UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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

DEFENDANT-INTERVENOR GOLDEN'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65(b)(1), Plaintiffs Brett Baber, Terry Hamm-Morris, Mary Hartt, and Bruce Poliquin (collectively "Poliquin") seek a preliminary injunction ("Poliquin Motion") requiring the Secretary of State, Defendant Matthew Dunlap, to ignore the final results of the ranked choice election for Maine's Second Congressional District, and to certify Bruce Poliquin as the winner of that election. Defendant-Intervenor Jared Golden, who a majority of the voters in the Second Congressional District preferred over Poliquin, hereby opposes this extraordinary attempt to overturn the results of a fair and free election.

As this Court concluded when it denied Poliquin's motion for a temporary restraining order (TRO Order, ECF No. 26), Poliquin is unlikely to prevail on any of his federal constitutional and statutory challenges. The U.S. Constitution expressly grants states expansive authority to conduct federal elections and to select the method to decide the winner, and Maine voters have selected ranked choice voting ("RCV") to determine the winners of federal elections. Now, after 296,077 Maine citizens have voted based on their understanding that the RCV system would be used to determine the winner of the election, Poliquin would like to change the rules. Poliquin's sour grapes preliminary injunction is too little, too late, and is outweighed by the injury to the thousands

of Maine voters who selected Golden over Poliquin and who would be disenfranchised by Poliquin's attempt to use the courts to overturn the results of the election. Further, the chaos, disruption, and violation of fundamental rights that would result from Poliquin's attempt to re-write the rules after the election is anathema to the public interest. Golden won the election fair and square, and Poliquin's attempt to overturn that result should be rejected.

BACKGROUND

In order to appreciate why Poliquin's post-election challenge to the RCV system is both too late and constitutionally baseless, it is helpful first to consider the extensive timeline of efforts to adopt the RCV system and the repeated legal challenges to the RCV process prior to the election, none of which Poliquin chose to participate in.

On November 8, 2016, 388,273 Maine voters (52.1%) passed a referendum to use RCV for elections beginning in 2018. Secretary of State, *Timeline of Ranked-Choice Voting*, available at https://www.maine.gov/sos/cec/elec/upcoming/pdf/RCVTimelinefinal62618.pdf; *see also Maine Senate v. Sec'y of State*, 183 A.3d 749, 751–52 (Me. 2018). The Maine Senate subsequently requested an opinion from the Maine Supreme Court on the constitutionality of RCV under the Maine Constitution. *See Op. of the Justices*, 162 A.3d 188, 193 (Me. 2017). The Justices concluded in a non-binding Opinion that in the general elections for State Representative, State Senator, and Governor, RCV violated the Maine Constitution because the Constitution explicitly required that the winner in those races obtain only a plurality of the electorate. *See id*. at 209-10. However, the Justices did *not* opine that the RCV system was unconstitutional in federal congressional races because the Maine Constitution does not say anything about the requirements for election of a Congressman. Following *Opinion of the Justices*, the Legislature passed a bill to "implement" the

ranked choice voting referendum, which delayed the effective date of RCV and added a contingent repeal. L.D. 1646 (128th Legis. 2017); *see also Maine Senate*, 183 A.3d at 752-753.

Maine voters again demanded that RCV take effect immediately, despite the Legislature's attempts at delay. On February 2, 2018, advocates submitted over 66,000 signatures of Maine voters to submit to the voters a peoples' veto of the Legislature's "implementing" statute. *See* Sec'y of State, *Ranked-choice voting people's veto effort found valid with 66,687 signatures*, Mar. 5, 2018, available at https://www.maine.gov/sos/news/2018/rankchoicesigs.html; *Maine Senate*, 183 A.3d at 753. On June 12, 2018, 149,900 Maine voters (53.1%) passed the people's veto, thereby mandating use of RCV in federal elections and primaries, including the general election in November 2018. Sec'y of State, *Tabulations for elections held June 12, 2018*, available at https://www.maine.gov/sos/cec/elec/results/results18.html#ref.

