Poliquin won the Republican nomination for the Second Congressional District in a primary election that applied RCV and utilized a RCV ballot. Compl. ¶¶ 10, 23-24.

After June 12, 2018, it was common knowledge that RCV would be used in Maine's general elections for federal officers, and that RCV would be fully implemented in the November 6, 2018, general election. Compl. ¶¶ 10, 23-34. Defendant Tiffany Bond thereafter entered the Second Congressional District election campaign as an independent candidate, in reliance on the RCV procedures that ensure votes won by independent candidates do not alter the outcome of election between the top two vote-getters.

On September 20, 2018—six weeks before the general election—the State released the official ranked-choice ballot for the Second Congressional District. The ballot clearly identified the four named candidates for that race: Republican Bruce Poliquin, Democrat Jared F. Golden, and Independents Tiffany L. Bond and William R.S. Hoar. Compl. ¶ 33. The ballot also contained accurate instructions for how to effectively fill out the ballot. Compl. ¶¶ 34-35. The ballot, instructions, and an explanation as to how ranked-choice voting works, were readily available after September 20, 2018, on the State's website. Compl. ¶¶ 33-35. Pursuant to Maine law, absentee ballots were available in municipal town offices or city halls 30 days prior to November 6, 2018. 21-A M.R.S. § 752.

On November 6, 2018, Plaintiffs and all other voters in the Second Congressional District cast their vote for U.S. Representative using the official RCV ballot. Compl. ¶¶ 32-34. Plaintiffs exercised their right to choose Poliquin as their first choice on the ballot, and also exercised their right not to rank any other candidates on their ballot. Compl. ¶¶ 7-10. Defendants Kaylee Michaud and Rachael Wollstadt also cast RCV ballots selecting Defendant Bond as the No. 1 preference in reliance on the RCV system that ensured secondary selection between the major party candidates would be counted.

After the State calculated the first round of votes, the unofficial results appeared to indicate that no candidate received more than fifty percent of the vote and that Poliquin had approximately 2,000 more votes than Jared Golden. *Order on Motion for TRO*, at 4-5; Compl. ¶ 37. The Plaintiffs then filed this suit seven days after the general election to prevent the State from carrying out the requirements of RCV.

ARGUMENT

Plaintiffs' constitutional challenges to Maine's use of RCV to elect the State's congressional representatives are meritless: (i) the United States Constitution, Art. 1, Sec. 2 establishes no limitation on Maine's right to prescribe RCV as its preferred manner of electing congressional representatives; (ii) RCV is not preempted by the federal Voting Rights Act (the "VRA") because RCV does not impair the rights of any protected class, and does not infringe on any voter's VRA right to assistance in casting an effective vote; and (iii) RCV violates no provision of the First Amendment or the Fourteenth Amendment because RCV is a politically neutral and nondiscriminatory election regulation reasonably related to Maine's legitimate interest in protecting its election integrity.

Even if Plaintiffs could establish any of its claims against RCV, the claims are all barred by laches. Laches applies here because Plaintiffs waited until *after* Election Day to bring this action on claims that were entirely justiciable weeks, or even months, before ballots were cast. Further, Defendants Michaud, Wollstadt and Bond relied upon RCV to their detriment when they voted for third-party candidates expecting that Maine's established RCV procedures ensured an opportunity to ultimately choose between Poliquin and Golden, if necessary.

Plaintiffs nonetheless seek a preliminary injunction asserting that they have demonstrated: "(1) a likelihood of success on the merits, (2) a likelihood of irreparable harm absent interim relief, (3) a balance of equities in [their] favor, and (4) service of the public interest." *Arborjet, Inc. v. Rainbow Treecare Scientific Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015).

Ultimately, Plaintiffs' ability to demonstrate likelihood of success on the merits "is the touchstone of the preliminary injunction inquiry." *Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145, 152 (1st Cir. 2012) (internal quotation omitted).

I. PLAINTIFFS' CLAIMS ARE WITHOUT MERIT BECAUSE RCV IS CONSTIUTIONAL, NONDISCRIMINATORY AND RELATED TO THE STATE'S IMPORTANT ELECTIONS INTERESTS.

