UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 18-2250

BRETT BABER, et al.
Plaintiffs-Appellants

v.

MATTHEW DUNLAP, et al.
Defendants-Appellees

OPPOSITION TO APPELLANTS' EMERGENCY MOTION FOR INJUNCTION OF APPELLEES TIFFANY BOND, KAYLEE MICHAUD and RACHAEL WOLSTADT

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OVERVIEW

This appeal centers on four Maine voters ("Appellants") who effectively cast a ballot for their preferred candidate and had that ballot counted in the final tally of Maine's Second Congressional District election. But, Appellants' preferred candidate—Bruce Poliquin—ultimately received fewer votes than his opponent, and lost the election. Now, Appellants seek emergency relief for the election lost.

As emergency relief, Appellants seek to put the results of Maine's election on hold. In so doing, Appellants ask the Court to order that the constituents of Maine's Second Congressional District go *unrepresented* in the upcoming Congress pending a frivolous appeal.

Appellants justify their demand for extraordinary appellate relief with an array of constitutional claims that were thoughtfully analyzed and rejected by the United States District Court for the District of Maine. Appellants thresh out their claims with an array of constitutional injuries hypothetically suffered by *other* voters who are not a party to this action. Alleged burdens including claims that Maine's ranked-choice voting system ("RCV") denied other voters their right to select their preferred candidate on Election Day, or to have their votes tabulated for that candidate's benefit. *See Appellants' Emergency Mot. for Inj.* , Dec. 18, 2018, at 2-3 ("Appellants' Motion"). The District Court reviewed the evidence purporting to prove Appellants' claims, but ultimately found that Appellants'

suffered no constitutional injury. *See generally Decision and Order on Mot. for Prelim. Inj.*, December 13, 2018, ECF No. 64 ("Final Order").

Appellants are not entitled to emergency consideration for an emergency of their own making. *See Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010). These constitutional challenges of Maine's RCV system were ripe to be decided as early as June 2018 – soon after Appellant Poliquin won his primary election using RCV. No claim was brought. Once filed, these claims could have moved from the District Court to this Court *before* Thanksgiving. Appellants could have requested an interlocutory appeal immediately after the District Court's Order on Plaintiffs' Motion for Temporary Restraining Order concluded their claims were unlikely to succeed. But Appellants waited. Even then, Appellants could have filed a notice of appeal and moved for emergency relief *immediately* upon the District Court's entry of judgment on December 13. But Appellants instead took *five days* to draft and file a verbose motion asking that this Court render judgment within just *three days*. *See Appellants' Emergency Mot. for Inj.* , Dec. 18, 2018, at 2 ("Appellants' Motion").

Appellants' demand for relief from an emergency of their own making does not warrant an injunctive order risking that constituents of Maine's Second Congressional district go unrepresented when the 116th United States Congress convenes on January 3, 2019.

ARGUMENT

Appellants' Motion for Emergency Injunction should be denied because (i) Appellants are unlikely to succeed on the merits of their appeal, and (ii) granting emergency relief will substantially harm the public interest.

A party requesting injunctive relief pending appeal bears the burden of showing that the circumstances of the case justify emergency intervention at the Court's discretion. *See McKee*, 622 F.3d at 16. As in cases involving stays of actions pending appeal, the Court considers four factors on motions for injunction pending 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 parties interested in the proceeding; and (4) where the public interest lies.

McKee, 622 F.3d at 16 (citing *Nken v. Holder*, 556 U.S. 418 (2009)). The *sine qua non* of this test is whether the movants are likely to succeed on the merits. *See Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 16 (1st Cir. 2002).

This Opposition – drafted and filed with just over one day's notice – focuses on Appellants' inability to succeed on the merits of their appeal, and the severe harm Appellants' requested relief imposed on the public interest.

I. APPELLANTS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THIS APPEAL.

Appellants' arguments will fail on appeal because the District Court acted within its discretion in finding that Appellants' suffered no constitutional injury, and answered Appellants' questions of law consistent with the precedent.

Appellants argue they are likely to succeed on appeal by demonstrating that the District Court's "sidestepping" of the legal questions presented amounted to reversible error. In fact, the District Court squarely answered each of the three questions that Appellants argue entitles them to emergency relief.