While this legislative action was pending, numerous court cases were brought challenging the use of RCV, none of which Poliquin participated in, and all of which affirmed the constitutionality of RCV for congressional elections. First, on February 16, 2018, the Committee on Ranked Choice and certain candidates filed suit seeking to compel the Secretary of State to utilize RCV in the up-coming primary election. *Comm. for Ranked Choice Voting v. Sec'y of State*, AUGSC–CV–2018–24 (Me. Super. Ct., Kennebec Cty., Apr. 3, 2018); *see also Maine Senate*, 183 A.3d at 753. These plaintiffs filed a motion for a TRO, and on April 3, Superior Court Justice Murphy ordered "the Secretary of State's Office to continue implementation of the system of ranked-choice voting for the June 12, 2018 primary election." *Comm. for Ranked–Choice Voting*, AUGSC–CV–2018–24, at 13-14; *see also Maine Senate*, 183 A.3d at 754. No appeal was filed from that order. *Maine Senate*, 183 A.3d at 754.

The Maine Senate then brought suit seeking to halt the use of RCV. This litigation was originally brought on April 3, and Superior Court Justice Murphy certified seven questions to the Law Court pursuant to M.R. App. P. 24(a) on April 11. *Id*. On April 17, the Law Court ruled against the Maine Senate and directed that RCV be used for the June 2018 primary, including for congressional races. *Id* at 759. Poliquin again did not join this litigation.

The Maine Republican Party then filed suit in federal court, challenging the use of RCV in the up-coming primary election. Although all the grounds asserted in this lawsuit could have been asserted there, none were. Poliquin again did not join this litigation. *See Maine Republican Party*, 324 F. Supp. 3d 202 (D. Me. 2018). On May 29, Judge Levy denied the Maine Republican Party's motion for a preliminary injunction, allowing RCV to be used for the upcoming congressional primary election. *See id* at 214. The Maine Republican Party did not pursue an appeal of this decision.

Maine voters used RCV in both the primary and general elections. First, on June 12, the Secretary of State used RCV to tabulate the results of the Democratic primaries for Governor and the Second Congressional District, as no candidate in either race received over 50% of the vote in the first round. *See* Kevin Miller, *With 54%, Janet Mills wins Democratic nomination in race for Maine governor*, Portland Press Herald, June 20, 2018, available at https://www.pressherald.com/2018/06/20/ranked-choice-voting-tabulation-to-start-at-6-p-m/. Even though his principal opponent had been selected using RCV and RCV would be used to determine the winner of the general election, *see* Steve Collins, *Ranked-choice voting likely to determine outcome of 2nd District U.S. House race, polls find*, Lewiston Sun-Journal, Sept. 25, 2018, available at https://www.centralmaine.com/2018/09/25/ranked-choice-voting-likely-to-determine-outcome-of-2nd-district-u-s-house-race-polls-find/, Poliquin did not bring suit after the

primary or before the general election. On November 6, Maine conducted the election for Maine's Second Congressional District and presented voters with a ballot that asked them to rank their preferences for Golden, Poliquin, Tiffany Bond, and William Hoar. Sec'y of State, Nov. 6, 2018, *General Election - Ranked-choice office*, available at https://www.maine.gov/sos/cec/elec/results/index.html. The next day, based on media reports, the Secretary of State confirmed that no candidate received more than 50% of the vote based on municipalities' reports of first-round results, and directed the tabulation of results using the RCV system. *See* Sec'y of State, *Secretary Dunlap confirms: Congressional District 2 tabulation will go into ranked-choice voting rounds*, Nov. 7, 2018, available at https://www.maine.gov/sos/news/2018/rcvcongressdis2.html; Aff. of Dep. Sec'y of State Julie L. Flynn ("Flynn Affidavit"), ECF No. 24, ¶ 8. After this Court denied Poliquin's motion for a TRO, the Secretary of State ran the ranked choice tabulation of the 296,077 votes cast and declared Golden the winner with 142,440 votes over Poliquin with 138,931 votes. *See* Sec'y of State, *Representative to Congress – District 2 – Results Certified to the Governor 11/26/18*, Nov. 27, 2018, available at https://www.maine.gov/sos/cec/elec/results/2018/updated-summary-report-CD2.xls.

ARGUMENT

I. Legal Standard

"[Injunctive relief] is an extraordinary and drastic remedy that is never awarded as of right." TRO Order, ECF No. 26 at 5 (citations omitted); *accord Maine Republican Party*, 324 F. Supp. 3d at 206. "To obtain a preliminary injunction, the moving party must establish: "(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 Republican Party*,

324 F. Supp. 3d at 206 (quoting *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015)). Poliquin cannot satisfy *any* of these four requirements.

