UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

BRETT BABER, *et al.*, Plaintiffs, v. MATTHEW DUNLAP, in his official capacity as Secretary of State of Maine, *et al.*, Defendants.	Case No. 1:18-cv-00465-LEW

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Amicus curiae[1] Campaign Legal Center respectfully submits this brief in opposition to Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs' motion should be denied because neither the U.S. Constitution nor the Voting Rights Act precludes ranked choice voting. To the contrary, ranked choice voting advances the interests protected by the Constitution and the Voting Rights Act by ensuring an equal and effective opportunity for all voters to participate in the democratic process.

INTERESTS OF *AMICUS CURIAE*

Amicus curiae Campaign Legal Center ("CLC") is a leading nonpartisan, nonprofit election law organization. CLC litigates, develops policy, and advocates on a range of democracy issues, including by participating in voting rights cases across the country as both counsel for parties and as *amicus curiae*. CLC aims to ensure the protection of Americans' voting rights to encourage widespread and equal participation in the democratic process. CLC has expertise in legal issues

[1] *Amicus* affirms that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund the preparation and submission of this brief, and no person other than *amicus* or its counsel contributed money that was intended to fund the preparation and submission of this brief.

related to the fundamental right to vote protected by the Constitution and the rights protected by the Voting Rights Act. CLC advocates for the adoption of ranked choice voting as a means to strengthen majoritarian democratic principles, to encourage participation by candidates with diverse backgrounds, and to reduce political polarization, influence of big money in politics, administrative costs, and the drop-off in voter participation that accompanies traditional runoff elections.

ARGUMENT

I. Ranked Choice Voting Is Permitted by the Constitution and the Voting Rights Act.

A. Ranked Choice Voting Is Consistent with Article I, Section 2 and the Elections Clause of the Constitution.

The Constitution permits Maine's adoption of ranked choice voting to elect representatives to Congress. Article I, Section 2 of the Constitution provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." U.S. Const. art. I, § 2. Plaintiffs' contention that the Framers included in that requirement an unspoken plurality-election requirement lacks merit.

The Framers knew how to specify requirements for determining the winners of elections, but did not do so with respect to determining the winners of elections for the House of Representatives. In Article II, Section 1, the Framers provided that "[t]he person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed." U.S. Const. art. II, § 1. If no candidate received a majority, the House of Representatives would select the president from among the five top candidates, with the required vote of a majority of state delegations. *Id.* The Twelfth Amendment modified this process to provide separate ballots for electors to choose the president and vice president, but continued to

specify that a majority vote was necessary—either by a majority of electors or a majority of state delegations. U.S. Const. amend. XII.

Although the Framers dictated with particularity the necessary number of votes and the vote-counting process for electing the president and vice president, they were silent on the manner and procedure for electing members of the House. Thus, the Framers should not be seen as having mandated—through silence—any particular vote total or counting procedure for determining winners of House elections. *See, e.g.*, *NLRB v. Canning*, 134 S. Ct. 2550, 2609 (2014) (Scalia, J., concurring in judgment) (noting that absence of language in constitutional provision was intentional: "[i]f the Framers had thought those options insufficient and preferred to authorize the President to make recess appointments . . . they would have known how to do so"); *cf. Jama v.ICE*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.").

Plaintiffs offer no reason, other than their mere say so, to explain why the phrase "by the people" must mean only a plurality of the people. Indeed, the Supreme Court has suggested, consistent with the argument above, that states may choose either a majority or plurality vote requirement. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) ("[T]he State understandably and properly seeks to . . . assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections."). If the Framers intended to require that winners of House elections be determined by a plurality vote, they would have said so expressly.[2]

[2] As this Court noted in denying Plaintiffs' motion for a temporary restraining order, Plaintiffs' reliance on *Phillips v. Rockefeller*, 435 F.2d 976 (2d Cir. 1970) is misplaced because the court merely held that Article

Moreover, the Framers specifically empowered states to determine the procedures for electing members of Congress: "[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 chusing Senators." U.S. Const. art. I, § 4 (emphasis added). The Supreme Court has interpreted the Elections Clause to permit states to "regulate[ ] election *procedures*" so long as those regulations do not "impose any substantive qualification rendering a class of potential candidates ineligible for ballot position." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995) (emphasis in original). That is precisely what Maine has done: it has adopted a procedure for determining the winners of federal elections that leaves the ballot open to anyone who meets the constitutionally prescribed age, citizenship, and residency qualifications.

