

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: April 26, 2021

To: Veterans and Legal Affairs Committee

From: Janet Stocco, Legislative Analyst

LD 231 **An Act To Establish Open Primaries** (*Sen. Maxmin*)

LD 303 **An Act To Establish Semi-open Primary Elections To Allow Unenrolled Voters To Participate** (*Rep. Lookner*)

CURRENT LAW (*all citations are to Title 21-A of the Maine Revised Statutes; full text of statutes is attached*)

Who may vote in a primary?	<p>Default Rule: A voter must be enrolled in a party to vote in that party’s primary election. §340(1); §441(2) (presidential primaries).</p> <p>Exception - party choice: A party may notify the Secretary of State “of the enrollment qualifications” to participate in its primary elections. §441(2) (notice of presidential primary qualifications must be sent by Dec. 1 of year before election); §340(1) (notice of qualifications for other primaries must be sent by Feb. 1 of election year). One restriction exists, however: A party may not authorize the participation in their primaries of voters who have changed their party enrollment from one party to another (without also changing their municipality of registration) in the 15 days prior to the primary. §144(2).</p>
Party enrollment process.	<p>Default Rule: An unenrolled voter may enroll in a party at any time, up to and including on the day of an election. §142; §143-A.</p> <p>Exceptions - change in party enrollment:</p> <ul style="list-style-type: none"> • Switch parties: A voter who changes the voter’s party enrollment from one party to another may not vote in a primary election for 15 days—unless the voter concurrently switches the voter’s municipality of residence. §144(3). • Withdraw: A voter who withdraws from a party may re-enroll in the voter’s former party and vote in that party’s primary election but may <u>not</u> enroll in a new party for the first 15 days after unenrolling—unless the voter concurrently switches the voter’s municipality of residence. §145(2).
Consequence of party enrollment	<p>When an unenrolled voter enrolls in a party or when an enrolled voter switches parties, the voter may not withdraw from the new party or change the voter’s enrollment to a different party for a period of 3 months. §142(3). <i>See also</i> §144; §145.</p>

BILL SUMMARIES

- **Unenrolled voters may vote in a single party primary.** Both bills allow an unenrolled voter to vote in a single party’s primary election without enrolling in a political party. The Secretary of State is directed to establish procedures to ensure that the voter is offered a ballot for that primary election.

Restriction from current law - party withdrawal: The bills allow a voter who was previously enrolled in a party to withdraw from that party and vote in a different party’s primary election as an unenrolled voter. But, due to a provision of current law, a party voter may not take this

approach unless the withdrawal application is received on or before *the day before* the primary election. See [§145](#) (*attached*) (“When a voter files an application to withdraw enrollment on the day of a primary election, the application is deemed received the following business day.”).

- **Primaries affected.**
 - **LD 231 (Maxmin)** applies all primaries: county, state legislative, gubernatorial, congressional and presidential primary elections.
 - **LD 303 (Lookner)** applies to all **except** presidential primary elections.
- **Parties no longer choose who participates in their primaries.** Section 2 of each bill repeals [§340](#), which allows each political party to decide by February 1 of an election year “the enrollment qualifications” for participation in its primary elections. Section 4 of LD 231 similarly repeals [§441\(2\)](#), which allows each political party to decide by December 1 of the year before a presidential election “the enrollment qualifications” for participation in its presidential primary election.
- **Crossover voters prohibited.** Neither bill permits a voter who is enrolled in one party to vote in a different party’s primary election or presidential primary election.

SPONSOR-PROPOSED AMENDMENTS

LD 231 (Maxmin) — See Proposed Amendment, posted [here](#).

1. Require election clerks to track which party’s ballot is given to an unenrolled voter by: annotating the incoming voting list and, within 45 days of the election, including this information in the central voter registration system’s voter participation history.
2. Require unenrolled voters who participated in a party’s primary election to be considered members of the party for purposes of selecting and allocating delegates to the party’s state convention and the party’s national presidential nominating conventions.
3. Delay the effective date of the bill until January 1, 2024.

LD 303 (Lookner) — See Sponsor’s Testimony, posted [here](#).

1. Allow unenrolled voters to sign party candidate’s primary petitions.
2. Allow voters to sign party candidates’ primary petitions and unenrolled candidates’ nomination petitions electronically and to have those signatures verified electronically, similar to the system for making and verifying qualifying contributions under the MCEA.

ADDITIONAL INFORMATION

A. Related Pending Legislation.

LD 1121 (Baldacci)	Creates a jungle / “top two” primary: all candidates appear on the same primary ballot; all voters may select 1 candidate per office; and the top two candidates, tabulated using ranked-choice voting, proceed to the general election.
LD 1363 , §6 & §8 (Secretary of State)	Would limit political parties to allowing only unenrolled voters, not voters in other parties, to participate in their primary and presidential primary elections.

B. Other States.

NCSL’s January 2021 summary of state primary laws is attached to this bill analysis. For a more in-depth review of state primary laws, see NCSL’s November 2020 report: [Primaries: More than One Way to Find a Party Nominee](#).