II. Poliquin Cannot Establish a Likelihood of Success on the Merits.

Before turning to the specifics of Poliquin's various challenges, it is important to note, as both this Court and the Maine Supreme Court have previously, that this case is *not* about whether RCV is a good idea. *See Op. of the Justices*, 162 A.3d at 198; TRO Order, ECF No. 26 at 15-16. Maine voters have affirmed their desire to use RCV to pick their representatives. The only question before this Court is whether the choice made by Maine voters violates federal law. Each of Poliquin's constitutional and statutory challenges falls short of the mark.

A. Poliquin is Unlikely to Prevail on a Challenge that the U.S. Constitution Expressly Prohibits the Use of Ranked Choice Voting.

Poliquin's contention that the U.S. Constitution prohibits RCV finds no support in the Constitution's plain language. Article I, Section 2 of the Constitution provides that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States," and that "[n]o 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." There is nothing in Article I, Section 2 about the manner in which such Members shall be "chosen," and the Supreme Court's holding that States cannot impose additional qualifications on a congressional candidate in light of the express provisions of the Qualifications Clause, *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), does nothing to alter that fact.

Rather than mandating the method of selection of congressional representatives, the Constitution, through the Elections Clause, provides States expansive power to experiment in the method of selection of their representatives, precisely what Maine has chosen to do through the

RCV system. The Elections Clause provides 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, except as to the places of ch[oo]sing Senators." U.S. Const. Art. I, § 4, cl. 1. "The Clause's substantive scope is broad," as times, places, and manner are "'comprehensive words,' which 'embrace authority to provide a complete code for congressional elections[.]'" *Arizona v. Inter-Tribal Council of Arizona, Inc.*, 570 U.S 1, 8-9 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)) (citations omitted) (quotation marks omitted). The *Smiley* Court specifically stated that this authority included the "counting of votes" in congressional elections. *See Smiley*, 285 U.S. at 366. Indeed, by granting states autonomy, the Founders explicitly encouraged the states to experiment with different approaches. The Supreme Court "has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Arizona State Legislature v. Arizona Independent Redistricting Com'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)) (citation omitted). Experimentation such as that undertaken by Maine through the use of RCV is thus a goal and not a side-effect of our constitutional system. Poliquin can identify no constitutional text to the contrary.

Given that the Constitution explicitly permits Maine to enact a system such as RCV, it is unsurprising that Poliquin's arguments lack support from any precedent that has even remotely touched on the issue. Poliquin seeks to support his argument by pointing to a quote from *Phillips v. Rockefeller*, 435 F.2d 976, 980 (2d Cir. 1970), stating that Article I, Section 2 "has always been construed to mean that the candidate receiving the highest number of votes at the general election is elected, although his vote be only a plurality of all votes cast." *See* Poliquin Mot. at 7. But this simply states a historical fact; the Second Circuit did not state that a plurality was required, only

that that "language [of Article I, Section 2] ha[s] *permitted* elections by a plurality." 435 F.2d at 980 (emphasis added). By contrast, in *Public Citizen v. Miller*, 992 F.2d 1548 (11th Cir. 1993) (*per curiam*), the Eleventh Circuit affirmed a district court order rejecting Poliquin's precise argument. The plaintiffs argued that Georgia's run-off statute, which required candidates to obtain a majority to be elected, violated the Qualifications Clause by adding a requirement "that a candidate receive a majority of the votes cast." 813 F. Supp. 821, 831 (N.D. Ga. 1993). After noting that "the requirement that a candidate receive a majority of the vote is merely a restatement of the truism that in a race between two people the person who receives the most votes wins," *id*. at 832, the district court held:

> [T]he majority vote statute is more accurately interpreted as a method for construing the meaning of the votes cast than as a way of describing the candidates involved in the campaign. If the Court were to find that this method of construing the meaning of votes cast in an election is an unconstitutional "qualification" for the office, it would be hard pressed not to find a state law requiring that a candidate receive a plurality of the votes cast similarly infirmed.

Id. at 833; *see also Bond v. Fortson*, 334 F. Supp. 1192, 1193 (N.D. Ga. 1971), *aff'd*, 404 U.S. 930 (1971) ("[T]here is no constitutional provision expressly providing for election of Congressmen by plurality vote or in terms prohibiting the states from requiring election by a majority vote.").

