No. 18-2250

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Brett Baber, *et al*.
Plaintiffs-Appellants

v.

Matthew Dunlap, *et al*.
Defendants-Appellees

On Appeal from the United States District Court
For the District of Maine

INTERVENOR-DEFENDANT-APPELLEE GOLDEN'S BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS' EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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INTRODUCTION

Pursuant to Fed. R. App. P. 8(a)(2), Plaintiffs-Appellants Brett Baber, Terry Hamm-Morris, Mary Hartt, and Bruce Poliquin (collectively, "Poliquin") seek an "emergency injunction" to prevent the Secretary of State, Defendant-Appellant Matthew Dunlap, from certifying a winner of the November 6, 2018, election for the Second Congressional District ("Emergency Motion"). Intervenor-Defendant-Appellee Jared Golden submits this brief in opposition to that motion.

Poliquin seeks an "emergency injunction" to prevent the Secretary of State from doing what he has already done, namely, certifying that Golden won the election fair and square. The Secretary of State already certified Golden as the winner on November 26, 2018, at the conclusion of the ranked choice voting ("RCV") tabulation, and he did it again on December 14 after Poliquin dropped his unsuccessful recount, *i.e.*, four days *before* Poliquin filed his Emergency Motion. *See* ECF Nos. 44-3, 44-4. This motion is more than a day late, and a dollar short.

In the RCV system approved twice by Maine voters through popular referendum, a majority of Maine voters rejected Poliquin in favor of Golden. In two thoughtful, comprehensive opinions, first denying Poliquin's motion for a temporary restraining order, TRO Order, ECF No. 26 (16 pages), and second granting judgment against Poliquin after a trial on a consolidated motion for preliminary and permanent injunction, Decision, ECF No. 64 (30 pages), the district court decisively dispatched Poliquin's novel legal theories.

Rather than recognizing that a majority of voters and the district court have now rejected his entreaties, Poliquin throws a "Hail Mary" pass to this Court seeking emergency relief. Poliquin effectively seeks to have this Court summarily reverse the district court by derogatively dismissing the district court's opinions, *e.g.*, "superficial level of analysis," "sidestepped these issues," "district court speculated," "blinks reality to speculate, as the … district court did," and "district court avoided addressing the serious legal challenges by noting superficially…." *See* Emergency Motion at 1, 3, 8, 10 (ellipses added). In addition to disparaging the district court, Poliquin also

faults the district court for failing to address arguments Poliquin did not make. *See, e.g., id*. at 20 (arguing States have only "limited" authority to regulate congressional elections, citing *Cook v. Gralike*, 531 U.S. 510 (2001), which was not cited in Poliquin's motion for a preliminary injunction, ECF No. 3).

Further, Poliquin ignores the district court's factual findings following a final hearing on the merits, in which the court discounted entirely the testimony of Poliquin's expert, and found that Poliquin failed to demonstrate that the inferences he drew from the ballot data were more likely true than false. *See* Decision, ECF No. 64 at 26. Indeed, Poliquin does not even cite to his expert's imploding testimony that led the district court to reject wholly his proffered opinions, preferring instead to cite exclusively to his expert's report submitted prior to the hearing. *See* Emergency Motion at 11, 12, 13.

Poliquin's arguments to this Court generally are a rehash of arguments roundly rejected by the district court. On this record, in which there is no substantial question concerning the soundness of the district court's

conclusion, in addition to denying the Emergency Motion, this Court could—and should—summarily affirm the judgment below pursuant to First Circuit Rule 27.0(c).

BACKGROUND

"In determining the weight to be accorded to the appellants' claims, we also note that this 'emergency' is largely one of their own making." *Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). Poliquin sat on his hands rather than bringing his—unmeritorious—claims in a timely fashion.

In 2016, Maine voters approved the use of RCV for congressional and other elections beginning in 2018. *See Maine Senate v. Sec'y of State*, 183 A.3d 749, 751–52 (Me. 2018). In 2018, Maine voters rejected an attempt to overturn the use of RCV for congressional and other elections. *See* Secretary of State, *Tabulations for elections held June 12*, 2018, available at https://www.maine.gov/sos/cec/elec/results/results18.html#ref. Poliquin knew for months prior to the November 2018 election that the RCV system would be used to determine the winner, and yet he did nothing until it

became apparent that he risked losing the election following the RCV tabulation.