A. The United States Constitution guarantees Maine's right to prescribe RCV or any other manner of majority election to select federal representatives, absent superseding federal law.

Article 1, Section 2 of the Constitution does not bar Maine's right to prescribe RCV as its preferred manner of electing its congressional representatives through a majority or instant run-off vote. On the contrary, Article 1, Section 4 of the Constitution, *guarantees* Maine's right as a state to select RCV, or any other manner of election not preempted by federal law, as the State's chosen method of electing congressional representatives "by the People."

Article 1, Section 4, Clause 1 of the Constitution (hereinafter the "Elections Clause") provides that that "[t]he 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."

The Elections Clause harmonizes with Article 1, Section 2, Clause 1, which provides that states shall determine voters' qualifications, and that congressional representatives shall be chosen "by the People" (hereinafter the "Voters Clause"). The two clauses congruously require that any congressional election consistent with that State's prescribed "[m]anner of holding elections," pursuant to the Elections Clause, similarly satisfies the requirement for a selection "by the People" pursuant to the Voters Clause. *See Phillips v. Rockefeller*, 435 F.2d 976, 980 (2nd Cir. 1970) (holding that a federal election satisfied the constitutional requirement for federal

elections "by the People" of New York only where it was consistent with New York's chosen "manner of holding elections" by plurality).

The Elections Clause "empowers the States to regulate" congressional elections where Congress does not adopt superseding law. *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972). The United States Supreme Court has repeatedly recognized that the Election Clause provides States with broad authority, *including* the autonomy to determine the manner through which congressional votes are counted. *See Roudebush*, 405 U.S. at 24. The Supreme Court has summarized the Elections Clause:

> It cannot be doubted that these comprehensive words embrace authority [for States] 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.

Smiley v. Holm, 285 U.S. 355, 366 (1932) (emphasis added); *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

This interpretation is not a novel evolution of thought. The Framers of the Constitution similarly recognized the Elections Clause as a broad reservation of rights for States to "determine how the[] electors shall elect—whether by ballot, or by vote, or by any other way," and to regulate those elections procedures absent superseding federal law. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833 (1995) (quoting 4 Elliot's Debates 71).

The Constitution does *not* require States to adopt a one-size-fits-all approach to congressional elections. In fact, "[r]ules may differ widely from state to state, but all may reflect a state's 'compelling interest' in setting up a structured system, even though no one format can

be said to be the only possible one." *LaRouche v. Guzzi*, 417 F. Supp. 444, 448 (D. Mass. 1976). Therefore, election regulations are not deemed unconstitutional simply because they are unique, or because they impose a moderate burden on an unprotected class of voters. *See Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (explaining, in response to an argument that Illinois absentee ballot law was more restrictive than Oregon's that "the states that have more liberal provisions for absentee voting may well have different political cultures from Illinois [. . .] . One size need not fit all.").

RCV is one of *dozens* of Maine laws and regulations that are properly imposed upon voters under the State's constitutional power to prescribe the "Times, Places, and Manner of holding Elections." U.S. Const. Art. 1, § 4. The State's power to direct the manner of elections is broadly interpreted, because "there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Here, Maine's comprehensive state right to regulate its own lawful election system is guaranteed by the U.S. Constitution's Elections Clause. *See Smiley*, 285 U.S. at 366. Maine, acting through its citizen legislators in 2016 and 2018, has repeatedly and unambiguously prescribed RCV as the State's chosen "[m]anner of holding Elections for Senators and Representatives." Art. 1, § 4, Cl. 1. In fact, Maine has fully incorporated RCV into its "complete code for congressional elections," *Smiley*, 285 U.S. at 366, including, *inter alia*, the State's specified regulations for the "counting of votes," *id.*; *see also Roudebush*, 405 U.S. at 24.

Additionally, the State's adoption of RCV has even-handedly affected *all* federal candidates—and voters—in Maine, requiring that the successful candidate in each of the congressional districts wins election pursuant to RCV by outright majority or by instant run-off

vote. RCV remains a lawful exercise of the State's regulatory elections authority because RCV imposes consistent, reasonable burdens on all candidates and all voters, without regard for political party, race, creed or home town.