Maine's decision to adopt ranked choice voting falls squarely within its power under the Elections Clause, and is entirely consistent with the Constitution's requirement that members of the House be elected "by the people." U.S. Const. art. I, § 2. Moreover, Maine's decision advances important state interests endorsed by the Supreme Court. *See Storer v. Brown*, 415 U.S. 724, 729 (1974) (noting the "substantial state interest in . . . attempting to ensure that the election winner will represent a majority of the community"). The Court should reject Plaintiffs' invitation to read from silence a constitutional prohibition on Maine's choice to employ ranked choice voting for electing federal officeholders. Plaintiffs' recourse is through the political process—either at the state level or through federal legislation to "alter [Maine's] regulations," U.S. Const. art. I, § 4—not litigation.

I, Section 2 did not *require* majority-vote elections for the House. Indeed, the *Phillips* court relied upon the Framers' silence to conclude that a majority vote was not required. That silence likewise means that the Framers did not require a plurality vote system.

B. Ranked Choice Voting Does Not Burden the Right to Vote Protected by the First and Fourteenth Amendments and Does Not Violate the Voting Rights Act.

Ranked choice voting does not burden the right to vote, and thus Plaintiffs' remaining claims lack merit. Plaintiffs raise a number of policy objections to ranked choice voting, which they label as varying forms of First and Fourteenth Amendment claims and a Voting Rights Act claim. *See* Pls.' Br. at 8-18. But none of Plaintiffs' arguments actually implicates any cognizable claim for relief under the Constitution or the Voting Rights Act, nor do their policy objections make sense on their own terms.

i. Ranked Choice Voting Does Not Burden the Right to Vote.

Plaintiffs contend that ranked choice voting imposes a "[s]evere [b]urden on the [r]ight to [v]ote [e]ffectively," Pls.' Br. at 8, because (1) some voters may choose to rank candidates differently if they knew which candidate(s) would be eliminated after the initial count and (2) some voters may wish to select only a single candidate without ranking the other candidates. *Id.* at 9-13. These arguments do not implicate the Constitution.

When considering Plaintiffs' undue burden claim, the Court must first "'weigh the character and magnitude of the burden the [s]tate's rule imposes [on rights to vote and run for office] against the interests the state contends justifies that burden.'" *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks omitted; brackets in original). The Court's task is simple here because the magnitude of the burden is *zero*. The opportunity to rank multiple candidates is not a "burden" on the right to vote—and certainly not a "severe" one that would trigger strict scrutiny. *See Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (holding that rational basis review applies where burden is minor). Voters are not *required* to rank candidates—indeed, none of the Plaintiffs did so—they

only selected Congressman Poliquin. *See* Am. Compl. ¶¶ 7-10, ECF No. 36. Maine's system does not burden anyone by requiring any additional effort in voting. Nor does the ability to rank one's choices constitute a restriction on the right to vote. It does not restrict any voter from casting a ballot, or require any advance steps by the voter in order to be permitted to vote. In fact, ranked choice voting constitutes an expansion of the right to vote by permitting voters to express preferences for more than a single candidate and to ensure their opportunity to have their voice considered in determining the ultimate winner. Maine's system of ranked choice voting is neither a burden nor a restriction. Plaintiffs' undue burden claim cannot proceed in the absence of any actual burden on the right to vote.

But even if Plaintiffs' two objections could be characterized as describing a "burden," they still do not implicate any constitutional right. Plaintiffs contend that ranked choice voting precludes voters from reconsidering their rankings after the first round based upon "intransitive voter preferences" that might yield a different ranking once the field is winnowed. Pls.' Br. at 10-11. But voters can consider such preferences and the possible permutations of subsequent rounds, if they so choose, in advance when choosing how to rank candidates.

