

No. 18-2250

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Brett Baber, *et al.*

Plaintiffs-Appellants,

v.

Matthew Dunlap, Secretary of State of Maine, et al.

Defendants-Appellees,

Jared Golden,

Intervenor-Defendant-Appellee,

and Tiffany Bond, et al.

*Intervenors-Defendants-
Appellees*

**DEFENDANT SECRETARY OF STATE'S BRIEF IN OPPOSITION
TO PLAINTIFFS-APPELLANTS' EMERGENCY
MOTION FOR INJUNCTION PENDING APPEAL**

On Appeal from the United States District Court for the District of Maine
Case No. 1:18-cv-00465-LEW

INTRODUCTION

Defendant-Appellee Secretary of State Matthew Dunlap (“Secretary”) submits this brief in opposition to the Emergency Motion for Injunction Pending Appeal that was filed in this Court just yesterday by Plaintiffs-Appellants Brett Baber, Terry Hamm-Morris, Mary Hartt, and Bruce Poliquin. Appellants seek an emergency injunction to “prevent[] the State of Maine from certifying a winner of the November 6, 2018 election for Maine’s Second Congressional District pursuant to Maine’s Ranked-Choice Voting Act, 21-A M.R.S. § 723-A (“RCV Act”).” App. Mot. at 2. The election results have already been certified, however. Under the U.S. Constitution, it is now up to the United States House of Representatives to determine, when it convenes on January 3, 2019, whether to seat Jared Golden, who is the undisputed winner of the ranked-choice voting tabulation under the RCV Act and thus the Representative-elect for Maine’s Second Congressional District. U.S. Const. Art. I, § 5 (“Each house shall be the judge of the elections, returns and qualifications of its own members.”).

There is no merit to this appeal, and no justification for issuing emergency injunctive relief pending the appeal. The Secretary urges the Court to deny Appellants’ emergency motion and, ultimately, to dismiss the appeal.

BACKGROUND

Appellant Bruce Poliquin and three of his supporters filed this lawsuit challenging Maine’s ranked-choice voting (“RCV”) law as *facially* unconstitutional on November 13, 2018 – a week *after* nearly 300,000 Maine voters had cast their ballots for candidates in the Second Congressional District and after the RCV counting process was well underway. At a hearing the next day, Appellants asked the District Court to grant a temporary restraining order to stop the Secretary from completing the process. The court denied the TRO on November 15, finding that Appellants had failed to show likelihood of success on the merits and that no irreparable harm would result from allowing the counting process prescribed by state law to reach a conclusion. ECF No. 26. Later that same day, the Secretary announced the RCV tabulation showing that although Bruce Poliquin had received the largest number of first-choice votes in the first round, Jared Golden had prevailed with a majority (50.62%) of votes in the final round after candidates Tiffany Bond and William Hoar were eliminated. ECF No. 44-3The District Court’s opinion accurately describes the process by which Maine conducted the general election on November 6, 2018, pursuant to its ranked-choice voting law, 21-A M.R.S. § 723-A, and rules. *See* Decision and Order on Motion for Preliminary Injunction (“Decision”), ECF No. 65 at 3-5.

On November 26, 2018, the Secretary submitted the official tabulation of all the general election results to the Governor, in accordance with 21-A M.R.S. § 722. Copies of the portions pertaining to the Second Congressional District are included in the trial court record. *See* Flynn Decl., ECF No. 44-1, ¶ 14; ECF Nos. 44-3 and 44-4. That same day, candidate Poliquin filed a request with the Secretary for a recount, pursuant to 21-A M.R.S. § 737-A and the Secretary of State's recount rule, 29-250 C.M.R. Ch. 536.¹

Appellants pursued their motion for preliminary injunction in an effort to reverse the election result, asking the court to order the Secretary to declare Poliquin the winner based on receiving a plurality of the first-choice votes or, in the alternative, to order a new election. At the hearing on December 5, 2018, the court granted the parties' oral motion to consolidate the requests for preliminary and permanent injunctive relief with a trial on the merits. Appellants presented testimony of one expert, Dr. James Gimpel, and the parties presented oral argument. The trial record also contains affidavits filed by each of the plaintiffs, affidavits of four additional voters, submitted by the defendant-intervenors, and two declarations of Deputy Secretary of State Julie L. Flynn with exhibits. A week after the hearing, on December 13, 2018, the District Court issued a 30-page

¹ This rule is posted on the Secretary's website at: <http://www.maine.gov/sos/cec/rules/29/chaps29.htm>

decision denying Appellants' requests for injunctive relief and entered judgment for the defendants. ECF No. 65.

