

Ranked-Choice Voting

Maine Republican Party v. Dunlap
(Jon D. Levy, 1:18-cv-179) and Baber v. Dunlap
(Lance E. Walker, 1:18-cv-465) (D. Me.)

For federal elections, Maine used ranked-choice voting in 2018, a voting method that provides instant runoff votes if no candidate gets a majority of first-choice votes. In May, a political party sought a federal injunction against the use of ranked-choice voting in its primary election. A federal district judge denied the party relief. In November, neither major-party candidate earned a majority of first-place votes in a congressional election. The plurality winner's efforts at a federal injunction against counting second and third choices of voters who ranked independent candidates first were unsuccessful.

Subject: Voting procedures. *Topics:* Instant runoff; enjoining certification; party procedures; primary election; intervention.

Ranked-choice voting functions as an instant runoff election.¹ In addition to selecting a top choice for an office, a voter may rank order other choices so that the voter's preference can be counted even if the voter's top choice does not receive enough votes to have a chance of winning.² By initiative, Maine voters decided that Maine would use ranked-choice voting for elections beginning in 2018.³ If there are more than two candidates and no candidate receives a majority of the votes, then candidates beginning with the last-place candidate are eliminated and votes for eliminated candidates are allocated to voters' top choices among candidates not eliminated until one candidate has a majority.⁴

In 2018, a district judge determined that ranked-choice voting in a primary election did not improperly infringe on a political party's association rights.⁵ After ranked-choice voting procedures determined the winner of a congressional race in the general election, the defeated incumbent's federal suit to declare him the plurality winner instead was also unsuccessful.⁶

1. See *Me. Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 205 (D. Me. 2018); Opinion at 3, 6, *Baber v. Dunlap*, No. 1:18-cv-465 (D. Me. Dec. 13, 2018), D.E. 64 [hereinafter *Baber Final Opinion*], 2018 WL 6571202.

2. See Kate Taylor & Liam Stack, *Maine's Voting Method Puts B.O.P. Seat in Jeopardy*, N.Y. Times, Nov. 14, 2018, at A18.

3. Me. Rev. Stat. tit. 21-A, § 723-A; see *Me. Senate v. Sec'y of State*, 2018 Me. 52, 183 A.3d 749, 751 (2018); Opinion of the Justices, 2017 Me. 100, 162 A.3d 188, 197 (2017); see also *Baber v. Dunlap*, 349 F. Supp. 3d 68, 72 (D. Me. 2018).

4. Me. Rev. Stat. tit. 21-A, § 723-A; see *Opinion of the Justices*, 2017 Me. 100, 162 A.3d at 204.

5. *Me. Republican Party*, 324 F. Supp. 3d 202.

6. *Baber Final Opinion*, *supra* note 1; *Baber*, 349 F. Supp. 3d 68.

A Primary Election

The Maine Republican Party filed a federal complaint against Maine’s secretary of state on Friday, May 4, 2018, in the District of Maine’s Bangor courthouse, asking the court “to declare the Act to Establish Ranked-Choice Voting (the ‘RCV Act’), to be unconstitutional as applied to the Party’s process for nominating its candidates for federal and state elected office.”⁷

With their complaint, the party filed motions for a preliminary injunction permitting the party to select its nominees in a June 12 primary election by traditional plurality winner⁸ with expedited briefing and a nonevidentiary hearing.⁹

Judge Jon D. Levy held a telephonic status conference on Monday¹⁰ and set the case for hearing on May 23.¹¹

Also on Monday, May 7, the Committee on Ranked-Choice Voting, “the public interest group [that] drafted the law, campaigned for its passage in 2016 and litigated its constitutionality in Maine state court,” moved to intervene in the case.¹² On May 16, Judge Levy denied intervention because the committee did not show that its defense of ranked-choice voting would differ substantially from the secretary’s, and adding an additional party could delay resolution of the preliminary injunction motion.¹³

Six days after the May 23 hearing, Judge Levy denied the party an injunction.¹⁴ Judge Levy acknowledged “the fact that ranked-choice voting may produce a standard-bearer for a particular office who is different than the candidate who would have won the primary had a simple plurality been required.”¹⁵ On the other hand, Maine has an interest in establishing a uniform set of rules for all parties and for both primary and general elections.¹⁶

Because the RCV Act does not regulate who may participate in a primary or intrude on the Maine Republican Party’s internal governance or processes, its effect on Maine’s primary process does not impose a severe or heavy burden on the Maine Republican Party’s associational rights.

