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 the State of Maine, *et al.*,

Defendants-Appellees,

PLAINTIFFS-APPELLANTS' REPLY IN SUPPORT OF THEIR EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL[1]

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

[1] Plaintiffs-Appellants submit this reply pursuant to Fed. R. App. P. 27(a)(4).

Defendants' briefs collectively demonstrate the necessity to enjoin the state from determining and certifying a "winner" of the ME-02 congressional election pending expedited review by this Court. Rather than address Plaintiffs' core constitutional claims – for which Defendants have little-to-no substantive response – the State and Defendant Golden have shifted tactics in a bald and irresponsible effort to frustrate judicial review. The Secretary of State ("Secretary") has self-certified the election results in violation of state law vesting that authority in the Governor in a transparent bid to convince this Court to cede its jurisdiction over constitutional claims to the U.S. House of Representatives. This Court should not permit such unlawful gamesmanship of the solemn judicial process by which citizens obtain review of constitutional claims.

Judicial review, while maintaining the status quo, is merited here because no federal appellate court has addressed the substantive questions underlying this case, and the Defendant Secretary has taken unlawful action designed to prevent this Court from exercising its solemn judicial function for the benefit of all citizens of Maine.

I. Defendants' Efforts to Frustrate This Court's Jurisdiction Are Contrary to Federal and State Law.

This Court is the only proper institution to adjudicate Plaintiffs' constitutional claims. The Secretary (at 1, 11), however, urges this Court to shirk its responsibility to rule on the constitutionality of his administration of the

election by surrendering the constitutional issues to the House of Representatives. But Plaintiffs here have not filed an election contest raising election irregularities. Rather, they have challenged the very constitutionality of Maine's administration of this election and Maine's voting system – a subject that is uniquely this Court's province under the Constitution. *See Powell v. McCormack*, 395 U.S. 486, 550 (1969).

Under Defendants' logic, the remedy for any violation involving a congressional election (e.g., unlawful voting restrictions, poll taxes, literacy tests, etc.) is to contest the certification with the applicable chamber of Congress. But the authority of each congressional chamber to seat its members under Article I, section 5 is a wholly separate question from whether a state election law or procedure "is a valid exercise of the State's power" under the Constitution, and a court is "obliged to consider" the latter question. *Roudebash v. Hartke*, 405 U.S. 15, 19 (1972).

Moreover, an injunction is needed to restrain the Secretary, who has no authority to determine or certify the winner of this election to the U.S. House Clerk but has attempted to do so anyway. Both the Secretary (at 1, 5) and Intervenor Defendant-Appellee Golden (at 1, 6-7) assert that the "Secretary of State already certified Golden as the winner on November 26, 2018" and thus "[t]here is nothing to enjoin."

Nothing could be further from the law. 21-A M.R.S. § 724 clearly states that "the Governor shall issue an election certificate," and that he "may not issue a certificate while the election is contested before the court." The Secretary makes no appearance in this statute, and his signature is neither required nor even contemplated. His only function, under a separate provision, is to "prepare" and "present" to the Governor a certificate of election, "in order that the same may receive the signature of the Governor." 5 M.R.S. § 84. *See also Opinion of the Justices*, 815 A.2d 791, 798 (2002) (discussing the Secretary's and Governor's respective roles in certifying state and congressional elections). The Secretary acknowledges that this certificate of election constitutes the credential required to be presented to the Clerk of the U.S. House of Representatives under 2 U.S.C. § 26. *See* Decl. of Deputy Sec'y of State Julie L. Flynn (Doc. 24) at ¶ 14.

In other words, despite recognizing the Governor of Maine's concern that the RCV Act is unconstitutional, Response by Paul LePage (Doc. 61), the Secretary has taken it upon himself to usurp the Governor's legal authority, in violation of 21-A M.R.S. § 724. The Secretary's brazen violation of Maine law only underscores the importance of an injunction here to maintain the status quo while this Court decides the constitutionality of the Maine RCV Act in the election. Thus, the matter is not mooted by the Secretary's attempted *ultra vires* usurpation of gubernatorial authority.

II. Plaintiffs Are Likely To Succeed on the Merits of Their Appeal.

A. Plaintiffs' Constitutional Questions Remain Unanswered.

Defendant Golden argues (at 11) that other courts have upheld instant runoff voting but omits from its survey of decisions the fact that no court has ever ruled a state can force voters to guess at the identity and matchup of candidates on a hypothetical runoff ballot. In fact, the U.S. Court of Appeals for the Ninth Circuit identified *sua sponte* this critical infirmity in instant runoff voting but did not decide the issue. *Dudum v. Arntz*, 640 F.3d 1098, 1105 (9th Cir. 2011). The Ninth Circuit's identification of this inherent problem has been the elephant in the room that all Defendants and the district court have avoided.