The recount began on December 6, 2018, and continued until the morning of December 14, 2018. Teams of volunteers for candidates Poliquin and Golden, acting under the Secretary's supervision in accordance with the recount rule, recounted approximately 165,000 ballots (56% of the total) from 320 towns representing over 85% of the municipalities in the Second District. At that point, Poliquin exercised his option to voluntarily terminate the recount. *See* 29-250 C.M.R. Ch. 536, § 7(13). Under Maine's recount rule, this means that the original RCV count reported in the official tabulation of November 26, 2018, constitutes the "Final Recount Tabulation." *See* 29-250 C.M.R. Ch. 536, § 7(13) and Ex. A to Declaration of Secretary of State Matthew Dunlap ("Dunlap Decl.").

Upon termination of the recount, the Secretary prepared and signed a certificate of election, in accordance with 5 M.R.S. § 84 and 21-A M.R.S. § 724, attesting that Jared Golden has been elected the Representative to Congress for the Second Congressional District. Ex. B to Dunlap Decl. The certificate was delivered to the Governor on Friday, December 14, 2018, for his signature. To date, the Governor has not signed it. On December 18, 2018, the Secretary provided the original certificate containing the Secretary's signature to the Clerk of the U.S. House of Representatives, in response to the Clerk's written request (ECF

No. 24-4) and in accordance with federal law, 2 U.S.C. § 26.² See Ex. B to Dunlap Decl.

ARGUMENT

Standard of review. “A party requesting injunctive relief pending appeal bears the burden of showing that the circumstances of the case justify the exercise of the court’s discretion.” *Respect Maine PAC v. McKee*, 622 F.3d 13, 15 (1st Cir. 2010). As with a request for preliminary injunction or a stay pending appeal, the court considers four factors: 1) whether Appellants have made a strong showing that they are likely to succeed on the merits, 2) whether they will be irreparably injured absent relief, 3) whether issuance of relief will substantially injure the other parties interested in the proceeding, 4) where the public interest lies. *Id.*, citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Moreover, “the first two factors

² 2 U.S.C. § 26 provides, in pertinent part:

Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States.

In contrast to the statute for Senators-elect, this federal law does not specify which state officials must sign the document providing the name of the candidate who was duly elected to the House of Representatives in accordance with state law. Compare 2 U.S.C. §§ 1a & 1b (“it shall be the duty of the executive of the State from which any Senator has been chosen to certify his election” and that certificate “must be countersigned by the secretary of state of the State”).

are the most critical” and “[b]oth require a showing of more than mere possibility.”

*Id.*³ Because the District Court ruled on the merits, and not simply on preliminary relief, Appellants must show a likelihood of establishing that the court abused its discretion or committed a clear error of law in ruling for the defendants.

Conservation Law Foundation of New England, Inc. v. Andrus, 617 F.2d 296, 298 (1st Cir. 1979).

I. Appellants have shown no reasonable likelihood of success on the merits of any of their claims.

The District Court issued a detailed and thoughtful 30-page decision after a trial on the merits, addressing each constitutional and statutory claim raised by the Appellants. Appellants’ assertion that the lower court somehow “sidestepped” the “questions presented” below (App. Mot. at 3) is completely unfounded. Their questions merely restate or reframe the same factual and legal issues that were raised and addressed by the lower court. Many of their arguments are based on pure speculation about what voters must have been thinking or “trying to do” when they cast their ballots. The District Court soundly rejected these claims, and the Appellants have offered nothing new to suggest the lower court erred.