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7. Complaint at 1, *Me. Republican Party v. Dunlap*, No. 1:18-cv-179 (D. Me. May 4, 2018), D.E. 1; see Christopher Cousins, *Maine Republicans Take Defiant Stand Against Ranked-Choice Voting*, Bangor Daily News, May 4, 2018.

8. Preliminary Injunction Motion, *Me. Republican Party*, No. 1:18-cv-179 (D. Me. May 4, 2018), D.E. 3.

9. Motion, *id.* (May 4, 2018), D.E. 4.

10. Docket Sheet, *id.* (May 4, 2018) (D.E. 7).

11. Order, *id.* (May 7, 2018), D.E. 10.

12. Intervention Motion, *id.* (May 7, 2018), D.E. 9.

13. Opinion, *id.* (May 16, 2018), D.E. 16, 2018 WL 2248583.

14. *Me. Republican Party v. Dunlap*, 324 F. Supp. 3d 202 (D. Me. 2018); see Michael Shepherd, *Maine GOP Must Use Ranked-Choice Voting in Primary, Judge Rules*, Bangor Daily News, May 29, 2018.

15. *Me. Republican Party*, 324 F. Supp. 3d at 211.

16. *Id.* at 212.

The RCV Act also advances the state interest in requiring that candidates for public office demonstrate a preliminary showing of substantial support to appear on the general election ballot.¹⁷

A General Election

The November 6 general election gave the Republican incumbent member of the U.S. House of Representatives from Maine's Second District 46.3% of the first-choice vote and the Democratic challenger 45.6%; two additional challengers split the remaining 8.1%.¹⁸ Some observers expected the Democratic challenger to prevail as a result of the instant runoff.¹⁹

On November 13, the incumbent and three voters who voted for him and did not cast ranked votes for any other candidate filed a federal complaint against the secretary in the District of Maine seeking the incumbent's right to a plurality victory.²⁰ With their complaint, the plaintiffs filed motions for a preliminary injunction²¹ and, later in the day, a temporary restraining order.²²

On that same day, the Democratic challenger filed,²³ and Judge Lance E. Walker granted,²⁴ an unopposed motion to intervene. The third-place finisher and two voters filed an unopposed motion to intervene on the next day stating that the candidate "entered the race with the expectation that Maine's ranked-choice voting procedures ensured that an independent candidate for federal office would never become a so-called 'spoiler' by diverting votes from either major party."²⁵ Judge Walker granted the second intervention motion on November 15.²⁶

17. *Id.* at 212–13.

18. *Baber v. Dunlap*, 349 F. Supp. 3d 68, 74 (D. Me. 2018); see *Baber* Final Opinion, *supra* note 1, at 4.

19. See Michael Shepherd, *Poliquin Sues Dunlap to Stop Ranked-Choice Count in Maine's 2nd District*, Bangor Daily News, Nov. 13, 2018 ("[Democrat] Golden is favored to win when [independent] Bond's and [independent] Hoar's votes are reallocated, according to an Election Day exit poll of 534 voters in the 2nd District conducted by the *Bangor Daily News*, FairVote and Colby College."). But see *Baber*, 349 F. Supp. 3d at 74 ("Neither Plaintiffs nor Defendant has suggested that the outcome of the RCV election is known at this time.").

20. Complaint, *Baber v. Dunlap*, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 1; *Baber*, 349 F. Supp. 3d at 72–73; see Amended Complaint, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 27, 2018), D.E. 36; see also Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, N.Y. Times, Nov. 14, 2018, at A18; Shepherd, *supra* note 19.

21. Preliminary Injunction Motion, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 3.

22. Temporary Restraining Order Motion, *id.* (Nov. 13, 2018), D.E. 13 (arguing that immediate relief was necessary because the secretary did not cease plans for counting the ranked votes upon the plaintiffs' filing their complaint); see *Baber*, 349 F. Supp. 3d at 76; see also Motion to Consolidate Hearing on Preliminary Injunction and Temporary Restraining Order, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 14, 2018), D.E. 19.