As Poliquin's counsel acknowledged at oral argument, acceptance of his argument would render unconstitutional any form of voting other than a plurality, which would wipe out election systems around the country in favor of a one-size-fits-all approach that would be generated from the ether and grafted onto the Constitutional text. *See* Hr'g Tr. ("Tr.") at 86-88. This is an extraordinary request, particularly where, as this Court observed, "it appears that both majority and plurality standards have historical antecedents in American politics." TRO Order, ECF No. 26 at 7. In fact, states have adopted and currently employ a wide variety of approaches to counting ballots to determine the winner of elections, and Poliquin cannot point to any text or decision

finding these methods constitutionally suspect. *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, 329 (2006) ("In electing public officials in the United States, state and local governments use a variety of different voting systems. Voting systems currently in use include plurality voting, runoff voting, instant runoff voting, at-large voting, limited voting, cumulative voting, and the single transferable vote.") (footnote omitted).

Further, the fact that Maine voters have explicitly chosen to employ RCV, and reaffirmed that choice, weighs heavily in favor of finding that the method comports with the requirement of election "by the people" in every sense of the phrase. As this Court noted in its order denying Poliquin's request for a TRO, the *Phillips* court found significant the fact that the state had explicitly provided for the method of election at issue in that case, and thus the method was in accord with the requirement of election "by the people." TRO Order, ECF No. 26 at 7 n.3 (citing *Phillips*, 435 F.2d at 980). Much the same is true here—through multiple referenda, "the people" of Maine have made clear their preferred method of electing members of Congress. Poliquin has failed to demonstrate any basis to hold that method unconstitutional.

B. Poliquin is Unlikely to Prevail on His Equal Protection Challenge to Ranked Choice Voting.

Every Court to consider the issue has rejected Poliquin's argument that RCV violates the Equal Protection Clause of the U.S. Constitution. *See Dudum v. Arntz*, 640 F.3d 1098 (9th Cir. 2011); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996); *Stephenson v. Ann Arbor Bd. of City Canvassers*, No. 75-10166-AW (Mich. Cir. Ct. 1975) (attached as Ex. A). The reason for these uniform court decisions is simple: there is no arguable basis for an equal protection claim here. Every voter in an RCV system has the same rights and is treated exactly the same. Poliquin's

argument amounts to the contention that a runoff system is unconstitutional if some voters do not choose to vote in the runoff election, which no court has ever held. Despite this overwhelming case law, Poliquin contends that Maine's RCV system violates equal protection by allowing some votes to be counted more than once or weighted more significantly. But this argument fundamentally misconstrues the nature of RCV. "[I]n actuality, all voters participating in a restricted [RCV] election are afforded a single and equal opportunity to express their preferences for three candidates; voters can use all three preferences, or fewer if they choose." *Dudum*, 640 F.3d at 1107; *see also Minnesota Voters Alliance*, 766 N.W.2d at 693 ("Every voter has the same opportunity to rank candidates when she casts her ballot, and in each round every voter's vote carries the same value."); *McSweeney*, 665 N.E.2d at 14 ("[I]t would be misleading to say that some ballots are counted two or more times. Although these ballots are examined two or more times, no ballot can help elect more than one candidate."). Poliquin's argument for an equal protection violation has no basis in fact or in law.

C. Poliquin is Unlikely to Prevail on His Due Process Challenge to Ranked Choice Voting.

Poliquin's argument that RCV violates the Due Process Clause fares no better than his other constitutional arguments and makes even less sense. *See* Poliquin Mot. at 17-18. Courts "apply a 'flexible standard' when considering constitutional challenges to election regulations," *Dudum*, 640 F.3d at 1106 (quoting *Burdick*, 504 U.S. at 433) and, "[w]here non-severe, '[l]esser burdens' on voting are at stake, [courts] apply 'less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)) (citation omitted). Contrary to Poliquin's assertion, no court has ever applied strict scrutiny to evaluate any of the alleged burdens imposed by an RCV system, *see* Poliquin Mot. at 15-17, and indeed it is hard to

see what "burden" the system imposes at all. Every voter shows up to vote in the same manner as they have previously, and they just fill out their ballot in a certain way. There is no obvious "burden" at all, and there are numerous state interests served by the RCV system. *See, e.g. Minnesota Voters Alliance*, 766 N.W.2d at 697 (Because the citizens adopted the RCV system by referendum, it "serves the purpose of respecting the democratic process"); *id.* (By requiring only one election, RCV system "reduces the inconvenience and costs to voters, candidates, and taxpayers" compared to a run-off); *Dudum*, 640 F.3d at 1116 (RCV "provid[es] voters an opportunity to express nuanced voting preferences and elect[] candidates with strong plurality support,"); *McSweeney*, 665 N.E.2d at 15 ("[A] preferential scheme, far from seeking to infringe on each citizen's equal franchise, seeks more accurately to reflect voter sentiment[.]").