³ Appellants’ suggestion that they need only show that their appeal raises “serious legal questions” is plainly wrong. That standard may apply only where denial of a stay (or injunction pending appeal) would “utterly destroy the status quo.” *Conservation Law Foundation of New England, Inc. v. Andrus*, 617 F.2d 296, 297-98 (1st Cir. 1979), discussing *Providence Journal Co. v. FBI*, 595 F.2d 889, 890 (1st Cir. 1979).

For example, in arguing that ranked-choice voting imposes a severe burden on voters' rights, the Appellants contend that 8,000 votes for Tiffany Bond and William Hoar were improperly "discarded" and that the voters "tried to vote" in the runoff election but were unable to do so. App. Mot. at 10. The lower court found – and the undisputed election tabulation shows – that these voters either chose Ms. Bond and no one else, Mr. Hoar and no one else, or selected both of these independent candidates but ranked no other candidate. *See* ECF No. 64 at 5, n. 6, and ECF No. 44-4. While Appellants suggest that these voters were confused or somehow "tried to vote" unsuccessfully because of the RCV system, Appellants presented *no evidence* at trial to support those theories – other than their expert's testimony, which was rejected by the trial court as mere speculation. *See* ECF No. 64 at 26 ("To put it generously, Plaintiffs have not demonstrated persuasively that the inferences they draw from the ballot data are more likely true than false... There was no evidence produced to support that argument other than the conclusory testimony of Dr. Gimpel, which I have summarized and discounted entirely.") The trial court found it more likely from the evidence presented that these voters were expressing themselves "with clarity and conviction" when they chose how to mark their ballots. ECF No. 64 at 27. These findings are not clearly erroneous.

In support of their equal protection claim, Appellants reiterate their assertions at trial that voters were treated unequally under the RCV system, based on which candidate they selected as their first choice (App. Mot. at 17-18). The District Court rejected this claim as a matter of fact and law, finding that “[p]laintiffs have not demonstrated that their votes received less weight... [Their] votes were not rendered irrelevant or diluted by this process.” ECF No. 64 at 21.

It is undisputed that each of the Appellants voted only for Mr. Poliquin – and that their vote for him was counted in every round of RCV. Thus, they were not “locked into voting only for their first-choice candidate, with no ability to shift electoral support to other candidates in runoff rounds” by virtue of the RCV law, as alleged (App. Mot. at 18) – they *chose* to vote for only one candidate. Appellants’ own expert witness conceded that they “participated fully in the election.” ECF No. 64 at 22. Their claim of unequal treatment thus fails completely. Moreover, both at trial and in this motion, Appellants fail to cite any legal authority for the proposition that the ability to cast an “effective” vote means the ability to vote in a particular strategic manner that requires a separate run-off election.

Appellants assert that the District Court erred in concluding that the Voting Rights Act is limited to racial discrimination (App. Mot. at 17), but that is not what the District Court found. The District Court rejected Appellants’ claims that RCV violates the Voting Rights Act because “the facts, as alleged, do not involve any

effort by Defendants or anyone else with vested state-delegated authority to deny Plaintiffs their right to vote or to refuse to tabulate their vote.” ECF No. 64 at 9, n. 12. Appellants offer nothing to demonstrate that this finding was in error.

Far from failing to address their Article I claims below, as Appellants contend (App. Mot. at 21), the District Court spent several pages of its decision detailing the reasons it was unpersuaded by Appellants’ arguments. ECF No. 64 at 9-16. There is simply no language in the U.S. Constitution, nor any legal precedent, to support Appellants’ assertions that RCV “far exceeds” Maine’s authority to prescribe the manner of conducting Congressional elections. App. Mot. at 21.

In short, the District Court performed a careful and thorough analysis of the facts and legal arguments presented below. Appellants’ motion offers no grounds for finding error.

II. The absence of an injunction pending appeal would not affect the status quo and could cause no irreparable injury to Appellants.

