STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

No. KEN-18-367

JACK SPRAT,

Plaintiff-Appellant

v.

SECRETARY OF STATE MATTHEW DUNLAP *et al.*,

Defendants-Appellees

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF FOR THE APPELLEES

Timothy R. Shannon, Bar No. 4582
Assistant Attorney General
109 Sewall St, Augusta, ME 04330
Attorney for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

This case is about whether the state may use a ranked-choice tabulation method in counting votes for Governor.

FACTUAL BACKGROUND

On November 6, 2018 the citizens of Maine cast their ballots for Governor. Pursuant to 21-A M.R.S.A. § 1 sub § 27-C, the voters submitted ranked-choice voting ("RCV") ballots, ranking each of the five qualified candidates on the ballot: O'Hill (R), Sprat (D), Lamb (L), Gretel (U), and Shafto (GI). The ballots were then tabulated per 21-A M.R.S.A. § 723-A and the resulting tally was: O'Hill (R) - 286,000 votes; Sprat (D) – 265,500 votes; Exhausted ballots – 33,500. O'Hill was duly declared the winner.

Sprat brought suit against *inter alia* the Secretary of State challenging the constitutionality of § 723-A, and contending that only the first-round votes should have been tabulated and counted (a method that would have yielded a higher number of votes for him) or that the election should be nullified entirely.

ISSUES ON APPEAL

Whether the ranked-choice tabulation procedure set forth in § 723-A violates the "plurality of votes" provision of Me. Const. art. V, part 1, § 3.

ARGUMENT

I. Review is Highly Deferential

"All legislative enactments are presumed constitutional and the party attacking the constitutionality of a state statute carries a heavy burden of persuasion." *Aseptic Packaging Council v. State*, 637 A.2d 457, 459 (Me. 1994) (*citing Orono-Veazie Water Dist. v. Penobscot Cty. Water Co.*, 348 A.2d 249, 253 (Me. 1975)). "A statute's unconstitutionality must be established to such a degree of certainty as to leave no room for reasonable doubt." *Asceptic,*

637 A.2d at 459*; see also Maine Milk Producers v. Com'r. of Agriculture*, 483 A.2d 1213, 1218 (Me.1984) ("Statutes will be construed, where possible, to preserve their constitutionality.").

Review is thus essentially deferential to the Legislature. "Because we must assume that the Legislature acted in accord with due process requirements, if we can reasonably interpret a statute as satisfying those constitutional requirements, we must read it in such a way, notwithstanding other possible unconstitutional interpretations of the same statute." *Rideout v. Riendeau*, 761 A.2d 291, 297-98 (Me. 2000).

II. The Constitution is Silent as to How a "Plurality" is Found

We begin with the text of the Constitution. *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) ("In interpreting our State Constitution, we look primarily to the language used."). Article V, Part I, Section 3 sets forth the requirements for election of Governor:

> Section 3. Election [of Governor] . . .The meetings for election of Governor shall be notified, held and regulated and votes shall be received, sorted, counted and declared and recorded, in the same manner as those for Senators and Representatives. Copies of lists of votes shall be sealed and returned to the secretary's office in the same manner and at the same time as those for Senators. The Secretary of State for the time being shall, on the first Wednesday after the first Tuesday of January then next, lay the lists returned to the secretary's office before the Senate and House of Representatives to be by them examined, together with the ballots cast if they so elect, and they shall determine the number of votes duly cast for the office of Governor, and *in case of a choice by plurality* of all of the votes returned they shall declare and publish the same. If there shall be a tie between the 2 persons having the largest number of votes for Governor, the House of Representatives and the Senate meeting in joint session . . . shall elect one of said 2 persons . . .

Me. Const. art. V, part I, § 3 (emphasis added). It is worth noting what Section 3 does *not* say. It does not prescribe a particular method of voting. It does not prescribe a method of counting. It does not prohibit optically-scanned ballots, Braille ballots, mailed ballots, ranked ballots, or any number of other modern inventions. Nor does it prohibit any tabulation method that *in the*

process of finding the largest vote-getter yields a majority. Indeed, if the word "plurality" meant "the greatest number but less than a majority" or "the greatest number but not a majority," the sentence would forbid the election of any candidate who achieved a majority, an absurd result.