More importantly, Plaintiffs' objection would not be redressed by a return to plurality voting. Plaintiffs complain that a voter might have "voted differently had she been presented with the identities of the actual candidates in the runoff election and the matchup of candidates," *id.* at 11, or had she known "more specific information about other voters' selections," *id.* (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1105 (9th Cir. 2011)).[3] But the same is true of plurality voting

[3] In *Dudum*, the court was comparing a ranked choice system to a two-round runoff system. *See id.* at 1105 ("A two-round runoff system, in contrast, provides voters that opportunity through a new round of balloting."). At the same time, the court acknowledged the advantages of ranked choice voting over a plurality system, noting that ranked choice voting presents a "better test[ ] of the depth of voter support for each candidate than a simple first-past-the-post plurality system," and produces "fewer votes cast only for losing candidates" as such votes "can be redistributed to candidates with a chance of winning." *Id.* at 1104.

whenever a minor party candidate appears to have played the role of "spoiler" in a close race between the major party candidates. No one contends that, in a plurality system, voting imposes an unconstitutional burden on the right to vote effectively merely because voters for a "spoiler" candidate are not given the opportunity to "*reconsider* their choices," *id.* (emphasis in original), upon learning that other voters were closely divided between the major party candidates. Voters are perfectly capable of making a decision based upon their individual values and interests in the possible outcomes of the election.

Likewise, Plaintiffs' second objection—that ranked choice voting "unconstitutionally dilutes," Pls.' Br. at 11 n.2, the votes of those who only select a single candidate without ranking others—is misplaced. Plaintiffs contend that such voters "will not have any say in subsequent rounds of vote counting." *Id.* Not so. If those voters' chosen candidate proceeds to the subsequent round, their votes are necessarily counted again as part of the majority vote determination. If their only ranked candidate is eliminated, their vote will still have been counted, and they will have *chosen* not to participate in subsequent rounds—a choice the Constitution protects. Voters do not have a constitutional right to have their votes repeatedly counted after their candidate fails to secure enough support to advance. "[T]he function of the election process is 'to winnow out and finally reject all but the chosen candidates,' not to provide a means of giving vent to 'short-range political goals, pique, or personal quarrel[s].' Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (quoting *Storer*, 415 U.S. at 735) (citations omitted). Voters who choose not to rank additional candidates are no differently situated than those who choose not to participate in runoff elections after their chosen candidates are eliminated in the initial election. No one contends such a scenario infringes some constitutional right. Rather, those voters will

simply have exercised their First Amendment right *not* to vote. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (noting First Amendment protects "both the right to speak freely and the right to refrain from speaking at all").

ii. Ranked Choice Voting Does Not Violate the Voting Rights Act.

Ranked choice voting does not violate the Voting Rights Act. In their briefing of their undue burden claim, Plaintiffs contend the two objections discussed above also establish a violation of the Voting Rights Act, without identifying any particular cause of action under the Voting Rights Act. Plaintiffs contend that the ballot is confusing to voters, and refer (without citing) to the bilingual ballot requirements of the Voting Rights Act. *See* Pls.' Br. at 9; *id.* at 12 ("Maine's confusing voting procedures denied voters an effective vote in the same way that misleading ballots and ballots printed in a language that voters cannot understand deny voters an effective vote."). But that provision only applies to certain jurisdictions, *see* 52 U.S.C. § 10503(b)(2), and its application requires that ballots be printed in additional languages, *id.* Maine is not a covered jurisdiction. *See* Voting Rights Act Amendments of 2006, Determinations Under Section 203, 81 Fed. Reg. 87532, 87535 (Dec. 5, 2016). The statutory cause of action is limited to covered jurisdictions and to the refusal to print ballots in required languages, *see id.* § 10503(d); it does not extend to Plaintiffs' contention that English-speaking voters may be confused by a particular voting process described in English. The Voting Rights Act prohibits discrimination in voting on account of race, color, or minority language status. *See* 52 U.S.C. § 10301(a). It does not prohibit non-plurality voting systems. Plaintiffs' invocation of the Voting Rights Act in this case lacks merit.

iii. There Is No Constitutional Right to Tactically Advance, and then Vote Against, a Weaker Candidate.