Plaintiffs contend that absent the issuance of an emergency injunction, “the State will immediately certify the election results under [RCV], and the winner will take office on Jan. 3, 2019.” App. Br. at 22. Both assertions are off the mark. First, the Secretary already has certified the election results, having “certified a final tabulation of the votes,” as the District Court found. Decision, ECF No. 65 at 5-6. The recount completed after the District Court issued its decision did not

change the final tabulation, and the Secretary has now issued the certificate of election according to that tabulation. Second, whether Jared Golden, as the certified winner of the election, will take office when Congress convenes on January 3, 2019, is a matter for the U.S. House of Representatives to decide in accordance with the U.S. Constitution, Article I, § 5 (“[e]ach house shall be the judge of the elections, returns and qualifications of its own members”) – not any state or federal court.

The certificate of election that the Secretary has signed and sent to the House Clerk provides a credential for Representative-elect Golden to present to the House, but it does not determine as a matter of law whether he will be seated by that body. *See Franken v. Pawlenty*, 762 N.W.2d 558, 570 (Minn. 2009) (absence of certificate of election signed by Governor and Secretary of State had no effect on ability of U.S. Senate to seat the Senator-elect). The absence of the Governor’s signature on the certificate likewise is not determinative.⁴ *See Deschler’s*

⁴ The Governor’s reluctance to sign presumably reflects his disagreement with ranked-choice voting, as expressed in a letter submitted to the trial court on December 7, 2018 (ECF No. 61). The Governor also may be relying on language in 21-A M.R.S. § 724 stating that “[t]he Governor may not issue a certificate [of election] while the election is contested before the court.” However, this statement refers only to elections in which a state court has jurisdiction to resolve disputed and/or challenged ballots pursuant to Maine’s recount statute. *See* 21-A M.R.S. § 737-A (10). These include primary elections and general elections for county offices. *See In the Matter of Primary Election Ballot Disputes*, 2004 ME 99, ¶¶ 6-17, 857 A.2d 494, for a full discussion of Maine’s recount statute and the court’s jurisdiction. *See also Opinion of the Justices*, 152 Me. 212, 218-19, 142 A.2d 532

Precedents, Vol. __, Chapter 8, Section 17 (certificate is only prima facie proof of entitlement to House seat and validity of certificate is for House to determine).

Indeed, on at least one prior occasion, the U.S. House of Representatives voted to seat a Maine Congressman for whom no certificate had been issued because the Governor and Executive Council were deadlocked on the results of a recount. H. Res. 5, 77 Cong. Rec. 71, 72 73rd Cong. 1st Sess. At this stage of the process, there is no emergency relief that this Court can issue that would deprive the United States House of Representatives of the authority to determine whether Jared Golden can be properly seated as a member of the House.

III. Issuance of an injunction pending appeal would harm other parties and be contrary to the public interest.

If the injunction Appellants seek were able to prevent Jared Golden from being seated when the Congress convenes on January 3, 2019, pending the outcome of this appeal, that would certainly harm both Mr. Golden as the winning candidate and the public interest. It would deprive Mr. Golden of the ability to serve in the office to which he was properly elected in accordance with Maine law. It would also leave the citizens of the Second District without representation in Congress during an important session. On January 3, 2019, and every day

(1956) (Governor required by law to issue certificate of election to apparent winner of Congressional election).

thereafter that Congress remains in session would constitute irreparable harm to those citizens if they are not represented and is contrary to the public interest.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court deny Appellants' motion for emergency injunctive relief, and ultimately deny the appeal.

Dated: December 19, 2018

Respectfully submitted,

/s/ Phyllis Gardiner

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Fax (207) 287-3145

Counsel for Defendant Secretary of
State Matthew Dunlap

CERTIFICATE OF SERVICE

I hereby certify that on this, the 19th day of December 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification to counsel of record.

Dated: December 19, 2018

/s/ Phyllis Gardiner
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Brett Baber, et al.)	
)	
Plaintiffs-Appellants,)	
)	
v.)	Case No. 18-2250
)	
Matthew Dunlap,)	
Secretary of State of Maine, et al.)	
)	
Defendants-Appellees,)	

DECLARATION OF SECRETARY OF STATE MATTHEW DUNLAP

I, Matthew Dunlap, declare as follows:

1. My name is Matthew Dunlap. I am over the age of 21 years, have personal knowledge of the facts stated herein, and am competent to testify to the same.