Although the State's RCV provisions are novel as applied to federal elections, the unique nature of RCV cannot render it constitutionally invalid: "One size need not fit all." *Griffin*, 385 F.3d at 1131. In fact, Maine's first-in-the-nation adoption of RCV can be permissibly influenced by the State's "different political culture," *Griffin*, 385 F.3d at 1131, by "an interest in attempting to see that the election winner be the choice of a majority of its voters," *Williams v. Rhodes*, 393 U.S. 23, 32 (1968), or simply by Maine's recognized, legitimate interest in maintaining "fair and orderly elections" and bolstering the "integrity, fairness and efficiency" of Maine's congressional elections. *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 213 (D. Me. 2018) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 352 (1997)).

Plaintiffs' claim that the Voters Clause, Art. 1, § 2, Cl. 1, somehow *requires* congressional elections to be decided by plurality—and prohibit election by majority—is inconsistent with established precedent, and must fail. Plaintiffs erroneously rely upon *Phillips v. Rockefeller* and *U.S. Term Limits, Inc. v. Thornton* to support their claims.

Phillips fails to demonstrate that the By-the People Clause *requires* plurality voting because that New York case merely *permitted* federal election by plurality there because the State of New York, at the time, had affirmatively recognized plurality election as its prescribed manner of election "by the People." 435 F.2d at 980. New York's laws and regulation of its federal elections cannot require Maine to follow suit. *See Griffin*, 385 F.3d at 1131 (holding liberal Oregon absentee voting law cannot establish constitutional infirmity of Illinois absentee voting law based on different state interests and policies). Maine is further insulated from

importing New York's election laws in this case, where Maine has repeatedly and overtly demonstrated its intent to adopt RCV as its manner of election requiring an outright majority or an instant run-off to win election. *C.f. Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (unpublished table decision) ("A state's decision to interpret a plurality result as being inconclusive is not itself unconstitutional.").

U.S. Term Limits similarly fails to restrict Maine's constitutional use of RCV because that case relates to the State of Missouri's impermissible effort to guise a state-sponsored modification to the "Qualifications Clause," Art. 1, Sec. 2, Cl. 2 (distinguished from the separate "Voters" Clause one clause preceding at Art. 1, Sec. 2, Cl. 1). The State rights established in the Elections Clause and the Voters Clause to regulate elections are clearly distinguishable from Congress's exclusive right to establish qualifications for federal representatives through the "Qualifications Clause. *See U.S. Term Limits*, 514 U.S. at 780-81. Indeed, the Elections Clause was intended to grant states the authority to protect the integrity of the election process through election *procedures*, not to permit states to impose substantive qualifications excluding classes of candidates from office. *See id.* at 827-835.

B. The Voting Rights Act does not preempt RCV or bar Maine's prescribed manner of electing representatives by majority vote or instant run-off.

RCV is not preempted by the federal Voting Rights Act (the "VRA") because Maine's prescribed manner of election does not impair the rights of any protected class and does not infringe on any voter's VRA right to assistance in casting an effective vote. The VRA is narrowly construed to protect historically at-risk voting populations from systematic, disparate treatment at the polls. *See, e.g.*, *Abrams v. Johnson*, 521 U.S. 74 (1997) (protecting minority groups); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (same); *Puerto Rican Org. for*

Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973) (requiring assistance for at-risk groups at the polls). Plaintiffs have not alleged that any other federal election statute preempts or supersedes the Maine RCV law.

Specifically, the VRA provides that United States citizens lawfully entitled to vote in any elections "shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude," 52 U.S.C. § 10101. Additionally, the VRA provides protections guaranteeing that no lawful voter shall be subjected to any voting practice or procedure "different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." *Id.* at § 10101(2)(A).