Nor does Section 3 incorporate ("in the same manner") any such limitation from the House and Senate provisions. *See* art. IV, part I, § 5 (Representatives) and art. IV, Part II, § 5 (Senators). Those provisions only refer to "a plurality of all voters" and "a plurality of votes."[1] They are similarly silent as to ballot design, method of voting, and method of tabulating, and they make no prohibition against a candidate also receiving a majority. At most, those provisions establish "plurality" as a threshold requirement for a candidate's election, not a cap. More important, they are completely silent as to how that plurality is reached.

Returning to Section 3, the text states that the votes for Governor (in whatever form – the provision is silent) are "received, sorted [and] counted" before the winner is selected by the Legislature. Section 3 is agnostic as to *how* that plurality is reached. Any system that yields a plurality after the votes are received, sorted, and counted should pass constitutional muster.

III. RCV Yields a Plurality

RCV yields such a plurality. In each round of tabulation, the lowest vote-getter is eliminated and the ballots are re-tabulated. At the end of the tabulation process, one of the two remaining candidates has the highest number of votes. That highest number *is* the plurality for that set. *See, e.g.*, Blacks Law Dictionary (9th ed. 2009) ("The greatest number (esp. of votes) regardless of whether it is a simple majority or an absolute majority"). It may also happen to be

[1] In the case of House and Senate elections, the final determination of votes is left to the respective bodies, with the Governor having first summoned to Augusta those candidates who "appear" to have met the vote threshold. *See* art. IV, part I, § 5 (Governor shall "issue a summons to such persons as shall appear to have been elected") and art. IV, Part II, § 4 (similar). The Governor's role in summoning winning candidates has no relevance here, other than to underscore the primacy of the Legislature in counting the votes – a constitutional scheme that underscore's the Legislature's presumed competence in legislating in this area.

a majority of the ballots cast, but as the highest number it is certainly a plurality.[2]

There is nothing odd, mysterious, or untoward about this system. One election is held. One electorate is consulted. One ballot is distributed and collected. That ballot captures more of the voters' preferences than a single-tabulation ballot would, but each voter only votes once. Thos votes are tabulated. One candidate gets the highest number. That person is elected.

Here, O'Hill received the highest number of votes when all of the votes were tabulated; she was duly elected.

IV. Sprat Has Misunderstood RCV and Misread the Relevant History of Section 3

The foregoing analysis should end the inquiry. The Court can interpret RCV in a manner consistent with Section 3's plurality language (*i.e.* as constitutional) and therefore should. *Aseptic*, 637 A.2d at 459; *Rideout*, 761 A.2d at 297. We address Sprat's arguments nonetheless.

Sprat argues that only the first-round tabulation should be considered since it yields a plurality. This is akin to arguing that the Court should consider only part of a tabulation. *All* systems yield fluctuations during tabulation. Candidate A has a plurality of the votes early on election night only to be displaced by Candidate B when the remote towns' returns come in. Courts do not declare winners when half the votes are tabulated. By analogy, this Court should not declare a winner based on only part of the ballots, or only partway through the process.

Sprat argues that the term "plurality" somehow means "not a majority." Such a reading not only mathematically wrong, as noted above, it would mean that the winning candidate in a two-person race would have a majority but *not* a plurality and would be ineligible to win.