2. I currently serve as Maine’s Secretary of State and have held that office continuously since January 7, 2013. Among other duties, the Secretary of State’s Office is responsible for administering state and federal elections, in accordance with Title 21-A of the Maine Revised Statutes and applicable federal election statutes.

3. A true and accurate copy of the Final Recount Tabulation for the November 6, 2018 General Election Recount, Second Congressional District, signed by representatives of the candidates and by the Deputy Secretary of State

after the requesting candidate, Bruce Poliquin, decided to terminate the recount on Friday, December 14, 2018, is attached hereto as Exhibit A.

4. After the Final Recount Tabulation was signed on Friday, December 14, 2018, my office prepared and I signed a certificate of election attesting that Jared F. Golden of Lewiston, Maine was duly elected the Representative to Congress for Maine's Second Congressional District at the general election on November 6, 2018. A true and accurate copy of the original certificate is attached here as the second page of Exhibit B.

5. Also attached here as the first page of Exhibit B is a true and accurate copy of the letter that I sent to the Clerk of the U.S. House of Representatives on December 18, 2018, enclosing the original certificate of election.

DECLARATION PURSUANT TO 28 U.S.C. § 1746

Dated: December 19, 2018

/s/ Matthew Dunlap
Matthew Dunlap

CERTIFICATE OF SERVICE

I hereby certify that on this, the 19th day of December 2018, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification to counsel of record.

Dated: December 19, 2018

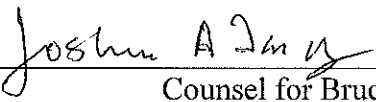
/s/ Phyllis Gardiner
PHYLLIS GARDINER
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel. (207) 626-8800
phyllis.gardiner@maine.gov

FINAL RECOUNT TABULATION
NOVEMBER 6, 2018 GENERAL ELECTION RECOUNT
SECOND CONGRESSIONAL DISTRICT

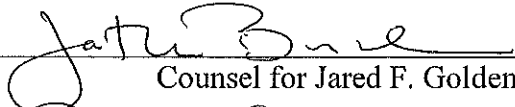
Date: December 14, 2018

A recount of the general election for the Second Congressional District was initiated on December 6, 2018, with Mr. Poliquin as the requesting candidate, and it has been ongoing since that date. Over 165,000 ballots from approximately 320 out of the 375 municipalities in the Second District have been recounted. The requesting candidate having now decided to terminate the recount, in accordance with the Secretary of State's Rules Establishing Procedures for Requesting and Conducting Recounts of Elections Determined by Ranked-choice Voting, Chapter 536, section 7, subsection 13, the original ranked-choice voting count (attached hereto and referenced in the official tabulation submitted to the Governor on November 26, 2018) constitutes the Final Recount Tabulation.


SIGNED:



Counsel for Bruce Poliquin



Counsel for Jared F. Golden



Secretary of State Recount Supervisor or Designee

Report Name **Summary Report**

Election Name **General Election**

Election Date **11.06.18**

Office Title **Congressional District 2**

Candidate Names	Round 1			Round 2		
	Votes	Percentage	Transfer	Votes	Percentage	Transfer
Bond, Tiffany L.	16552	05.71%	-16552	0	00.00%	0
DEM Golden, Jared F.	132013	45.58%	10427	142440	50.62%	0
Hoar, William R.S.	6875	02.37%	-6875	0	00.00%	0
REP Poliquin, Bruce	134184	46.33%	4747	138931	49.38%	0
Ballot Exhausted						
By Overvotes	435		98	533		0
By Undervotes	6018		7820	13838		0
By Exhausted Choices	0		335	335		0
Continuing Ballots	289624		0	281371		0
TOTAL	296077		0	296077		0
Winning threshold by round	144813			140686		

Generated: 11/21/2018 19:36

Total = Ballot Exhausted by Overvotes + Ballot Exhausted by Undervotes + Exhausted Ballot + Continuing Ballots

Winning Threshold = [Continuing ballots/(Vote for [number] +1)] + 1

"*" symbol signifies elimination due to Tie Resolution.



