JOINT STANDING COMMITTEE ON VETERANS AND LEGAL AFFAIRS

LD 1646 "An Act To Bring Maine's Ranked-choice Voting Law into Constitutional Compliance"
Testimony Provided by Julie L. Flynn, Deputy Secretary of State, October 16, 2017

Senator Mason, Representative Luchini and Members of the Committee:

The Secretary of State is neither for nor against this legislation but would like to provide information about the issues surrounding the implementation of Ranked-choice Voting (RCV). I'd like to start by emphasizing that the Secretary of State is committed to implementing the requirements of all election laws, including RCV, in the most efficient manner as possible, while still preserving the integrity of the process, so that voters will have confidence in the outcome of the election. In fact, that has been my professional mission in over 29 years of election administration in Maine, with almost 23 years administering statewide elections for the Secretary of State.

Implementing RCV in Maine involves a unique set of circumstances, unmatched in any RCV implementation in the US to date – a statewide implementation, with up to 7 offices and 4 party primaries, each with up to 350 separate ballot styles (different combinations of Congressional, State Senate, State House and County Commissioner districts), in a large, rural state with no county or regional election authority. Five hundred (500) individual municipalities conduct their own elections and sort, count and declare votes and report to the Secretary of State in paper format within 3 business days after the election.

Our assessments of necessary rules, procedures, and associated costs for implementing RCV, represent our best professional judgement of what is needed for administration in Maine. Over time, it may be possible to find efficiencies that could potentially reduce these costs. However, we would caution the Legislature not to cut corners on this historic, initial application. Once voter confidence is lost, it is extremely hard to regain, and we could feel the effects of a poor implementation for decades. Adequate funding is essential to successful administration of RCV.

We believe that the Legislature needs to do 4 things to secure a successful implementation of RCV for the June 12, 2018 Primary Election:

1. **Take emergency action.** Enact emergency legislation to ensure that conforming amendments to the statutes, rulemaking authority and adequate funding are available immediately.
2. **Enact conforming amendments.** Further amend Chapter 9 of Title 21-A to remove conflicts between the laws governing non-RCV versus RCV ballot counting and tabulation.
3. **Provide rulemaking authority.** Give the Secretary of State the rulemaking authority to address issues not easily provided for in statute, such as how to count certain ballot markings or how to conduct RCV recounts.
4. **Appropriate funds for implementation.** Provide the necessary funding as proposed by the Secretary of State and State Police in the fiscal note attached to LD 1646.

Why is emergency action needed?

- There is an RCV law in effect now that must be implemented for the 2018 Primary Elections.
- The law doesn't adequately address the RCV ballot counting or tabulation processes; and where it does, there are inconsistencies between existing non-RCV and RCV provisions. And there is no rulemaking authority for the Secretary of State to specify those processes. LD 1646 does grant the necessary rulemaking authority but some statutory changes are needed as well.
- No funds have been appropriated for RCV implementation, although a fiscal note is attached to LD 1646.
- Non-emergency action on this or any amended version of this bill would not take effect until 90 days after adjournment of the Special Session and would be subject to the Governor's or a People's Veto. Even if there is no veto, without an emergency preamble the statutory amendments, rulemaking authority and funding would not be effective until late January 2018. Emergency rules would have to be adopted in order to be in place before the election. Truncating the rulemaking process (with reduced opportunity for public comment) runs the risk of not gaining broad acceptance of the procedures ultimately adopted.
- A Governor's Veto would leave us in the same precarious position as now – with an incomplete law, no rulemaking authority and no funding for implementation.
- A successful People's Veto would be even worse because it would force a citizens' vote on the new law at the same June 2018 election during which we would be required to implement RCV under existing law for offices on the primary ballot. This means we would have to implement RCV with the same incomplete law, no rulemaking authority and no funding for implementation – but with the added confusion of conducting an election to veto the law at the same time as the first RCV election.

What conforming amendments (to Title 21-A) are needed?

- Section 1(27-C) – definition of elections determined by RCV – clarify that RCV applies only when there are more than 2 candidates (either listed on the ballot or as a declared write-in) for a particular office.
- Section 601 – ballot layout – address differences in how RCV ballots will be prepared.
- Section 605-A(2)(A) – voting instruction poster – authorize a separate instruction poster for RCV.
- Section 691(1) and 692(1) – marking ballots for primary and general elections - address marking ballots for RCV elections.
- Section 695 – ballot counting procedures – specify the procedures for RCV either in this section, OR state that this section is for non-RCV procedures and specify the RCV counting procedures in another section of law or authorize those procedures to be developed by RCV Rules.
- Section 696, 1st ¶ - counting of certain ballots – add language such as "except to the extent they may be modified by Ranked-choice voting".
- Section 696(2) – determining invalid votes – add cross-reference to RCV Rules.
- Section 698 – packaging RCV ballots – if RCV ballots are printed separately from non-RCV ballots, specify that municipalities with more than 750 ballots cast (i.e., what will fit into 1 tamper-proof container) must package RCV and non-RCV ballots in separate, marked, tamper-proof containers.
- Section 700 – posting unofficial results – specify these would be first choices only for RCV.
- Section 711 – reporting results to State - specify these would be first choices only for RCV.

