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MAINE SUPREME JUDICIAL MOOT COURT  
SITTING AS THE LAW COURT  
DOCKET NO. KEN-18-367

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JACK SPRAT,  
Plaintiff-Appellant

v.

SECRETARY OF STATE MATTHEW DUNLAP *et al.*,  
Defendants-Appellees

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ON APPEAL FROM AN ORDER OF  
THE KENNEBEC COUNTY SUPERIOR COURT

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BRIEF OF APPELLANT

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### **Statement of Facts**

The facts are undisputed: Mr. Sprat received 37.6% of the first round votes in the five-candidate race for governor – 5,000 more than the next candidate. But 21-A M.R.S.A. §723-A mandates a majority winner, so the State conducted three unprecedented additional tabulations, eliminating all but the top two candidates and redistributing 116,500 ballots. The “final tabulation” was 48.1% for Mr. Sprat and 51.9% for Ms. O’Hill. For the first time since 1880 the State had nullified the plurality winner and enforced a majority vote requirement.

### **Issue Presented**

Whether a statutory vote tabulation system with the purpose and effect of requiring a majority vote for election of the governor violates the “choice by plurality” provision of the Maine Constitution enacted specifically to put an end to the majority requirement?

### **Standard of Review**

The Court follows a “liberal interpretation” of the Constitution to ensure that its purposes are given their full effect. *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983). A duly enacted statute is presumed constitutional. *Maine Beer & Wine Wholesalers Ass’n v. State*, 619 A.2d 94, 97 (Me. 1993). The presumption, however, “is not absolute; legislation which violates an express mandate of the Constitution is invalid even though . . . expedient . . .” *Id.* Moreover, the “duty of the court to maintain the Constitution as the fundamental law of the State is imperative and unceasing.” *State v. Butler*, 105 Me. 91, 73 A. 560 (Me. 1909).

### **Argument**

#### **1. The Majority Vote Rule In 21-A M.R.S.A. §723-A Is Invalid Because The Plain Language of the Constitution Requires A Plurality Vote Rule.**

The Maine Constitution is clear: the rule for deciding gubernatorial elections is

the plurality vote rule, not the majority vote rule. The Constitution mandates that the candidate “cho[sen] by plurality of all of the votes” shall be declared the governor-elect. Me. Const. art V, pt. 1 § 3 (hereinafter “Section 3”) (Appendix 1). The 2018 election, however, was not conducted as a plurality choice. Section §723-A imposed a majority requirement in violation of the Constitution and the election result is therefore invalid.

A plurality choice rule is a specific standard that must allow for the possibility that a winner will be named with less than half the total votes. Under the plurality rule, a winner is evident after the initial vote count, and no further tabulations are necessary or appropriate. In contrast, a majority vote rule such as “ranked choice voting” (RCV) or “instant runoff voting” (IRV) precludes the possibility of a minority winner. Under the majority vote rule, if no candidate receives over one-half of the initial tally a “failed vote” has occurred, and further proceedings such as a runoff election, a decision by the legislature, or additional tabulations are required.

“Choice by plurality” in Section 3 plainly refers to the plurality vote rule. This interpretation is especially obvious where “choice by plurality” was enacted<sup>1</sup> to replace “choice by majority.” (See p. 4-5 *infra*.) This gives “choice by plurality” its full meaning as the people’s decision among fundamentally different standards. Any other view makes “by plurality” mere surplusage in violation of the venerable maxim *verba cum effectu sunt accipienda*.<sup>2</sup>

The State has argued that §723-A does not violate the “choice by plurality” rule because the statute does not in fact require a majority vote. But §723-A is clearly a

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<sup>1</sup> “Majority” appears in the Constitution eighteen times. “Plurality” appears seven times.

<sup>2</sup> “Words should be taken so as to have an effect.” BALLENTIN’S LAW DICTIONARY 513 (3d Ed. 1969); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat) 122, 203 (1819) (words in the Constitution are to be given their full meaning absent an “absurd” or “monstrous” result.)

majority requirement as a matter of basic mathematics. Under §723-A(2)(A) lower-ranked candidates are eliminated until only two remain. One of the two candidates therefore must hold a majority of the remaining votes.<sup>3</sup> The State disputes this, arguing that if the “exhausted” ballots are considered, the winner’s total may amount to less than half of the overall total, making §723-A a plurality vote rule. But exhausted ballots by definition do not name an eligible person and should be disregarded when determining whether a choice by majority has occurred. Opinion of Justices, 7 Me. 497, 7 Greenl. 497 (1831); *see also Dudum v. Arntz*, 640 F.3d 1098, 1110 (9<sup>th</sup> Cir. 2011) (“exhausted ballots” are not “operative” ballots); *but see Heald v. Payson*, 85 A. 576, 110 Me. 204 (1913) (ballots for person who was eligible but not properly nominated may deprive opponent of plurality). In other words, it is not the number of exhausted ballots that matters. It is the number of candidates. Among the eligible candidates, §723-A forces a majority outcome. Accordingly, the Secretary of State, Maine’s highest election official, describes the system in §723-A as a majority vote rule. *See* Me. Sec’y of State, Report on the Feasibility of Instant Runoff Voting (IRV), Jan.15, 2005 (“a candidate needs a majority of votes to be elected”).<sup>4</sup> Indeed, ensuring majority outcomes is the primary motivation behind IRV.<sup>5</sup>