There is no constitutional right to tactically advance a weaker candidate to increase the odds of winning for a preferred candidate in a subsequent round of voting. Plaintiffs find that supposed constitutional right in case law articulating that voters have "the right to vote for a candidate of [their] own choice." Pls.' Br. at 13 (quoting *League of United Latin Am. Citizens, Dist. 19 v. City of Boerne*, 659 F.3d 421, 435 (5th Cir. 2011)). This quotation—the sole support Plaintiffs offer for this claim—does not create the constitutional right Plaintiffs posit. Indeed, the Supreme Court has held that states have an interest in ensuring that the elected candidate reflects the will of the voters. *See, e.g.*, *Bullock*, 405 U.S. at 145 ("[T]he State understandably and properly seeks to . . . assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections."). No court has ever held that a small minority of voters have a constitutional right to thwart the ability of the majority to prevail by engaging in multiple rounds of tactical voting for "weaker" opposing candidates. Indeed, the "tactical" voting Plaintiffs contend is constitutionally protected is akin to the "interparty raiding" the Supreme Court has held states have an interest in *preventing* during primary elections. *See Rosario v. Rockefeller*, 410 U.S. 752, 768-69 (1973) (holding that states have an interest in preventing "a member of one party deliberately entering another's primary to help nominate a weaker candidate, so that his own party's nominee might win more easily in the general election"); *Storer*, 415 U.S. at 731 (noting states' "strong interest in maintaining the integrity of the political process by preventing interparty raiding"). Moreover, if Plaintiffs were correct, then plurality voting would be unconstitutional as well; there is no ability to "advance" weaker opposing candidates in plurality voting. Only traditional runoff elections offer the opportunity to engage in

the type of "strategic[ ] or tactical[ ]" voting Plaintiffs contend is constitutionally mandated. Pls.' Br. at 14.

Plaintiffs' argument does not implicate the Constitution.

iv. Ranked Choice Voting Is Consistent with the Equal Protection Clause.

Maine's system of ranked choice voting does not violate the Equal Protection Clause because every voter has the equal opportunity to rank his or her preferred candidates. Plaintiffs contend that voters whose top-ranked candidates are eliminated and whose lower-ranked preferences are tallied are afforded more votes than those whose first-ranked candidate continues on to additional rounds of counting. *Id*. at 15. This makes no sense—all voters cast a single ballot, and those whose first-choice candidates carry forward to the subsequent rounds of tallying have their votes continually considered in order to ascertain which candidate has majority support. Plaintiffs articulate no constitutional distinction between ranked choice voting, where preferences are stated and tallied in a single election, and traditional runoff elections, where more than one ballot is cast per voter. In both systems, every voter has the same opportunity to cast a single vote in the outcome-determinative matchup. As the Ninth Circuit concluded in upholding San Francisco's system of ranked choice voting, "no voter is denied an opportunity to cast a ballot at the same time and with the same degree of choice among candidates available to other voters." *Dudum v. Arntz*, 640 F.3d 1098, 1109 (9th Cir. 2011). Plaintiffs' equal protection argument is without merit, and rests upon a flawed articulation of the vote counting process.

v. Ranked Choice Voting Does Not Violate Procedural Due Process Rights.

Ranked choice voting does not violate any voter's procedural due process rights. Without explanation, or citation to any record evidence, Plaintiffs contend in two sentences that ranked choice voting violates procedural due process because they say it might result in "non-monoticity."

Pls.' Br. at 18. As support, they cite the extra-record website of a mathematician who advocates "range" or "score" voting over "the USA's embarrassingly poor current 'plurality' system"—the very system Plaintiffs contend is constitutionally mandated. *See* Warren D. Smith, *About the Center for Range Voting*, RangeVoting.org, https://rangevoting.org/AboutUs.html (last visited Nov. 27, 2018). Their brief does not explain the phenomenon or how it (even if valid) implicates a constitutional concern. This is insufficient to raise a constitutional argument. *See Gemco LatinoAmerica, Inc. v. Seiko Time Corp.*, 61 F.3d 94, 101 (1st Cir. 1995) (noting that party "waives arguments . . . only cursorily developed"); *United States v. Bulger*, 816 F.3d 137, 148 (1st Cir. 2016) (finding argument waived for inadequate explanation and briefing because "constitutional claims . . . are just the type of complicated issues that call for some in depth treatment"). In any event, if any minor flaw—no matter how theoretical—with a voting system rendered it unconstitutional, there would be no available method of voting.

None of Plaintiffs' constitutional or statutory arguments has any merit. These are arguments for the legislature, the voters, or the Congress, not a federal court.

II. Ranked Choice Voting Increases Voters' Ability to Vote Effectively for Candidates of Their Choice.

As discussed above, Plaintiffs do not raise any cognizable legal claims, and instead muster only policy objections to Maine's use of ranked choice voting. Mere disagreements about the policy implications of ranked choice voting are insufficient to show that it is unconstitutional as a matter of law. Moreover, as a matter of policy, ranked choice voting is a more effective system for ensuring voters' ability to elect candidates of their choice than Plaintiffs' preferred system of plurality voting.