23. Intervention Motion, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 13, 2018), D.E. 5.

24. Docket Sheet, *id.* (Nov. 13, 2018) [hereinafter *Baber* Docket Sheet] (D.E. 11).

25. Intervention Motion, *id.* (Nov. 14, 2018), D.E. 23.

26. *Baber* Docket Sheet, *supra* note 24 (D.E. 28).

Judge Walker heard the case on the morning of November 14.²⁷ On the next day, he ruled that the plaintiffs were not entitled to a temporary restraining order and the case would proceed to consideration of a preliminary injunction in the normal course.²⁸ Judge Walker reasoned that although the plaintiffs' legal arguments showed that statutes and courts have permitted elections by plurality, it did not follow that plurality victors were entitled to office in opposition to a procedure for determining the preference of a majority.²⁹ "Moreover, for this Court to change the rules of the election, after the votes have been cast, could well offend due process."³⁰ Judge Walker set the case for hearing again on December 5.³¹

After consideration of the ranked choices of voters who ranked either of the third- and fourth-place finishers, The Democratic candidate had 50.6% of the vote, the Republican incumbent and plaintiff had 49.4% of the vote, and the secretary certified the incumbent as defeated.³²

At the December 5 hearing, Judge Walker granted the plaintiffs' motion to consolidate consideration of a preliminary injunction with the final merits of the case.³³ Judge Walker determined on December 13 that the plaintiffs had not shown that Maine was legally forbidden from using ranked-choice voting to determine a majority preference.³⁴

27. Transcript, *Baber*, No. 1:18-cv-465 (D. Me. Nov. 14, 2018, filed Nov. 17, 2018), D.E. 32; *Baber* Docket Sheet, *supra* note 24 (D.E. 25); *Baber*, 349 F. Supp. 3d at 73; see Judy Harrison, *Judge Denies Poliquin's Request to Stop Ranked-Choice Count as Decision Nears*, Bangor Daily News, Nov. 15, 2018 (reporting that the hearing lasted two and a half hours).

28. *Baber*, 349 F. Supp. 3d at 73; see Jon Kamp, *Democrat Declared Winner in Maine*, Wall St. J., Nov. 16, 2018, at A4.

29. *Baber*, 349 F. Supp. 3d at 75.

30. *Id.* at 76.

31. *Baber* Docket Sheet, *supra* note 24 (D.E. 31, 53); *Baber* Final Opinion, *supra* note 1, at 6; see Judy Harrison, *Dunlap Sends Election Certification to House Naming Golden 2nd District Winner*, Bangor Daily News, Dec. 19, 2018.

32. *Baber* Final Opinion, *supra* note 1, at 5–6; see Michael Shepherd, *Golden Defeats Poliquin in Contested 2nd District Ranked-Choice Count*, Bangor Daily News, Nov. 15, 2018 ("[Democrat] Golden received 44.5 percent of the [independent] Bond or [independent] Hoar voters, with 20.4 percent going to [incumbent Republican] Poliquin and 35.1 percent of them expressing no preference between the party candidates."); see also Judy Harrison, *Poliquin Asks Judge to Order New Election If He's Not Declared Winner in 2nd District Race*, Bangor Daily News, Nov. 28, 2018; Kamp, *supra* note 28.

33. *Baber* Docket Sheet, *supra* note 24 (D.E. 53, 54); *Baber* Final Opinion, *supra* note 1, at 1.

34. *Baber* Final Opinion, *supra* note 1; see Judy Harrison, *Judge Rejects Poliquin's Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 13, 2018.

On December 21, the court of appeals declined to issue an injunction pending appeal,³⁵ and the appeal was voluntarily dismissed a week later.³⁶

35. Order, *Baber v. Dunlap*, No. 18-2250 (1st Cir. Dec. 21, 2018); see Judy Harrison, *1st Circuit Ends Poliquin's Efforts to Keep House Seat*, Bangor Daily News, Dec. 21, 2018; see also Michael Shepherd, *Poliquin to Appeal Ruling That Rejected His Legal Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 17, 2018.

36. Judgment, *Baber*, No. 18-2250 (1st Cir. Dec. 28, 2018); see Michael Shepherd, *Poliquin Announces He Is Giving Up Legal Challenge to Ranked-Choice Voting*, Bangor Daily News, Dec. 24, 2018; Kate Taylor, *Maine Republican Concedes, Ending Voting Law Dispute*, N.Y. Times, Dec. 25, 2018, at A16.