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By Email (kyle@rcvmaine.com)

Portland Press Herald
Bangor Daily News
c/o Kyle Bailey
Committee for Ranked Choice Voting
PO Box 928
Gorham, ME 04038

Re: Constitutionality of pending RCV proposal

To Whom It May Concern:

The ranked-choice voting (“RCV”) proposal recently presented to the Legislature by the Committee for Ranked Choice Voting is constitutional.

First, some background. Constitutional questions turn on the text of the Maine constitution and relevant case law, not on political soundbites or isolated words. In the heat of political battle some commentators have unfortunately used shorthand phrases to frame the discussion – using terms that appear nowhere in the Constitution – and/or taken individual words out of context.

Some skeptics have also misunderstood the relevant history. 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. Section 3 of Article V stated:

... [I]f 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). In short, at the time, the Legislature got to

choose the Governor. The Legislature proceeded to pick a minority candidate. People panicked. After the crisis abated, in 1880 the framers proposed Article XXIV, amending Section 3 to eliminate the possibility of the Legislature picking a Governor. In 1963, Section 3 was amended again (adopting the current language) to clarify that the Legislature's role was limited to tie-breaking in the impossibly rare circumstance of a true statewide tie. *See generally* State of Maine, 101st Legislature, Legislative Record—Senate, June 21–22, 1963, *passim*, Legislative Record—House, June 21–22, 1963, *passim*). Hence the current language:

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. . . . 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 recent developments. Nor does it prohibit any system that, in the process of finding the largest vote-getter, happens to yield a majority. (Current elections often yield a majority-vote-winner and no one questions their legitimacy.) Section 3 is also agnostic as to *how* a plurality is reached. Any system that yields a plurality after the votes are received, sorted, and counted will pass constitutional muster.

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 election. *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”).

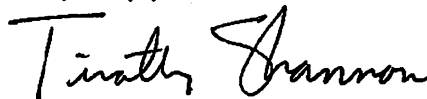
Often the winning candidate also gets a numerical majority, but sometimes not – if the number of exhausted ballots leaves the highest vote-getter with less than a majority. Either way RCV yields a “choice by a plurality” exactly as the Constitution requires. This is precisely where RCV opponents’ use of phrases like “plurality system” and “majority system” misses the mark. The Constitution never uses those terms. It never prescribes a “system.” No one should be making constitutional arguments based on terms and phrases plucked out of thin air.

Kyle Bailey
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There is nothing untoward or difficult about RCV from a legal standpoint. RCV captures voter preference and yields at least a plurality. One election is held. One electorate is consulted. One ballot is distributed and collected. Those votes are tabulated. One candidate gets the highest number. That person is elected.

Critically, RCV is not a return to the bad old days of the Legislatures picking winners. Nor is it a return to the old "majority" system used in the 19th century. I would encourage all of us to keep focused on the text of the proposal, the text of the constitution, and the future of our state. The current RCV proposal squares with the text and history of the Maine Constitution. It is clearly constitutional.

Very truly yours,

A handwritten signature in black ink that reads "Timothy Shannon". The signature is written in a cursive style with a large, sweeping initial 'T'.

Timothy R. Shannon

TRS:esh

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