Ranked choice voting increases voters' democratic influence and maximizes their chances to elect a candidate of their choosing. *Cf. Holder v. Hall*, 512 U.S. 874, 909-12 (1994) (Thomas,

J. concurring) (finding that cumulative and transferable voting systems constitute "efficient and straightforward" methods for ensuring minority voters' ability to elect candidates of their choice). Under a traditional plurality voting system, the candidate who receives the most votes wins, even if she fails to win the votes of a majority of the voters. Ranked choice voting is, by definition, a more majoritarian system than plurality voting because it requires a candidate to receive more than fifty percent of the votes to win. As such, ranked choice voting systems "ordinarily will result in the election of a candidate with more widespread support than would simple plurality voting." *Dudum*, 640 F.3d at 1104.

Because candidates must win majority support, ranked choice voting requires candidates to reach out to a broad coalition of voters. Thus, candidates in ranked choice systems are more likely to reach out and engage with voters directly. *See* Haley Smith, *Ranked Choice Voting and Participation: Impacts on Deliberative Engagement* 9-12, FAIRVOTE (June 2016) (FairVote Civility Report #7). Further, ranked choice voting allows voters to express their true political preferences freely, without the risks associated with winner-take-all plurality voting. For voters who support independent, less popular, or third party candidates with little chance of electoral success, plurality voting creates disincentives to voting for their preferred candidate. These voters may perceive such a vote as ineffective or "wasted" because it does not affect the ultimate outcome of the race. *Cf. Dudum*, 640 F.3d at 1105 (finding that voters in ranked choice systems "are more free to vote their true preferences, because they face less of a threat of having their votes entirely 'wasted.'"). Alternately, plurality system voters may worry that voting their true preference would spoil the chances of a less preferred but competitive candidate, or split votes among two preferred candidates, thereby allowing a third, less preferred candidate to win. Thus, voters under a plurality system are often left with the unsavory choice between voting for their preferred candidate and

voting for a candidate who has a better chance of winning. Voters in a ranked choice system, however, are able to express their true preferences by ranking their preferred candidate first, while also expressing a preference among the candidates they perceive as more likely to win. *See id.* at 1104 (finding that voters in ranked choice systems have "more say over who they want to represent them: if it is not to be their first choice, then they can choose a second").

Notably, Plaintiffs fail to advance any substantive policy arguments in favor of plurality voting, other than its relative simplicity. Even there, research shows that voters in jurisdictions that use ranked choice voting understand and are satisfied with the system.[4] Further, Plaintiffs have failed to provide any evidence of actual voter confusion in the November 6, 2018 election. Instead, statements by elections officials suggest that most voters "knew what they were doing," and that to the extent voters had questions, they were easily answered by officials at the polls. *See* Scott Thistle, *Poliquin says recount needed to address "chaotic" ranked choice process*, https://www.pressherald.com/2018/11/27/poliquin-says-recount-necessary-to-address-chaotic-ranked-choice-process/?rel=related (Nov. 27, 2018). Even granting Plaintiffs the benefit of the doubt on the merits of their policy preferences, "the citizens of Maine have rejected the policy arguments Plaintiffs advance against RCV." Order at 16, ECF No. 26. This Court is not the appropriate forum for Plaintiffs to raise their disagreement with the policy choices of the citizens of Maine.

[4] In a 2013 survey of American cities using ranked choice voting, 90% of respondents found the ballot easy to understand. Sarah John & Andrew Douglas, *Candidate Civility and Voter Engagement in Seven Cities with Ranked Choice Voting*, NAT'L CIV. REV. 25, 26 (Spring 2017). Similarly, in a 2014 survey of California cities using ranked choice voting, 89% of respondents found the ballot easy to understand. *Id.* And in one study cited by Plaintiffs, researchers found similar rates of confusion in plurality systems as they did in ranked choice voting systems. *See* David C. Kimball & Joseph Anthony, *Voter Participation with Ranked Choice Voting in the United States* 20, UNIV. OF MO.-ST LOUIS, DEP'T OF POLITICAL SCI. (Oct. 2016).

CONCLUSION

For the foregoing reasons, and those articulated in the briefs of Defendant and Defendants-Intervenors, Plaintiffs' motion for a preliminary injunction should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2018, I served a copy of the foregoing on all counsel of record via the Court's CM/ECF system.

/s/ Paul Brunetti
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