Nor has any court ever ruled that Article I, Section 4's "time, place, and manner" provisions authorize a state to manipulate election tabulations the way Maine seeks to do in this election: (1) to establish an absolute majority rule, (2) to disregard a plurality winner, (3) to discard over 8,000 voters from the electorate, (4) to thereby manufacture a *faux* majority vote, (5) to declare as its winner a different plurality winner, and (6) to purportedly do all of this to blunt the effect of so-called "spoiler" candidates on elections. Defendants prefer to avoid appellate review of this constitutional question.

Defendant Golden also faults (at 3) Plaintiffs for not asserting the limits of the State's authority to implement instant runoff voting in the Court below. Not

true. Plaintiffs argued consistently that the State had exceeded its authority to establish the "time, place, and manner" of elections delegated to it under Article I, Section 4 of the Constitution and cited both *U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995) and *Cook v. Gralike*, 531 U.S. 510 (2001) in support of this argument. In open court Plaintiffs argued:

> We do not believe that under Article I, Section 4, time, place, manner, that the State has the authority to manipulate, to require the majority, or then manipulate votes in that manner to determine a preferred plurality winner, or to manipulate votes to then divine or produce the majority. . . . We don't think time, place, manner gives the State authority to change the voting rules to prefer or unprefer certain types of candidates in an election.

Dec. 5, 2018 Hrg. Tr. at 77-78 (citing *Cook* and *U.S. Term Limits*); *see also* Pls' Reply Br. (Doc. 52) at 1-2; Pls' Mot. for Prelim. Inj. (Doc. 3) at 7.

In short, Defendants have not, and cannot, offer substantive defenses to a voting system that required all Maine voters to vote blind in the runoff election. Indeed, absent from Defendants' arguments is any principled defense of a voting system that requires voters to guess at the candidates standing for election in the runoff election. Defendant does not even mention the well-established precedents holding that states cannot make voters guess at what, or whom, they are voting for. *See* Mot. at 11-12 (collecting authority).

B. Plaintiffs' Expert Testimony on Key Points is Not Disputed.

Although Defendants (Golden Opp'n at 3, 13, 16; State Opp'n at 8) would have this Court believe there was no evidence supporting the constitutional

infirmities, the only specific disagreement the district court expressed with Defendants' expert Gimpel was the voting intent of the 8,000+ discarded voters. Op. (Doc. 64) at 26. But neither Defendants nor the district court rebutted or dismissed Defendants' expert evidence on these critical points:

- The Maine ballot forces voters to guess about who they are voting for (Sorens Aff. (Doc. 4) at 4, Gimpel Aff. (Doc. 37) at 8);
- The identity of the candidates and the match-up of candidates is critically important for voter choice (Sorens Aff. at 9, Gimpel Aff. at 8);
- As many as 27% of voters vote intransitively based on the identity and match-ups of actual candidates (Sorens Aff. at 5-6, Gimpel Aff. at 11); and
- Independent voters are particularly intransitive in their voting choices and "lean" toward major party candidates (Dec. 5, 2018 Hrg. Tr. at 77-78).

III. Defendants' Other Arguments Lack Merit.

A. Plaintiffs' Claims Were Not Delayed.

Defendant Golden (at 4-5, 14-15) argues that Plaintiffs should have challenged the Secretary's runoff vote tabulation before this election was held. At the outset, the Court should take note of the irony that Defendant's counsel has brought numerous post-election legal challenges to election administration laws

and procedures, arguing that the laches doctrine does not apply. *See*, *e.g.*, Plaintiffs' Reply in Support of Emergency Mot. for TRO, *Democratic Executive Comm. v. Detzner*, No. 4:18-cv-00520-RH-MJF (N.D. Fla. filed Nov. 12, 2018) (Doc. 28-1) at 9-10 (laches does not apply where "Plaintiffs merely seek that these votes [already cast]… be appropriately recorded"); *DSCC v. Detzner*, Plaintiffs' Reply in Support of Emergency Mot. for TRO, Case No. 4:18-cv-00526 at 9 (N.D. Fla. filed Nov. 15, 2018) (Doc. 29) ("had Plaintiffs brought the lawsuit much earlier, Intervenor and Defendants would have certainly argued that the issue was not ripe as the prospect of a manual recount remained remote"); *Ariz. Democratic Party v. Reagan*, Plaintiffs' Reply in Support of Emergency Mot. for TRO, Case No. 2:16-cv-03618-SPL at 12 (D. Ariz. filed Oct. 24, 2016) (Doc. 22) ("the application of a laches defense is particularly inappropriate in this case, where the challenged conduct affects the right to vote of thousands of Arizonans").