Poliquin's allies challenged the RCV system on several occasions prior to the November 2018 election, and yet Poliquin did not join the lawsuits or raise any of the arguments he now makes in this litigation. *See Opinion of the Justices*, 162 A.3d 188 (Me. 2017); *Maine Senate v. Sec'y of State*, 183 A.3d 749 (Me. 2018); *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202 (D. Me. 2018); *see also Comm. for Ranked Choice Voting v. Sec'y of State*, AUGSC-CV-2018-24 (Me. Super. Ct., Kennebec Cty., complaint filed Apr. 3, 2018) (obtaining a TRO to compel use of RCV system). Poliquin could have joined any number of these lawsuits to make the arguments that he now makes concerning RCV's constitutionality, but instead stood idly by. Nor did he file his own action seeking resolution of these questions. Meanwhile, no court invalidated the use of RCV for congressional elections in Maine.

Poliquin claims that he won a plurality of the votes on November 6, 2018, based on the unofficial tally that night, *see* Emergency Motion at 5, and yet he did not file suit until November 13, *see id.*, when he apparently

realized that it was likely he would lose the election using the RCV tabulation. The district court denied Poliquin's motion for a TRO two days later on November 15 in a 16-page opinion. TRO Order, ECF No. 26.

Following full briefing by all parties and a trial on the merits, in which the only evidence Poliquin submitted came from political scientist academics, the district court eviscerated all of Poliquin's arguments in a 30-page opinion issued on December 13. Decision, ECF No. 64. Notwithstanding the "emergency" he now claims, Poliquin did not appeal until the close of business on December 17, nearly five days later. Although Poliquin has not proceeded expeditiously, in his Emergency Motion filed on December 18, Poliquin asks this Court to rule by December 21, a mere three days after he filed his "emergency" motion, citing the impending Christmas holiday.

Even the Emergency Motion is too little, too late. Poliquin seeks to prevent the Secretary of State from certifying Golden as the winner. But the Secretary of State already did that on November 26 at the conclusion of the RCV tabulation, and he did it again on December 14 after Poliquin dropped

his unsuccessful recount. *See* ECF Nos. 44-3, 44-4. There is nothing to enjoin. *See McLane v. Mercedes-Benz of N. Am., Inc.*, 3 F.3d 522, 524 (1st Cir. 1993) ("It is well settled that an appeal from the denial of a motion for a preliminary injunction is rendered moot when the act sought to be enjoined has occurred."); *Oakville Dev. Corp. v. FDIC*, 986 F.2d 611, 613 (1st Cir. 1993) ("When, as will often happen, the act sought to be enjoined actually transpires, the court may thereafter be unable to fashion … meaningful [relief]. In such straitened circumstances, the appeal becomes moot.") (brackets and ellipsis added).

Quite simply, "[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). At every step of this process, Poliquin has done exactly that: he chose not to act before the election; he did not file in the district court promptly after the election; and he did not file a notice of appeal until days after the district court entered judgment and Poliquin ended his doomed recount. The timeline alone demonstrates that Poliquin is

not entitled to emergency relief based on his lassitude. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (failure to pursue election case diligently precludes relief even if meritorious claim asserted).

LEGAL STANDARD

Before turning to the merits of the Emergency Motion, we note that it is procedurally improper because Poliquin failed first to request relief from the district court, as required by Fed. R. App. P. 8(a)(1). Poliquin pays lip service to this requirement, offering only the conclusory argument that "[t]he impending certification makes seeking relief impracticable" and thus not required per Rule 8(a)(2)(A)(i). Emergency Motion at 2 (brackets added). But he offers no explanation for why this is so. Poliquin waited five days to file his emergency motion. To the extent that the passage of time made it impracticable for the district court to act—a doubtful proposition, given that district courts routinely act on such motions—this impracticability is entirely of his own making.

Initially, Poliquin acknowledges the high standard that the Supreme Court has imposed for over 30 years to obtain an injunction on appeal: (1)

whether the applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent relief; (3) whether issuance of relief will substantially injure the other interested parties; and (4) whether an injunction is in the public interest. *See* Emergency Motion at 7 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The first two of these factors are the most critical, and "[b]oth require a showing of more than mere possibility. Plaintiffs must show a strong likelihood of success, and they must demonstrate that irreparable injury will be likely absent an injunction." *Respect Maine PAC*, 622 F.3d at 15 (brackets added).