The State has also argued that “majority” means nothing different than “plurality,” since a majority vote recipient necessarily receives a plurality of votes. No one doubts such a mathematical truism, but it does not follow that a majority vote rule

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<sup>3</sup> The unlikely possibility of a tie in the statewide vote is addressed separately in Section 3.

<sup>4</sup> *See also Hearings on LD 265 Before the Joint Standing Committee on Legal and Veterans’ Affairs* (Feb. 7, 2005) (document entitled “InstantRunOff.com” stating that IRV “guarantees the winning candidate has a majority of the votes (instead of a plurality) . . . .” (Law and Legislative Reference Library).

<sup>5</sup> The claim that “RCV ensures a majority winner” appears first on a list of reasons why some members of the public support it. *Hearings on LD 518 Before the Joint Standing Committee on Legal and Veterans’ Affairs* (Apr. 22, 2013) (testimony of the League of Women Voters of Maine) (Law and Legislative Reference Library).

is also a plurality vote rule. The two are mutually exclusive rules for election outcomes. “Choice by plurality” allows a candidate to win with a plurality, and it is immaterial whether that plurality happens to be a majority. With “choice by majority” a minority winner is impossible. The State’s attempt to equate them deprives the “choice by plurality” clause of its natural meaning as understood in 1880.<sup>6</sup> The State’s view that any approach is permissible under Section 3 is the farthest thing from a “liberal interpretation,” *Allen v. Quinn*, 459 A.2d at 1102, of the Constitution.

The State’s third argument is that Mr. Sprat’s first round plurality consisted only of “preferences” not “votes.” According to the State, only the fourth-round tabulation is “the vote.” This radical reinterpretation of the term “vote” has no support in law or logic. When a voter marks the ballot next to the voter’s top choice, that mark is unquestionably a “vote.” The State’s argument also contradicts §723-A itself, which affirms at least eight times<sup>7</sup> that a “vote” is the voter’s choice expressed *in each round*, not only the final tally. Voters did not merely “prefer” or “rank” Mr. Sprat – they voted for him. The difference is dispositive.

## **2. The History Of Amendment XXIV Demonstrates That It Was Intended To Put An End To The Majority Vote Rule For Election Of The Governor.**

The Court need not review the history of Section 3 since the “choice by plurality” provision is clear. But events of 1879-1880 plainly confirm that Amendment XXIV was intended to replace the majority vote rule with the plurality vote rule.

Prior to 1880 the Constitution provided that any election where no candidate

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<sup>6</sup> Thus, a writer in the Daily Eastern Argus six days after adoption of Amendment XXIV understood that a candidate with a plurality but not a majority nonetheless must be declared the winner. *Blaine’s Blarney*, Daily Eastern Argus, Sept. 17, 1880, at 2 (referring to Amendment XXIV as the “plurality elect” system.)

<sup>7</sup> “[F]ewest votes in a round;” “In each round the number of votes . . . must be counted.” §723-A. Notably, the number of first round “votes” credited to a political party nominee remains the rule for all other statutory and constitutional purposes. §723-A(5)

obtained a majority (i.e. a “failed vote”) would be resolved by a Joint Session of the House and Senate. (*See* Appendix 2). Before 1878 Maine had few occasions to test this system because Republicans handily won 22 straight races. *See Maine: A History* at 593-629 [Louis Clinton Hatch ed., Centennial Edition 1919] (hereinafter “Hatch”).

Once the “choice by majority” requirement was triggered, however, it failed in spectacular fashion, causing “the gravest constitutional crisis” Maine has ever faced. Marshall J. Tinkle, *The Maine State Constitution* 12 (2011). In 1878 the emerging Greenback Party pulled enough gubernatorial votes to block either major party from a majority. A “failed vote” occurred, and the election was thrown to the legislature. After acrimonious proceedings, Democrat Alonzo Garcelon was named governor. Republicans were livid. Hatch at 593-629. The election of September 1879 was even more contentious. The public vote again produced no “choice by majority,” though Republican Daniel Davis was tantalizingly close, with 49.69 percent of the ballots. *Id.* at 599. The contest was again thrown to the legislature, where Republicans demanded that Davis be recognized as governor. Democrats coalesced behind Greenback nominee Joseph Smith, and tension rapidly escalated to the brink of civil war. *Id.* at 600-610. Mobs and militias roamed Augusta. The State Seal was secreted away, while authorities requisitioned munitions from the Bangor armory. *Id.* General Joshua Chamberlain arrived to keep peace in the capitol – and was then nearly kidnapped. *Id.* at 611. In comparison, *Bush v. Gore* was a stroll on the beach.