- Section 722(1) – State tabulation of results – for RCV results, specify that the Secretary of State shall tally or count (and then tabulate) RCV results OR amend this section to say "except for RCV elections" and enact a new section for RCV counting, or cross reference to RCV Rules for counting process.
- Section 723(1) – determination of primary election – change from plurality to majority as determined by RCV for certain offices.
- Section 723-A – determination of RCV winner – change "tabulation" to "counting" in several places.
- Section 723-A(1)(D) – definition of exhausted ballot – add cross-reference to RCV Rules.
- Section 723-A(2) – RCV counting procedures – put more detail here or authorize in RCV Rules.
- Section 723(A)(3) – determination of ties – substitute a reference to Section 732.

Why is rulemaking needed?

Rules are the most effective mechanism to flesh out details in a statutory scheme, such as by specifying administrative steps necessary to effectuate policy decisions made in statute. There is a need for rulemaking authority in this case because many important details about the counting process for RCV are not fully spelled out in the existing law. For example, although Section 723-A(1)(D) defines when an RCV ballot is "exhausted", it does not address how to handle all the different ways that RCV ballots might be marked by voters (not in accordance with instructions), and how those different markings should be counted – e.g., whether the ballot is counted for the next continuing candidate or whether the ballot is exhausted and not counted. This can be addressed in rules in a more precise and straightforward way than a narrative definition in statute. In order to implement an RCV tabulation algorithm, the counting procedures need to be very clear and precise, so the 3rd party vendor that we hire to write the software knows exactly what must be coded; we know how to test the algorithm to verify it is performing the rounds of counting accurately; and the public knows how to mark their ballots so as to avoid having their ballot be "exhausted".

The recount process for an RCV election would either have to be addressed in an amendment to the Recount Rules for non-RCV elections, or adopted as part of an RCV-specific rule. At the present time, we do not know of an RCV hand-counting procedure that could be implemented for a statewide recount in an RCV election. It has been suggested that we could obtain a town-by-town report of the Cast Vote Records from each RCV race, and sort and count the actual ballots by each Cast Vote Records permutation to verify that the count of actual ballots matches the results reported for each town. Although we don't have a final answer from the tabulation system vendor, Election Systems & Software (ES&S), early indications are that we cannot get a town-by-town report of the Cast Vote Records from the Election Reporting Manager (ERM) software we would use to aggregate the Cast Vote Records for tabulation by the 3rd party algorithm.

However, rules cannot correct statutory conflicts, so those would need to be addressed by amendments to the laws.

What funding is needed to implement RCV?

A fiscal note has been attached to the initiative since it was approved for circulation in 2014. Based on information supplied by the Secretary of State and the Maine State Police in 2014, the Office of Fiscal and Program Review prepared a fiscal impact statement for the RCV initiative, which was printed on the petition form before its circulation to the voters as required by statute (Title 21-A, § 901(5)). Presumably, the voters who signed the petition were aware of the fiscal impact when they did so. This

fiscal impact statement was printed in the *2016 Citizen's Guide to the Referendum Election* and thus was readily available for voters to review prior to voting on the initiative.

These costs were not included in the Department's 2017-18 and 2018-19 biennial budget proposal because that document had to be submitted to the Governor months before the November 2016 election. Instead, we provided updated fiscal information to the 128th Legislature in the first Regular Session, in response to the various Committee reports resulting from LD 1624, "RESOLUTION, Proposing an Amendment to the Constitution of Maine To Implement Ranked-choice Voting" and LD 1625, "An Act To Repeal the Ranked-choice Voting Law", so that the funding would be attached to whatever proposal was adopted. Unfortunately, none of these Committee reports was adopted, so there was no appropriation for RCV implementation.

However, the Office of Fiscal and Program Review subsequently attached the fiscal note to LD 1646; it is printed as part of the legislative document. Several of the items in the fiscal note must be implemented prior to preparing ballots for the June 12, 2018 Primary Election; ballot preparation begins about 120 days prior to the election – i.e., by mid-February of 2018. **Without the funding, there is no way for the Secretary of State to enter into contracts for necessary additions to the ballot layout and counting and tabulation software that must be accomplished before the primary candidate filing deadline.**

Following is more detail on the costs that were included in the current fiscal note, many of which are the same as the costs that comprised the original fiscal note in 2014. The fiscal note is constructed so that it includes the funding that would be needed in the event that one or more statewide RCV races require additional rounds of counting by the Secretary of State. If no such statewide RCV count is needed, then the funds would remain unspent and would lapse into surplus at the end of the fiscal year. However, we will need to make upgrades to the tabulation software and secure additional equipment, *whether or not* the central RCV counting and statewide tabulation actually has to be done.