Poliquin can make neither showing so he attempts to water down this standard by relying upon language from an earlier First Circuit case suggesting parties need only show "serious legal questions" if denial of the injunction will alter the status quo. *See* Emergency Motion at 7 (quotation omitted). Setting aside whether this is the proper standard or whether the requested injunction instead would alter the status quo, the district court's opinions demonstrate that there is no legal question, much less a "serious"

one, as to the legality of ranked choice voting. Additionally, even Poliquin's discredited expert testified that because all of the plaintiffs voted only for Poliquin and thus their votes were counted in each round of the RCV tabulation, none of them was disenfranchised. *See* Decision, ECF No. 64 at 4, 8. Therefore, Poliquin cannot claim any of the plaintiffs were injured at all by the use of ranked choice voting.

ARGUMENT

The district court's opinions demonstrate that Poliquin has no likelihood of success on merits, much less a strong likelihood of success. We rely on the district court's opinions, and offer a few additional observations.

Poliquin argues that "no federal appellate has ever addressed RCV's use in federal elections." Emergency Motion at 1. While technically true, this sentence ignores that fact that federal and state appellate courts have upheld RCV in state elections elsewhere, and that state and federal courts have upheld the use of RCV in federal elections in Maine. *See* Decision, ECF No. 64 at 22 n.21 (collecting cases); ECF No. 43-1 (unreported Michigan case). It also ignores that federal appellate courts have addressed and upheld the use

of separate runoff elections, which Poliquin's theories would likewise invalidate. *See* Nov. 14, 2018 Transcript at 86-87. Indeed, *every court* to have evaluated RCV or separate runoff elections has found them to comply with the U.S. Constitution. This is hardly the sign of a "strong" likelihood of success on the merits.

Poliquin criticizes the district court for "speculating" about the reasons that certain voters only voted for the third party candidates and did not choose Poliquin or Golden as their second choice. *See* Emergency Motion at 10. Of course, it was the responsibility of Poliquin, not the trial court, to submit evidence to support Poliquin's claims. It bears repeating that Poliquin did not submit any evidence from or concerning any voter who is not a named party in this matter, and Poliquin's expert, whose testimony was expressly rejected by the district court, did not even speak to any citizen who voted in this election. *See* Decision, ECF No. 64 at 7-8.

Poliquin's expert's entirely theoretical testimony that the voters who chose only to rank third party candidates in the RCV process in this election did so because of "confusion" about that process was rejected for good

reason: it defies common sense. Some individuals wish to vote for third-party candidates, and third-party candidates only. Poliquin acknowledges as much in his brief when he argues that sometimes, those individuals who vote for a "spoiler" candidate do so with the intention of having a spoiler effect. *See* Emergency Motion at 13. Yet he simultaneously contends that the approximately 8,000 voters who chose not to rank Poliquin or Golden simply "guessed wrong" about which candidates would make the runoff. *Id.* at 10. The district court cogently explained why Poliquin's guesswork makes no sense. *See* Decision, ECF No. 64 at 26.

In contrast to Poliquin's lack of evidence, Defendants submitted actual evidence that voiding the results of RCV tabulation after the election would disenfranchise thousands of voters. Golden submitted declarations from voters who selected Golden or Poliquin as their second choice based on the fact that the State was using RCV. ECF Nos. 18-1, 18-2, 18-3, 43-2. Furthermore, one of the third-party candidates who ran in the election stated that she only ran *because* RCV enabled her to do so without being a "spoiler." TRO Order, ECF No. 26 at 9. Indeed, over 10,000 voters chose Golden as their

second choice, and over 5,000 voters chose Poliquin as their second choice, as they were instructed to do under the RCV ballot instructions. These voters would, in fact, be disenfranchised if the Court grants Poliquin's emergency motion. *See, e.g.*, *Griffin v. Burns*, 570 F.2d 1065, 1078-79 (1st Cir. 1978) (holding post-election change to voting procedure violates voters' due process rights when it, "in effect, denied [their] vote[s]") (brackets added).