The VRA also requires that any voter "requir[ing] assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance," § 10508; *see Puerto Rican Org.*, 490 F.2d at 580 (holding that non-English speaking Puerto Rican born citizens are protected by the VRA). The VRA, and its supporting case law, designate these four classes of impaired voters as the exclusive recipients entitled to special assistance to ensure that their right to vote is not "an empty ritual," but instead an "effective vote" expressing the voter's preferences. *Id.*

Here, no Plaintiff has alleged being denied *any* opportunity to vote using RCV because of his or her race, color, or previous condition of servitude. Similarly, no Plaintiff here has alleged being subjected to RCV practices or procedures different from others in the same county or municipality. And, no Plaintiff has alleged being a member of one of the VRA's protected classes entitled to special voting assistance to cast an effective ballot.

Plaintiffs here do not allege *any* type of the systematic or racial discrimination that the VRA was enacted to expel. Instead, Plaintiffs attempt to shoe-horn themselves into the VRA's protections under a broader VRA clause providing that "[n]o person acting under color of law shall fail or refuse to permit any person to vote who . . . is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote." § 10307(a); *see also* Compl. ¶ 51.

The Second Circuit Court of Appeals deflated a similar ruse in *Powell v. Power*, 436 F.2d 84 (2nd Cir. 1970), where plaintiffs who were outside the scope of the VRA's voter protections attempted to invoke the VRA as persons "otherwise qualified to vote." The plaintiffs sought to prosecute an illegal voting claim that, like here, was unrelated to racial discrimination. The Court concluded that the VRA's broader jurisdiction for persons "otherwise qualified to vote" was not intended by Congress as a catch-all for actions unrelated to the VRA's true purpose.

> Since plaintiffs do not claim to be 'entitled' to vote by operation of the Voting Rights Act, their case rests entirely upon the six words 'or is otherwise qualified to vote.' They would isolate these words from their context in the Act and set them before us as a general mandate by which Federal courts may correct election deficiencies of any sort. We decline to perform any such radical and selective surgery. We do not believe that by appending the quoted language Congress intended to free them of the goal which permeates the entire Act— the abolition of racial discrimination in the election process

Powell, 436 F.2d at 87 (2d Cir. 1970). Plaintiffs' VRA claim, alleging that RCV denies their ability to cast an "effective ballot," without any claim based on discrimination of a VRA-protected class, should be similarly dismissed.

Even if Plaintiffs had standing under the VRA to pursue claims that RCV distorted their understanding of the ballot, the VRA claim still fails. Plaintiffs rely on *Burger v. Judge*to support the proposition that "the state may not mislead its voters to the extent that they do not

know what they are voting for or against." 364 F. Supp. 405, 511, n.16 (D. Mont. 1973). *Burger*, however, concluded that even public distribution of demonstrably false information regarding a pending ballot question was insufficient to reach the intent necessary to "mislead" voters. *Id.* at 511. "In any event, it is clear that all electors who were in fact opposed to the proposed [ballot measure] could have expressed their disapproval by voting against it," *Id.* Plaintiffs also rely on *Kohler v. Tugwell,* where the court held that despite the confusing and unintelligible wording of a proposed constitutional amendment and its ballot question, the ballot wording "was sufficient to tell the voters what the complicated constitutional amendment was about. It was up to them to study its exact text." 292 F. Supp. 978, 982 (E.D. La. 1968).Plaintiffs here allege only that the RCV ballot is confusing. Not one claims that he or she was willfully misled by the ballot or any election watcher.

C. Maine's prescribed manner of election by RCV is even-handed, politically neutral and reasonably related to Maine's legitimate state interest in fair and efficient elections.

RCV violates no provision of the First Amendment or the Fourteenth Amendment because RCV is a politically neutral and nondiscriminatory election regulation that is reasonably related to Maine's legitimate interest in conducting fair and efficient elections.

Courts recognize that *every* election law likely imposes *some* burden or injury on a voter. In fact, "[e]very provision of an election code … 'inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends.'" *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). A court evaluating a challenged state election law first must consider the "the character and magnitude of the asserted injury" to Plaintiffs' asserted constitutional rights. *Anderson*, 460 U.S. at 789; *Werme*, 84 F.2d at 483. The level of scrutiny applied corresponds with "the degree

to which a challenged regulation encumbers First and Fourteenth Amendment rights." *Id.* Generally, if the challenged law imposes only "modest burdens," then "the State's important regulatory interests are generally sufficient" to justify reasonable, nondiscriminatory restrictions on election procedures. *Anderson*, 460 U.S. at 788. "Under this forgiving standard, the party challenging the constitutionality of [an election law] bears the burden of negating any conceivable basis which might support it." *Donahue v. City of Boston*, 371 F.3d 7, 15-16 (1st Cir. 2004).