Beyond counsel's unblushing inconsistency, had candidate Poliquin brought a constitutional challenge before the election, asserting that he might be the plurality winner of the 2018 election, that the Secretary might discard 8,253 votes from the electorate in a runoff round, and that another candidate might obtain more votes in a runoff election, certainly Golden's national counsel would have argued the constitutional challenge was "not ripe," conjectural, and "remote," and that Poliquin lacked standing. *See DSCC*, *supra*. Thus, Plaintiff Poliquin's claim

ripened when the Secretary implemented the RCV Act in the post-election tabulation here, and there is no delay. *See Bush v. Gore*, 531 U.S. 98, 103 (2000). Likewise, the Plaintiffs had no way to predict or challenge in advance the Secretary's post-election discarding of more than 8,000 voters and ballots in a race the outcome of which the Secretary ultimately decided by about 3,000 votes. Even the district court ruled that the ultimate tabulation would prove relevant to the constitutional challenge here. *See* Order on Mot. for TRO (Doc. 26) at 15.

In any event, even had Plaintiffs delayed, in order for laches to apply any delay in bringing action must be unreasonable under the particular facts and circumstances. *See*, *e.g.*, *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012); *Hutchinson v. Pfeil*, 105 F.3d 562, 564 (10th Cir. 1997); *Phipps v. Robinson*, 858 F.2d 965, 972 (4th Cir. 1988). This was the first federal general election in U.S. history to be conducted under an RCV system, and thus the first type of this election in which all voters were forced to guess the identity of hypothetical runoff candidates. The Secretary did not adopt rules governing the instant runoff vote counting system until November 2, 2018, and the rules did not even take effect until *after* the election, on November 7! 29-250 C.M.R. Ch. 536; Decl. of Deputy Sec'y of State Julie L. Flynn (Doc. 24) at ¶ 5. The ballot instructions also provided to voters on election day were vague and provided no information about the significance or consequence of voting for candidates in an

instant runoff round at the time they cast their ballots. And after Election Day, the Secretary then made discretionary decisions in implementing the instant runoff tabulations. In sum, these Plaintiffs did not delay, but even if they did, their delay was reasonable.

B. Referenda Are Not Immune From Judicial Review.

Although Defendant Golden (at 2, 4, 15-16) cites the RCV Act's implementation by referendum, laws adopted by referendum are nonetheless subject to judicial review for constitutionality, and "voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295, 300 (1981). Moreover, in the "popular referendum" Golden invokes, Maine's citizens voted for a system that tabulates votes in multiple rounds "until a candidate wins by majority." Me. Citizen's Guide to the Referendum Election, Tuesday, Nov. 8, 2016 at 2.[2] As demonstrated by the results of this election, *see* Pls' Mot. at 5-6, the RCV Act contravenes the will of Maine's voters in this respect by manipulating the electorate to manufacture a *faux* majority.

C. Plaintiffs Have Standing to Bring Their Claims.

Defendant Golden argues (at 13-14) that each Plaintiff here must have been

[2] www.maine.gov/sos/cec/elec/upcoming/citizensguide2016.pdf

disenfranchised in order to have standing to challenge the constitutionality of Maine's election law and administration of this election. That overlooks the principle that all voters have a right to vote in a constitutional election and that candidate Poliquin has unique standing to challenge the election that has rejected his plurality victory. Many election cases are litigated by candidates. *See, e.g.*, *Bush*, 531 U.S. at 103.

D. Plaintiffs Were Not Required To Request a Fourth Injunction from the District Court.

The short timeline remaining in this case made it impracticable to seek an injunction pending appeal in the district court. One defendant suggests that Plaintiffs should have sought relief in this Court "before Thanksgiving," Bond Opp'n at 3, while another asserts that Plaintiffs are wrong to seek relief in this Court even now, Golden Opp'n at 8. Regardless, it was *Defendants* who sought finality in the district court by proposing to consolidate Plaintiffs' requests for a preliminary and permanent injunction. *See* Dec. 5, 2018 Hrg. Tr. at 4-5. Moreover, the district court denied Plaintiffs three separate requests for an injunction: a TRO, a preliminary injunction, and a request for permanent injunction. Requesting a fourth injunction, with no reason to suspect that it might be granted and with time running out, would have been futile. Fed. R. App. P. 8(a)(2).

CONCLUSION

Plaintiffs' fundamental constitutional questions continue to garner no substantive response, and they are entitled to a brief injunction while the Court determines the validity of the constitutional claims.

Dated: December 20, 2018

Respectfully submitted,

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I hereby certify, on this 20th day of December, 2018, that:

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/s/ Joshua A. Randlett

CERTIFICATE OF SERVICE

I certify that on December 20, 2018, I electronically filed the foregoing Plaintiffs-Appellants' Emergency Motion for Injunction Pending Appeal with the U.S. Court of Appeals for the First Circuit using the CM/ECF system, and effected service thereby and/or by e-mail on the following:

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