Poliquin seeks to counter all this by attempting to elevate the academic concept of "non-monoticity" to a constitutional mandate. Poliquin, however, does not and cannot point to any principle of case law or logic for why this alleged phenomenon constitutes a due process violation. The theory of "non-monoticity," and Poliquin's claim, both boil down to the contention that certain voters would choose to vote strategically in a traditional run-off in order to maximize their preferred candidate's chances of winning, but that, because these voters cannot utilize the same strategy in an RCV system, such a system violates their due process rights. Poliquin offers no *evidence* that this occurred, no case where such voters were found to be part of a protected class, and he cannot point to any evidence of invidious intent on the part of the state of Maine. As this Court noted in its denial of Poliquin's request for a TRO, "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. A fortiori it does not do so when, as here, the classes complaining of disparate impact are not even protected." TRO Order, ECF No. 26 at 10–11.

Further, Poliquin's argument boils down to a normative criticism of RCV, but such criticisms do not make a system unconstitutional. The Due Process Clause does not require perfection, and Poliquin cannot point to any voting system that has been invalidated on similar grounds. Indeed, under Poliquin's legal theory any set of voters whose particular goals in voting were frustrated by any election system, including plurality voting, would be able to invalidate that system of voting on constitutional grounds. This cannot be, and is not, the law.

D. Poliquin is Unlikely to Prevail on a Voting Rights Act Challenge to Ranked Choice Voting.

Poliquin next argues that RCV violates the Voting Rights Act ("VRA"), *see* Poliquin Mot. at 8-13, but this Court rightly rejected the notion that Poliquin is likely to succeed on the merits of this claim once already, *see* TRO Order, ECF No. 26 at 12–13, and should do so again in the current posture. As the Court noted, the VRA is aimed at abridgment of the right to vote based on race or color. *See* TRO Order, ECF No. 26 at 12–13 n.10 (citing 52 U.S.C. § 10301(a)). Poliquin has made no showing that the use of RCV intentionally discriminates based on race, save for a passing mention that RCV results in more improperly marked ballots than a plurality election, and that these ballots disproportionately come from minority voters. *See* Poliquin's Mot. at 4. Poliquin offers not a scintilla of evidence that the use of RCV in Maine even arguably discriminates on the basis of race or color.

Further, to the extent that Poliquin seeks to invoke the provision proscribing the failure or refusal "to permit any person to vote who is entitled to vote, or willfully fail or refuse to tabulate, count, and report such person's vote," 52 U.S.C. § 10307, he has likewise offered no evidence to make such a showing. His argument is that Section 10307 is somehow violated because RCV presents a barrier to a certain form of "strategic" voting, but, as Poliquin himself points out, the cases analyzing the right to an "effective" vote focus on the right to voter assistance with tasks

such as reading or interpreting a ballot. *See* Poliquin's Mot. at 9. Poliquin points to no case where the right to an "effective" vote under the VRA has been interpreted to mean a right to a voting system optimized to a voter's preferred electoral strategy. Poliquin's VRA claim fails.

* * *

Given this unanimity of unquestioned authority, Poliquin has shown no likelihood of success on the merits. Without a likelihood of success on merits, he is not entitled to a preliminary injunction. *See Doe v. Perille*, 2018 WL 5817024, *3 (D. Mass. Nov. 6, 2018) ("Although the Court considers all factors of the injunctive relief analysis, '[t]he sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.'") (quoting *New Comm Wireless Servs., Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)) (other citation omitted); *accord* TRO Order, ECF No. 26 at 5–6.

III. Poliquin Cannot Demonstrate Irreparable Harm.

Even if Poliquin could establish a likelihood of success on the merits—which he cannot—that is not enough. "As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). "Rather, a court must also consider whether the movant has shown 'that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.'" *Id*. at 1944 (quoting *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)).