The First Circuit Court of Appeals, however, reviews elections laws imposing a "modest or reasonable burden" using the Court's most deferential rational basis review. *See Werme*, 84 F.3d at 485; *Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 31 (1st Cir. 2016). The First Circuit summarized its binding precedent: "If the law imposes only a modest or reasonable burden, there need be only a rational basis undergirding the regulation in order for it to pass constitutional muster," *Gardner*, 843 F.3d at 31 (quoting *Barr v. Galvin*, 626 F.3d 99, 110 (1st Cir. 2010)) (internal quotations omitted).

1. Plaintiffs fail to show RCV causes any severe burden or injury.

Here, Plaintiffs allege four burdens caused by Maine's RCV election system, but those injuries fail to demonstrate any "severe" burden on Plaintiffs' constitutional rights. Rather, the burdens alleged are either modest or non-existent. Plaintiff's four alleged burdens will be addressed in turn:

First, Plaintiffs allege that RCV violates their constitutional rights by preventing Plaintiffs from knowing the "final pairing of candidates in advance, choosing among candidates and casting their vote effectively." Complaint ¶¶ 47-48, 52-53. This alleged burden cannot rise above a modest, minor inconvenience for Plaintiffs. Plaintiffs claim to have *only* cast their votes

for Poliquin as their most-preferred candidate, and their votes for Poliquin were tallied in the final vote count. Additionally, Poliquin remained in the RCV tabulation rounds until the final round, meaning no one was surprised by an unexpected final round match-up of other candidates. While Plaintiffs have no constitutional right to foresee the future, they are entitled to discover the identities of all candidates on the ballot before Election Day. In fact, an RCV sample ballot clearly identifying all candidates in the election—and including simple, clear RVC instructions—was released prior to the election, providing an opportunity to "know" the candidates to choose. Any burdens alleged based upon other, nonparty voters' choices or confusions about RCV are merely speculative.

Plaintiffs' alleged burdens for confusion are analogous to *Griffin,* where the working mothers also challenged Illinois' ballot as unconstitutionally complex, totaling 20 pages in length with 400 candidates named in the prior election. *Griffin*, 385 F.3d at 1132. The Court noted the ballot length and complexity resulted in many voters spoiling ballots and losing their right to have their vote counted. *Id.* However, those ballot concerns did not trigger a severe constitutional burden, because the nondiscriminatory burden of a complex ballot "applies to everyone" in the county, working mother or not. *Id.* at 1133. Similarly here, any confusion regarding the RCV ballot would generally have a politically neutral effect on voters using the RCV ballot, neutralizing any unique burden Poliquin and his supporters could have suffered.

Second, Plaintiffs allege that RCV violates their constitutional rights by barring the option to "vote strategically … to advance a weaker candidate to a subsequent election or round of voting so that [Poliquin] will have a better chance of ultimately winning." Compl. ¶¶ 59-60. This allegation imposes *no* burden on Plaintiffs' rights because the multi-round voting procedures of RCV guarantees Plaintiffs option to vote strategically by selecting a candidate

other than Poliquin in Round 1 of Round 2 of the RCV tabulation. Ultimately, Plaintiffs each *chose* to cast a vote for Poliquin as their preferred candidate rather than cast a strategic vote. Compl. ¶¶ 7-10.

Third, Plaintiffs allege RCV violates their constitutional rights because their vote for Poliquin as their preferred candidate tends "to reduce [Poliquin's] electoral chance to win." Compl. ¶¶ 64-65. This allegation fails to state a cognizable constitutional burden, because it is undisputed that each of Plaintiff's votes for Poliquin was ultimately included in the final tally of Poliquin votes that trailed behind Golden at the completion of the RCV process. If Plaintiffs' vote caused Poliquin's vote total to go *up*, it is impossible that the vote could also "reduce [Poliquin's] electoral chance to win."