State Police costs. The State Police provided the Secretary of State with the costs to both the Highway Fund and the General Fund to retrieve and secure the USB memory devices from towns using the DS-200 tabulators and the hand-counted ballots from the rest of the 500 municipalities across the state. These include both personnel costs and fuel/vehicle costs. The personnel costs are for overtime for off-duty personnel to retrieve the materials and bring them to a secure location in the Augusta area. As a result of the ballot-tampering case in the early 1990's, the State Police are now charged with collection of election materials for recounts (for chain of custody purposes), and we believe the not-fully-counted RCV votes require no less security than fully counted and declared votes in a plurality election. Although there may be other methods of collecting the election materials that appear to be less costly, we do not believe there is a better, more timely way to collect the election materials and secure them pending the central RCV count that will preserve the chain of custody and thus the integrity of these materials.

Printing separate RCV and non-RCV ballots. The software used to design the ballots compatible with the DS-200 tabulators can accommodate a grid-style RCV ballot in either portrait or landscape orientation, and also can accommodate both RCV and non-RCV contests on the same ballot page; however, the Secretary of State has other policy reasons for printing two separate ballots. Section 604-A of Title 21-A authorizes the Secretary of State to make suitable arrangement for the printing of candidate, referendum and municipal election ballots on a single ballot *only if* "...the Secretary of State finds that it is in the interest of the election process and that it will not contribute to voter confusion or unreasonable administrative difficulties". We would apply this same principal to the consideration of combining RCV and non-RCV ballots on the same ballot page.

We often have several recounts after each candidate election, which we would now have to conduct during the same time period in which we might have to complete an initial central count of one or more RCV races. Having separate ballots would allow us to administer both processes concurrently. Additionally, to avoid confusion, we need to ensure that adequate voting instructions can be placed at the top or start of the ballot page containing each type of voting method. Depending on the number of races subject to RCV at a given election, and the number of candidates for each RCV office, it may not be possible to fit the additional RCV instructions and RCV races on one side of a ballot and fit the non-RCV instructions and races on the other side of the ballot.

Although many proponents downplay the likelihood of voter confusion from RCV, we believe the risks are much greater when both methods are included on the same ballot, particularly if we have to limit the ballot instructions in order to fit all the offices on the ballot in the order prescribed by law. We already plan to have a separate instruction poster in each voting booth to explain RCV ballot marking, as distinct from the current non-RCV instructions.

We will need to instruct voters not only on how to vote using both methods at the same election (i.e., voting for U.S. Senator versus voting for Governor at a General Election), but also to explain that at a primary election, the ranking of candidates for Governor is allowed while at the General Election, conducted a few months later, the voter can only vote for one gubernatorial candidate.

Additional DS200 units and peripherals. In order to facilitate the process of completing a central RCV count in a statewide race, we would like to lease and deploy DS200 tabulators to the 75 towns that currently hand-count their ballots and have more than 500 voters. It will be easier and faster for the State Police to retrieve USB memory devices as opposed to tamper-proof containers of ballots, and will require less secure storage. This would also reduce the number of towns that hand-count ballots by about one-third. The fiscal note also includes the cost of leasing an additional DS200 tabulator for about 35 towns that have only one tabulator and that conduct a local election at the same time as the state election. With RCV ballots, the software will not allow for the state and local ballots to be tabulated by the same machine, so the additional tabulators will take care of that problem. We also have included the cost of an additional USB memory device for every DS200 tabulator deployed so that results and Cast Vote Records can be saved to a redundant memory device. We want to ensure that if one device fails, we can retrieve the second memory device, rather than having to retrieve the ballots and rescan them.

These are the major cost components in the fiscal note, but I can provide additional details on any aspect of the fiscal note, or answer any other questions of the Committee, either now or at the work session.

Fiscal Note Summary for Ranked-Choice Voting Amendments
Prepared by the Office of the Secretary of State, June 16, 2017

Personnel Services Costs:

		FY17-18	FY18-19
State Police	010-16A -0291-01	50,140	50,140
	012-16A-0291-01	48,174	48,174
Total Personnel Services Costs:		**98,314**	**98,314**

All Other & Capital Expenditure Information:

Description	C& O Code	FY17-18	FY18-19
Memory Devices	010-29A-0692-01 5355 S/W Maint	61,710	
DS200 Additional Units	010-29A-0692-01 5355 S/W Maint	220,000	200,000
EMS Upgrade (EVS 5.1)	010-29A-0692-01 5355 S/W Maint	24,800	24,800
ERM Software/hardware	010-29A-0692-01 5355 S/W Maint	19,196	---
SOS Temp Help (2)	010-29A-0692-01 4900 General Ops	2,640	2,640
Fuel – State Police	010-16A-0291-01 4400 State Veh. Ops	25,786	25,786
Fuel – State Police	012-16A-0291-01 4400 State Veh. Ops	24,774	24,774
Ballot Printing Costs	010-29A-0692-01 4900 General Ops	228,000	260,000
ESS Model 850 lease	010-29A-0692-01 5355 S/W Maint	73,444	---
Lease Facilities – 2 weeks		5,000	5,000
Voter Outreach Costs		50,000	50,000
Total All Other:		**735,350**	**593,000**
Total Cost All Lines:		**833,664**	**691,314**
			1,524,978