Poliquin cannot point to any proof of irreparable harm. The declarations he submits simply allege without any explanation that the affiants would suffer "irreparable injury." *See* ECF Nos. 13-1, 15. Merely parroting the preliminary injunction standard is not nearly enough to demonstrate

irreparable harm. *See, e.g.*, *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 30-31 (1st Cir. 1998); *Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 231 (1st Cir. 1994).

Further, Poliquin's claims of irreparable harm are undercut, and the relief he seeks barred, by his unreasonable delay. "[A] party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 138 S. Ct. at 1944 (citation omitted). "That is as true in election law cases as elsewhere." *Id*. Poliquin's delay in bringing suit is the quintessential case for the doctrine of laches to prevent him from being entitled to relief. Laches "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Museum of Fine Arts, Bos. v. Seger–Thomschitz*, 623 F.3d 1, 10 n.9 (1st Cir. 2010) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)). Both elements are easily met here.

Poliquin's alleged harm results from his own participation in this RCV election, in which the rules were clear. He chose not to challenge those rules in advance. As noted above, Poliquin chose to sit out at least three cases challenging the use of RCV in this very election filed prior to the election. *See Op. of the Justices*, 162 A.3d at 188; *Maine Senate*, 183 A.3d at 749; *Maine Republican Party*, 324 F. Supp. 3d at 202. Any claims Poliquin makes that he could not challenge RCV prior to the election are undercut by his counsel's argument to this Court at oral argument that it was the "process" of RCV which caused irreparable injury. *See* Tr. 81-82. The RCV "process" was the law of the land after this Court rejected the prior constitutional challenge in May 2018, after the voters again approved the use of RCV in June 2018, and, at latest, after the results of the primary election in June 2018 established that there were going to be four candidates for the Second Congressional District general election. At that point, Poliquin was obligated to bring his challenge based on his purported concerns about the "process" of RCV.

> [T]he law imposes the duty on parties having grievances based on discriminatory practices to bring the grievances forward for pre-election adjudication. . . . [T]he failure to require prompt pre-election action in such circumstances as a prerequisite to post-election relief may permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.

Toney v. White, 488 F.2d 310, 314 (5th Cir. 1973) (quotations omitted); *see also Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) ("In determining the weight to be accorded to the appellants' claims, we also note that this 'emergency' is largely one of their own making."). As Judge Woodcock has observed, "[t]here is no constitutional right to procrastinate." *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 188 (D. Me. 2008) (brackets added) (denying preliminary injunction in election case filed in August *before* November election based on laches)*; see also League of Women Voters v. Diamond*, 923 F. Supp. 266, 275 (D. Me. 1996).

The prejudice to Golden and the voters who supported him resulting from Poliquin's delay is also readily apparent. Without a whisper of protest or objection, Poliquin permitted 296,077 Maine citizens to vote using the RCV rules, which they rightly understood to be the law of the land. Asking for a "retroactive change in the election laws," as Poliquin does, "implicate[s] fundamental fairness issues" for both candidates and the voters who support them. *Roe v. State of Ala. By & Through Evans*, 43 F.3d 574, 581 (11th Cir. 1995); *see also Brown v. O'Brien*, 469 F.2d 563, 569 (D.C. Cir. 1972), *vacated as moot*, 409 U.S. 816 (1972) ("If the party had adopted [the rule change] prior to the . . . primary election, the candidates might have campaigned in a different manner . . . Voters might have cast their ballots for a different candidate; and the State of California might have enacted an alternative delegate selection scheme . . ." (footnote omitted)). Poliquin's proposed remedy—a judicial declaration that he is the winner of the election—seeks to change the rules after the game has already been played. His inexcusable delay is prejudicial to Jared Golden and to every Maine voter who utilized RCV in the Second Congressional District election because

they believed it to be the law of the land. That delay, without more, forecloses his attempt to reverse the outcome of the election after the fact.