MATTHEW DUNLAP
SECRETARY OF STATE

STATE OF MAINE
OFFICE
OF THE
SECRETARY OF STATE

December 18, 2018

Karen L. Haas, Clerk
U.S. House of Representatives
UPS Public Affairs
316 Pennsylvania Avenue, S.E., Suite 300
Washington, D.C. 20003

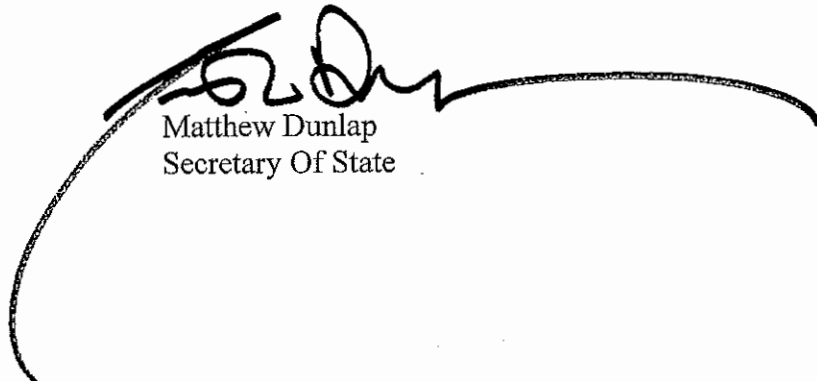
RE: Certificate of Election for Representative-elect Jared F. Golden

Dear Ms. Haas:

Enclosed, pursuant to 2 U.S.C. § 26 and in response to your letter of October 3, 2018, addressed to Melissa Packard as Director of our Elections Division, is an original certificate of election signed by me as Maine's Secretary of State, attesting that Jared F. Golden of Lewiston, Maine was duly elected the Representative to Congress for Maine's Second Congressional District at the general election held on November 6, 2018, in accordance with the election laws of this State.

If you have any questions or need additional information, please do not hesitate to contact me at (207) 626-8400.

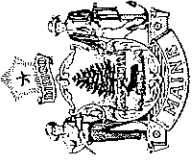
Sincerely,



Matthew Dunlap
Secretary Of State

State of Maine

Greeting:



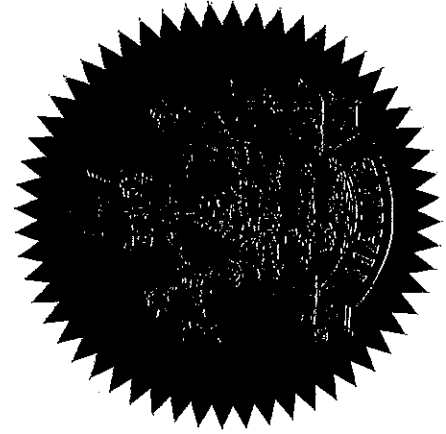
Know Be, That

Jared F. Golden
of Lewiston in the County of Androscoggin

on the sixth day of November, in the year Two Thousand and Eighteen, was chosen by the electors of this State, legally qualified to vote therefore, a

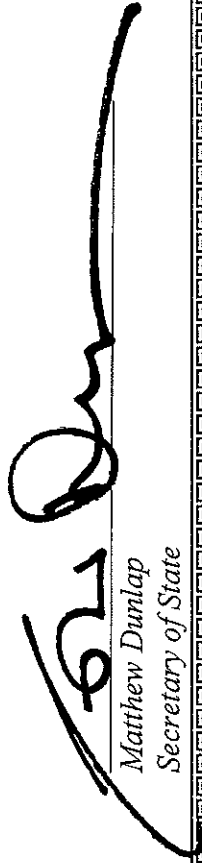
Representative to Congress
in the One Hundred Sixteenth Congress of the United States of America

to represent the State of Maine's Second Congressional District in the United States House of Representatives, for the term of two years, beginning on the third day of January, in the year Two Thousand and Nineteen.



In Testimony Whereof, I have caused the Great Seal of the State to be affixed, given under my hand at Augusta, Maine this fourteenth day of December in the year Two Thousand and Eighteen.

Paul R. LePage
Governor


Matthew Dunlap
Secretary of State