Answering Appellants' First Question, the District Court concluded that Appellants' substantive due process rights were not infringed where voters can understand the ballot, cast a vote for their preferred candidate, and ultimately have that vote tabulated. *Compare with* Appellants' Motion, at 2. Preliminarily, the District Court recognized evidence that Appellants understood their RCV ballot and effectively cast their votes for their preferred candidate—Poliquin. *See* Final Order at 25. Nonetheless, the District Court recognized that no due process injury applies. *See id.* "The RVC system implemented in Maine is not so opaque and bewildering that it deprives a class of citizens of the fundamental right to vote. In fact, I find the form of the ballot and the associated instructions more than adequate to apprise the voter of how to express preferences among the candidates." Final Order, at 28.

Answering Appellants' second question, the District Court concluded that RCV does not violate the Equal Protection Clause because it does *not* afford any voter a greater power or electoral voice, and therefore RCV. *Compare with* Appellants' Motion, at 2. Specifically, the Court recognized that RCV gave equal weight to Appellants' ballots—and all other ballots—and that no voter's ballot was disadvantaged or diluted. *See* Final Order at 19-20. "Plaintiffs insist that their votes received less weight. However, Plaintiffs have not demonstrated that their votes received less weight. … Plaintiffs' votes were not rendered irrelevant or diluted by this process." *Id.* at 21.

On Appellants' final question, the District Court concluded that Maine's RCV policy and procedure is consistent with the state's rights pursuant to Article I, Section 4 rights permitting the State to control the "time, places and manner" of congressional elections. *Compare with* Appellants' Motion, at 3. This justified conclusion was stated without ambiguity: "I find that RCV does not exceed the State's authority under Article I." Final Order, at 15, n.16.

Ultimately, these findings were based upon the District Court's interpretation of the evidence Appellants presented at a trial on the merits. Based on that evidence, the District Court determined that Appellants' suffered no burden – or a minimal burden at best – from the alleged constitutional violations.

Where election regulations cause voters a minimal constitutional burden, the First Circuit applies the rational-basis test to the challenged law. *See Libertarian Party of New Hampshire v. Gardner*, 843 F.3d 20, 31 (1st Cir. 2016). "If the law imposes only a modest or reasonable burden, there need be only a rational basis undergirding the regulation in order for it to pass constitutional muster," *Gardner*, 843 F.3d at 31.

Here, the District Court nonetheless recognized that Maine had not just a rational basis, but a legitimate interest in adopting RCV:

> [T]here is no dispute that the RCV Act—itself the product of a citizens' initiative involving a great deal of first amendment expression—was motivated by a desire to enable third-party and non-party candidates to participate in the political process, and to enable their supporters to express support, without producing the spoiler effect. In this way, the RCV Act actually encourages First Amendment expression, without discriminating against any voter based on viewpoint, faction or other invalid criteria.

Final Order, at 29.

In light of the District Court's thoughtful analysis of Appellants' legal questions presented, and its findings of fact on the minimal burden imposed on Appellants and the State's interest in adopting RCV, Appellants claims are likely to fail on appeal and do not warrant emergency relief.

II. APPELLANTS' EMERGENCY RELIEF WOULD SEVERELY HARM THE PUBLIC INTEREST.

Appellants request that this Court permit Maine's Second Congressional District to go unrepresented when the 116th United States Congress Convenes next month would severely harm the public interest to correct an emergency of their own making. *See McKee*, 622 F.3d at 16.

Appellants' request the Court to hold Maine's Second Congressional District seat empty while this appeal is pending comes amid a tumultuous political climate where critical issues affecting Mainers' lives and livelihoods are up for debate in Washington, and the Second Congressional District's adequate representation must be ensured. Permitting Mainers to go unrepresented cannot be justified when balanced with Appellants' likely inability to succeed on the merits of this appeal.

CONCLUSION

WHEREFORE, for the above-stated reasons, Appellee-Intervenors Tiffany Bond, Kaylee Michaud and Rachael Wollstadt respectfully request that the Court deny Appellants' Emergency Motion for Injunction pending appeal.

Dated: December 19, 2018

/s/ James G. Monteleone
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2018, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notice to counsel of record. The following parties were sent a copy via electronic mail.

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