Finally, Plaintiffs allege that RCV violates their constitutional rights because it denies them an opportunity to have their vote for Poliquin counted in each round. Complaint ¶¶ 69-70. This allegation fails to demonstrate any cognizable constitutional burden because Plaintiffs' votes for Poliquin were eligible to be counted in *each and every round* of the RCV tabulation, including the final tally that decided the election. At best, Plaintiffs can claim their vote isn't counted because of possible error in the ballot scanning, but that risk of scanning error remains relatively unchanged from Maine's prior manner of election.

2. Maine has legitimate and important interests in adopting RCV

The First Circuit's application of the rational basis review applies here, where Plaintiffs cannot show that the ranked-choice voting law causes anything beyond a modest burden. "Given the character and magnitude (or more aptly put, lack of magnitude) of the alleged injury to the plaintiff's First and Fourteenth Amendment rights … the defendants need only show that the enactment of [RCV] had a rational basis," *Werme*, 84 U.S. at 485 (parentheticals in original).

Maine has demonstrable important *and* legitimate interests in maintaining a fair and orderly elections system for conducting congressional elections in which Maine voters have confidence. In fact, the Court in *Maine Republican Party* recognized Maine's valid state interest in using RCV to conduct Maine's statewide elections in an orderly manner, and to preserve the integrity and reliability of the electoral process. 324 F. Supp. 3d at 213.

Additionally, Maine can show a state interest in electing congressional candidates via RCV to require majority support of the State's federal representatives. *Rhodes*, 393 U.S. at 32 ("Concededly, the State does have an interest in attempting to see that the election winner be the choice of a majority of its voters."

II. PLAINTIFFS' CLAIM IS BARRED BY LACHES BECAUSE PLAINTIFFS UNREASONABLY DELAYED FILING SUIT UNTIL AFTER ELECTION, AND DEFENDANTS ARE PREJUDICED BY RELIANCE ON RCV PROCEDURES.

A. Plaintiffs' claims was justiciable prior to Election Day, but were not timely filed.

Plaintiffs' claims were justiciable weeks prior to Election Day. Therefore, Plaintiffs had an obligation to bring this action before the Court with sufficient time before Election Day to give voters and other candidates' reasonable notice that the constitutionality of RCV was in dispute *before* ballots were cast.

Plaintiffs' RCV claims involved a facial challenge to the constitutionality of the implemented law, a Voting Rights Act claim based on confusion about the RCV ballot, and other constitutional claims imminently triggered by the RCV's implementation.

First, Plaintiffs' had standing to bring all six claims before the election. Standing requires an "injury in fact" and this requirement "helps to ensure that the plaintiff has a personal stake in the outcome of the controversy." *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017). In

the context of a statutory challenge prior to its application, the plaintiff can establish standing by "demonstrate[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbit v. United Farm Workers Nat'l Untion, 442 U.S. 289, 298 (1979). Here, Plaintiff Poliquin, as the Republican nominee for the Second Congressional District race, had standing to challenge the constitutionality of RCV immediately after RCV was re-enacted via the People's Veto election on June 12, 2018. Thereafter, Plaintiff Poliquin established a concrete "personal stake in the [election]," *Reddy*, 845 F.3d at 501, governed by the newly reinstituted RCV law. The remaining Plaintiffs then established standing to challenge RCV upon the Secretary of State's Office formal release on September 20, 2018 of the official RCV ballot — still with six weeks spare before Election Day.

Second, Plaintiffs' claims were each ripe for adjudication and declaratory judgment at least six weeks prior to Election Day. Ripeness requires that a case "not be premature or speculative." *Shields v. Norton*, 289 F.3d 832, 835 (5th Cir. 2002). Ripeness has two prongs, "fitness and hardship." *Reddy*, 845 F.3d at 501 (quotation marks omitted). The fitness prong relates to whether the case "should be postponed in the name of judicial restraint," while the hardship prong "concerns the harm to the parties seeking relief that would come to those parties from [a court] withholding a decision." *Id.* (quotation marks omitted).