Sprat alternatively argues that the term "plurality" was designed to relax an earlier

[2] *Cf. Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 238 (Mass. 1941) (the Massachusetts SJC, in interpreting the city of Cambridge's ranked choice voting system, noting that "elections under [ranked choice voting] are in accordance with the principle of plurality voting … [C]andidates receiving the largest number of effective votes counted in accordance with the plan are elected, as would be true in ordinary plurality voting.").

majority-vote requirement – *i.e.* to lower the bar for victory – and that RCV somehow re-imposes an older or higher or prohibited majority rule. Sprat's argument is not only unsupported by the text of Section 3 (which is silent as to majorities), it misinterprets the history of Section 3. In 1879, Governor Garcelon attempted to engineer a victory for himself in the wake of an election that had yielded no majority winner. The Constitution at the time handed the determination to the Legislature, the membership of which Garcelon was able to manipulate using methods irrelevant to our current inquiry. Specifically, Section 3 then stated:

> . . . to be by them examined, and, in case of a choice by a majority of all the votes returned, they shall declare and publish the same. But if no person shall have a majority of votes, *the House of Representatives shall, by ballot, from the persons having the four highest numbers of votes on the lists, if so many there be, elect two persons . . . of whom the Senate shall, by ballot, elect one*.

Me. Const. art. V, part I, § 3 (1871) (emphasis added). Garcelon's obedient and illegitimate Legislature proceeded to pick a minority candidate. After the crisis abated, the framers proposed Article XXIV, amending Section 3 "by striking out the word 'majority' wherever it occurs therein, and inserting in the place thereof the word 'plurality'." Me. Const. art. XXIV (1880).[3]

In the context of the political crisis of the time, this Amendment had very little to do with *precluding* systems that happened to yield majorities and everything to do ensuring that the voters' preferences – rather than the Governor's or Legislature's – would be determinative even if no candidate received a majority. The plurality standard was designed to eliminate post-election meddling: a goal RCV accomplishes rather nicely.

In 1963, Section 3 was amended (adopting the current language) to clarify that the Legislature's role was limited to tie-breaking. *See generally* State of Maine, 101st Legislature, Legislative Record—Senate, June 21–22, 1963, *passim*, Legislative Record—House, June 21–

[3] The Amendment left in place the sentence, "But if no person shall have a plurality of votes . . .," a provision that would only be implemented in the rare event of a tie.

22, 1963, *passim*.). In short, the history of Section 3 demonstrates no animosity to systems yielding a majority, but rather to the kind of post-election meddling that the earlier text allowed.

Even if the Court were inclined to read Section 3 as somehow prohibiting "majority systems" – despite the illogical consequences of that reading – § 723-A is not a majority system. It never uses the term "majority." Nor does it require a candidate to receive a majority of ballots cast in order to be elected. A candidate with less than a majority can still win, and often does. After tabulation, O'Hill was elected with *less than a majority of the ballots cast* since several ballots were exhausted before the end of tabulation. O'Hill received 286,000 out of the 585,000 originally cast (48.9%), less than a majority; Sprat received 265,500 out of the 585,000 originally cast (45.4%).[4] That is, some voters expressed no preference for either of the last two candidates; they partially abstained. O'Hill won with less than a majority.[5]

Section 723-A does not violate the modern Section 3 because it does not return to the Bad Old Days of Legislative meddling. Quite the opposite; it ensures that the greatest concentration of public sentiment will be given a voice and a Governor.

CONCLUSION

Sprat has not met his burden. The Court can and therefore should find § 723-A constitutional.

Respectfully submitted,

/s/ Timothy R. Shannon
Counsel for Appellees

March 12, 2014

[4] Likewise, Portland's Mayor Brennan was elected by RCV in 2012 with less than a majority of ballots cast.

[5] Nor is there any merit to Sprat's contention that only the ballots used in the final tabulation should count because the other ballots were somehow thrown out or not used. The Ninth Circuit unanimously rejected that argument in a similar case involving a challenge to a ranked voting system in San Francisco. *See Dudum v. Arntz*, 640 F.3d 1098, 1109-10 (9th Cir. 2011) ("the supposed inequity Dudum has identified is one of surface appearances and semantics, not substance. . . . In essence, a more complete explication of the tabulation process demonstrates that "exhausted" ballots *are* counted in the election, they are simply counted as votes for losing candidates. . . . "[E]xhausted" ballots represent votes for losing candidates.")