This Court played a crucial role in averting bloodshed, issuing three opinions that resolved numerous election-related issues and allowed Davis to take office as Maine’s 37<sup>th</sup> governor. The Court’s final ruling, *Opinion of the Justices, 70 Me. 600 (Me. 1880)*, was issued on January 24, 1880, and *just three days later* the legislature endorsed a constitutional amendment entitled “ELECTION OF GOVERNOR BY PLURALITY

VOTE.” (Appendix 3.)<sup>8</sup> It proposed to change only one word – replacing “majority” with “plurality” in Section 3. Voters approved Amendment XXIV on September 13, 1880.

All Mainers understood that the crisis of 1879-1880 was a direct result of the majority vote rule. Republicans also believed that the plurality standard would deprive Greenbacks and others<sup>9</sup> of their leverage and restore the Republicans’ grip on power.<sup>10</sup> The indisputable purpose of Amendment XXIV was to terminate the failed majority vote rule and replace it with the plurality vote rule. *See Moore v. Election Comm’rs of Cambridge*, 35 N.E.2d 222, 238 (Mass. 1941) (analogous provision was intended “to do away with majority voting . . .”)

Section 723-A would reverse that decision and restore the majority vote rule. The statute directly conflicts with the Constitution and cannot be enforced.<sup>11</sup>

### Conclusion

The majority vote requirement in §723-A does not allow for a “choice by plurality” and is therefore unconstitutional. Appellant respectfully requests this Court to invalidate the final tabulation and order the Secretary of State to lay the list of first round votes before the Legislature as required by Section 3. Alternatively, appellant asks the Court to nullify the November 6, 2018 election of governor and order a new election that complies with the plurality rule of the Maine Constitution.

March 10, 2014

John Brautigam  
*For Appellant*

<sup>8</sup> “Resolves providing for an amendment of the Constitution, so as to elect the Governor by a plurality, instead of a Majority, of Votes.” Resolves 1880, ch. 159.

<sup>9</sup> Another third party threatening the status quo was the Temperance Party. Hatch at 629

<sup>10</sup> They were correct, but it took a few years. In 1881 the Democrats and Greenbacks temporarily circumvented the plurality rule by jointly nominating Harris M. Plaisted, who was then elected as a “fusion” candidate. But Republicans won the next nine elections and the Greenbacks vanished into the history books. Hatch at 620-629.

<sup>11</sup> *See Op. Me. Att’y Gen. 06-04*, p. 11 (statute requiring a super-majority would be invalid where the constitutional requirement is a simple majority).

## Appendix 1

### Me. Const. art V, pt. 1 § 3

**Section 3. Election; votes to be returned to Secretary of State; Secretary of State to lay lists before the Senate and House of Representatives; provision in case of tie.** 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. Copies of lists of votes shall be sealed and returned to the secretary's office in the same manner and at the same time as those for Senators. 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, and each member of said bodies having a single vote, shall elect one of said 2 persons having so received an equal number of votes and the person so elected by the Senate and House of Representatives shall be declared the Governor.



## Appendix 2

### Section 3 as of Election Day, September 13, 1879 (prior to the Amendment XXIV)

“SEC. 3. The meetings for election of Governor shall be notified, held and regulated and votes shall be received, sorted, counted, declared and recorded, in the same manner as those for senators and representatives. They shall be sealed and returned into the secretary's office in the same manner and at the same time as those for senators. And the secretary of state for the time being shall, on the first Wednesday of January, then next, lay the lists before the Senate and House of Representatives, and also the lists of votes of citizens in the military service returned into the secretary's office, to be by them examined, and, in case of a choice by majority of all of the votes returned, they shall declare and publish the same. But if 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 and make return of their names to the Senate, of whom the Senate shall, by ballot, elect one, who shall be declared the Governor.”

### **Appendix 3**

#### **Amendment XXIV to the Maine Constitution**

##### **“ELECTION OF GOVERNOR BY PLURALITY VOTE.**

The Constitution of this State shall be amended, in the third section of the first part of article five, by striking out the word ‘majority,’ wherever it occurs therein, and inserting in the place thereof the word ‘plurality.’”

Passed by legislative resolve January 27, 1880

Adopted by vote of the people September 13, 1880

Proclaimed by Governor Davis November 9, 1880

## Appendix 4

### Round-by-Round Tally

	1st Round	2nd Round	3rd Round	Final Round
Sprat (D)	220,000	231,500	231,500	265,500
O'Hill (R)	215,000	215,000	235,000	286,000
Gretel (U)	110,000	110,000	110,000	
Lamb (L)	25,000	25,000		
Horner (G)	15,000			
Exhausted		3,500	8,500	33,500
	585,000	585,000	585,000	585,000