All of the Plaintiffs' claims were ripe for judicial review—at the very least—on September 20, 2018, after the release of the official RCV ballot. Thereafter, it was plainly recognized that RCV would be implemented on November 6, 2018 as codified, which would foreseeably result in each of the "direct injur[ies]" alleged as the basis for all of Plaintiffs' claims. *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014).

Bond v. Fortson, 334 F. Supp. 1192, 1194 (N.D. Ga. 1971) is not instructive on Plaintiffs' standing here because *Bond* involved an election claim before the names and total number of candidates in that disputed election were even known. Bond involved a challenged Gerogia's law requiring federal representatives to be elevated by majority vote. The Court dismissed the action as unripe because the plaintiff sought to enjoin the Georgia law's application before the parties even knew who the candidates were or how many candidates were running. *Id.* at 1194. The *Bond* court, therefore, determined the claims were not remote because the "[a]pplication of the attacked laws to the plaintiffs [were] speculative and remote." *Id.*

Here, the RCV's implementation was imminent when the four candidates were identified on the Second Congressional District ballot. In fact, Plaintiffs knew exactly what the ballot looked like and knew that Act would be implemented, in its entirety, in the Second Congressional District. Compl. ¶¶ 22-24, 32-36. Thus, the Plaintiffs' challenges to the constitutionality of RCV were not speculative, like Bond. Rather, the claims were "sufficiently live," fit for judicial review, and the Plaintiffs could have shown that "withholding a decision" until after the election would cause hardship. *Reddy*, 845 F.3d 493.

B. Defendants Bond, Michaud and Wollstadt prejudicially relied upon RCV to their detriment when they voted for third-party candidates expecting subsequent RCV tabulation rounds to be counted.

Plaintiffs have demanded that the Court declare Poliquin the winner of the Second Congressional District election based solely upon a tabulation of first-round RCV ballots. Plaintiffs' requested relief, however, is barred by the doctrine of laches, because the delayed filing was unreasonable, and caused prejudice to Defendants Bond, Michaud and Wollstadt who cast their RCV ballots expecting RCV to apply.

The First Circuit Court of Appeals recognizes laches as an affirmative defense "that serves as a bar to a claim for equitable relief where a party's delay in bringing suit was (i) unreasonable, and (2) resulted in prejudice to the opposing party." *Murphy v. Timberlane Regl. Sch. Dist.*, 22 F.3d 1186, 1189 (1st Cir. 1994).

Here, Plaintiffs delayed this challenge of the RCV law until after Election Day with knowledge that the delay would prejudice voters who cast ballots relying upon the subsequent RCV rounds to be tabulated and counted toward the final vote tally. Plaintiffs' delayed filing was unreasonable here because the pending claims were ripe for consideration by the Court *at least* six weeks before Election Day. *See* Section II(A) *supra.*

Defendants Bond, Michaud and Wollstadt were ultimately prejudiced by their reliance on the RCV system. Defendant Bond entered the race with the expectation that Maine's ranked-choice voting procedures ensured that an independent candidate for federal office would never become a so-called "spoiler" by diverting votes from either major party. Defendants Michaud and Wollstadt, as voters, similarly relied upon the availability of ranked-choice voting procedures when they cast a first-round vote for Ms. Bond believing that their secondary and tertiary candidate choices would be tallied if Ms. Bond was unsuccessful.

Plaintiffs now seek relief from the Court that would effectively disenfranchise the Bond Defendants from the outcome of the election because of their reliance on the availability of ranked-choice voting procedures. Where Plaintiffs stand to benefit on the exclusion of Defendants Bond, Michaud and Wollstadt votes from the first-round RCV tabulation, Plaintiffs' requested remedy is barred by the equitable defense of laches. *See Murphy*, 22 F.3d at 1189.

CONCLUSION

WHEREFORE, for the above-stated reasons, Defendants Tiffany Bond, Kaylee Michaud and Rachael Wollstadt respectfully request that the Court deny Plaintiffs' Motion for Preliminary Injunction.

Dated at Portland, Maine, this 28th day of November, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I filed the foregoing Opposition with the Clerk of Court using the CM/ECF system, which will automatically send notice of such filing to all counsel of record in this matter.

Dated: November 28, 2018

/s/ James G. Monteleone
James G. Monteleone