In contrast, all of the plaintiffs who joined in Poliquin's challenge to RCV voted for Poliquin and Poliquin only, and their votes for Poliquin were counted at every stage of the RCV process. These voters plainly did not suffer any type of constitutional or statutory harm, especially after the district court discounted entirely the ivory tower speculation proffered by Poliquin's expert. *See* Decision, ECF No. 64 at 14 ("I find Dr. Gimpel's testimony to be unpersuasive in its entirety, at least as bearing on problems of constitutional magnitude.").

Poliquin's remaining legal arguments simply repeat points that the district court resoundingly rejected.

Poliquin argues that he and the other plaintiffs will be irreparably injured. *See* Emergency Motion at 22. Even setting aside the speculation and mischaracterization necessary to allege that there were 8,000 votes that were "discarded," Poliquin does not—and cannot—claim that he and the other plaintiffs are among those 8,000 voters. Poliquin and the other plaintiffs only voted for Poliquin and thus had their votes counted throughout the RCV tabulation. *See* Decision, ECF No. 64 at 4. Poliquin can scarcely claim to be the champion of the 8,000 voters who did not vote at all for Poliquin, and instead chose to vote only for one of the third-party candidates who were eliminated during the "instant runoff."

Furthermore, Poliquin does not even attempt to address the numerous election cases that reject claims of irreparable injury based on the plaintiffs' failure to bring them in a timely fashion. In addition to the cases cited above, courts regularly reject election claims that are brought too late, either close to or after the election. *See, e.g., 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); *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973) ("[T]he law imposes the duty on parties having grievances based on discriminatory practices to bring the grievances forward for pre-election adjudication."); *Baer v. Nat'l Bd. of Med. Exam'rs*, 392 F. Supp. 2d 42, 49 (D. Mass. 2005) (citing *San Francisco Real Estate Inv. v. Real Estate Inv. Tr. of Am.*, 692 F.2d 814, 818 (1st Cir. 1982)) (finding that plaintiff's alleged irreparable harm was self-inflicted when it could have been avoided had her pursuit of a judicial remedy been more expeditious); *League of Women Voters v. Diamond*, 923 F. Supp. 266, 275 (D. Me. 1996) (similar).

Finally, Poliquin argues that Defendants will not be harmed by a "temporary delay in certification" of Golden as the winner of the election. *See* Emergency Motion at 23. In other words, if no one is seated as a congressman from the Second District for some "temporary" period of time, no big deal. To describe that argument is to refute it.

Nearly 300,000 Maine citizens voted using the RCV system that had approved by popular referendum twice, and which had been repeatedly upheld against legal attack while Poliquin sat silently on the sidelines. A

majority of Maine citizens rejected Poliquin in favor of Golden in the election utilizing that process. Approximately 15,000 of those Maine citizens chose Golden or Poliquin as their second choice in accordance with the instructions on the ballot—which went unchallenged by Poliquin or anyone else prior to the election—all of whom would be disenfranchised if their second choice ballots were now disregarded after the election.

And to what end? These votes would not be counted, and this election would be overturned, in service of nothing more than academic speculation espoused by Poliquin's expert, whose opinion the trial court expressly considered and entirely rejected. Poliquin has no reasonable chance—much less a strong likelihood—of succeeding on the merits of his claims, which rely on legal arguments that no court has ever accepted and which the trial court correctly and conclusively rebuffed. Poliquin has no legitimate claim to irreparable harm, where the "harm" he purportedly seeks to avoid has already come to pass and resulted from his own inaction, and concerns speculation about voters who did not support Poliquin and who are not parties to this litigation. And the public interest and balance of the equities—

including the fundamental voting rights of the hundreds of thousands of Mainers who participated in the election in reliance of the fact that the State would use RCV to determine the winner—strongly weighs in favor of denying any relief, much less emergency relief.

CONCLUSION

Intervenor-Defendant-Appellee Jared Golden respectfully requests that the Court deny Poliquin's Emergency Motion. Additionally, Golden respectfully requests that the Court summarily affirm the judgment entered below pursuant to First Circuit Rule 27.0(c).

Dated: December 19, 2018

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CERTIFICATE OF SERVICE

I certify that on December 19, 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.

/s/ Peter J. Brann
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