IV. Poliquin Cannot Establish that the Balance of Equities Supports a Preliminary Injunction.

Even if Poliquin could establish some injury—which he cannot—the substantial injury to Golden, the voters who utilized RCV, and the electoral process itself vastly outweigh Poliquin's purported injury, making the balance of equities weigh strongly against the preliminary injunction Poliquin seeks. Changing the rules *after* the election would have the effect of disenfranchising the voters who participated in the election relying upon those rules. *See Roe* 43 F.3d 574, 581 (11th Cir. 1995); *Brown*, 469 F.2d at 570. Writing for the D.C. Circuit, Judge Bazelon explained, "[b]ut there can be no dispute that the very integrity of the process rests on the assumption that clear rules will be established and that, once established, they will be enforced fairly, consistently, and without discrimination so long as they remain in force." *Brown*, 469 F.2d at 570; *accord Stephenson*, slip op. at 4 ("Each voted with this same understanding that his second and third choice preferences could be counted if his or her first choice was the candidate with the least number of votes."). The First Circuit has held that retroactive changes of voting procedure are precisely the sort of case where due process concerns for voters come into play. *See Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978).

The due process concerns implicated by Poliquin's proposed remedy are myriad and touch Golden, his voters, all voters who utilized the RCV system, and Tiffany Bond, another candidate for the Second Congressional District. Indeed, Poliquin's proposed remedy would violate the due process rights of not only voters who selected Jared Golden first, but also those who selected him second or third and had their votes counted for Jared Golden based on the RCV process. It would, somewhat ironically, also violate the due process rights of those voters who selected *Bruce*

Poliquin second or third in reliance on RCV, who would similarly be disenfranchised by the ruling which Poliquin requests from this Court. (Golden attaches to this filing as Ex. B an additional affidavit from one of those voters). The due process concerns presented by a ruling for Poliquin were already perfectly articulated by this Court in denying Poliquin's TRO:

> Plaintiffs' position is not without irony. For instance, if the Court were to sustain Plaintiffs' claim, and if the Court were to determine, as Plaintiffs request, that the appropriate remedy is to declare Representative Poliquin the winner, there are many who would consider the cure to be worse than the alleged disease, as least insofar as the professed concern is with the right of voters to cast effective ballots in a fair election. … [F]or this Court to change the rules of the election, after the votes have been cast, could well offend due process.

TRO Order, ECF No. 26 at 8–9 (citing *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70, 73 (2000)). Further, as the Court also noted, Tiffany Bond stated that she would not even have run as an independent candidate without ranked choice voting because she did not want to be a "spoiler." *See* TRO Order, ECF No. 26 at 9; Tr. 63-64. Poliquin's proposed ruling would similarly injure her.

By contrast, neither Poliquin nor his supporters who submitted affidavits are at any risk of having their vote negated. Each admits that they voted for Poliquin and Poliquin only, who is one of the two front runners, and thus their votes were tabulated in each round. *See* ECF No. 13-1, 15. The only people who are at risk of being disenfranchised—and suffering truly irreparable harm—are the Maine voters who Poliquin seeks to suppress with this lawsuit.

V. The Public Interest Requires Rejection of Poliquin's Motion

Similarly, and relatedly, Poliquin cannot establish that the public interest supports a preliminary injunction because he seeks to disenfranchise thousands of voters and to change the state's election laws after the fact. If the rules can be changed after all the votes have been submitted and changed in such a way to entirely negate thousands of voters' ballots entirely, then

public trust in both Maine elections and the rule of law is likely be severely wounded. It is precisely the rights of *all* Maine voters—including the 14,297 voters who only voted for Golden or Poliquin as their second choice—to have their votes counted in accordance with the RCV system approved twice by the voters, and upheld as constitutional four times by the courts, that requires the motion for a preliminary injunction be denied. There could hardly be a more important public interest.

The public interest, moreover, also supports maintaining the orderly operation of Maine's election laws and avoiding the "chaotic and disruptive effect upon the electoral process" of a preliminary injunction. *Benisek*, 138 S. Ct. at 1944-45 (citation omitted); *Respect Maine PAC*, 622 F.3d at 16; *Alexander v. First Wind Energy LLC*, 2011 WL 5325297, *2 (D. Me. Nov. 2, 2011) ("[T]he Court notes that the public interest is best served by the Court abstaining from any action that might impact on the upcoming election."); *cf. Bowles v. Indiana Sec'y of State*, 837 F.3d 813 (7th Cir. 2016) (even when election statute is declared unconstitutional, court properly may refuse to invalidate election based on challenge filed after election).

CONCLUSION

Defendant-Intervenor Jared Golden respectfully requests that Plaintiff's motion for a preliminary injunction be denied.

Dated: November 28, 2018

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**Admitted in Maine, admission to District of Maine pending*

CERTIFICATE OF SERVICE

I certify that on November 28, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice to counsel of record.

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