Note that, because each state’s law is slightly different, NCSL’s characterization of a state’s primaries as closed, partially closed, partially open, open to unaffiliated voters, etc. may differ from other organizations’ characterization of those laws. For example, NCSL lists Maine as having primaries that are “Open to Unaffiliated Voters”—likely because Maine authorizes unenrolled voters to enroll in a party and vote in that party’s primary on election day—although other organizations may consider Maine’s current primaries to be “Semi-Closed”—because each party decides whether voters not enrolled in the party are authorized to participate in the primary. For a chart comparing each state’s primary system, with annotations explaining some of these nuances, *See* NCSL’s [State Primary Types Table](#).

C. Constitutional Issues.

The U.S. Supreme Court has held that the First and Fourteenth Amendments protect the associational rights of political parties, especially the process by which political parties select nominees who best represent the parties’ ideologies and preferences. The Supreme Court has never specifically decided whether a state law allowing voters who are unaffiliated with any political party to vote in one party’s primary election (as proposed in LD 231 and LD 303) violates those associational rights.

	Type of Primary	U.S. Supreme Court Decision
<i>Tashjian v. Republican Party of Connecticut</i> , 479 U.S. 208 (1986)	Closed primary: <u>only</u> registered members of a party were permitted to participate in a party primary.	Violated associational rights of the Republican Party of Connecticut, which wanted to associate with unenrolled voters by allowing them to participate in the party’s primary elections.
<i>California Democratic Party v. Jones</i> , 530 U.S. 567 (2000)	Partisan blanket primary: all party candidates were listed on a single ballot. All voters—any party or unenrolled—could vote for any one candidate. The candidate from each party who received the most votes would be <i>declared the nominee of that party</i> for the general election.	Violated associational rights of the four political parties that challenged the blanket primary law, by “forc[ing] political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival.” <i>Id.</i> at 577.
	Open primary: Each voter—any party or unenrolled—may choose to participate in a single party’s primary and choose that party’s nominees for multiple offices.	Court specifically did not decide whether open primaries violated the associational rights of parties, but observed that open primaries do require a voter to affiliate with the party— <i>i.e.</i> , by affirmatively choosing to participate in that party and only that party’s primary—at least for the duration of the election. <i>Id.</i> at 577 n.8.
<i>Clingman v. Beaver</i> , 544 U.S. 581 (2005) (Oklahoma case)	Semi-closed primary: A political party could choose either (1) to have only its own members vote in the primary or (2) to invite registered independents to vote in the primary. A party was not permitted to invite	Did not violate associational rights of the Libertarian party, which wanted to authorize members of other parties to participate in its primary. The Court was persuaded that the minimal burden imposed—voters must disaffiliate from

	<p>current members of other parties to vote in its primary, however.</p> <p><i>Note: The Secretary of State's proposal in LD 1363 is identical.</i></p>	<p>the other party before voting in the Libertarian primary—was justified by the state's interests in preserving the integrity of the primary system (the Libertarian party's 300 voters' wishes could have been overrun if a large number of other parties' voters participated in its primary) and in guarding against party raiding (manipulation of a party's primary election through cross-over votes from members of another party).</p>
<p><i>Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008)</i></p>	<p>Jungle primary (Top-2 primary): all candidates were listed on the same primary ballot and the ballot listed each candidate's self-identified party preference. All voters—any party or unenrolled—could vote for any one candidate. The top two candidates, regardless of each candidate's party preference, move on to the general election.</p> <p><i>Note: this is similar to Senator Baldacci's proposal in LD 1121, which also uses RCV in the primary.</i></p>	<p>Did not impermissibly burden the associational rights of parties because the jungle primary <i>did not claim to select a party's nominees</i> for office. The Court rejected the parties' argument that voters would be confused by a candidate's party preference listed on the ballot into believing that the candidate was the party's nominee or carried the party's endorsement. The Court noted that the law had not yet been implemented and it would be possible to draft the language of the ballot in a way that would prevent any such confusion.</p>

ISSUES FOR CONSIDERATION

A. Representative Bailey

Alternative approaches to primary elections: Although he testified in favor of both LD 231 and LD 303, Representative Bailey noted that, rather than opening primary elections to unaffiliated voters, the Committee could instead choose to:

- Establish nonpartisan voter registration and allow all voters to participate in any party's primary; or
- Allow parties to keep their primaries closed to non-party voters if the parties pay the cost to the State and the municipalities to administer their primary elections.

B. Representative Zager

MCEA primary funding: In part because semi-open primaries require primary candidates to reach out to more voters than Maine's current primary elections, Representative Zager suggested that the committee consider increasing the funding for Maine Clean Election Act candidates who run in a contested primary against a traditionally funded candidate.

C. Department of the Secretary of State

Process for voter to select primary ballot & election official to record the selection. The Department believes that the following procedures would be required to implement the law efficiently:

- Require an unenrolled voter to submit to the election clerk a signed form indicating the party primary in which that voter wishes to participate;
- Election clerk annotates the unenrolled voter's selection on the incoming voting list;
- After the election, municipal officials enter this information as part of the voter participation history information in the Central Voter Registration System (CVR), without changing the voter's registration status as an unenrolled voter in the CVR.

Costs: The Department anticipates the following additional costs if these bills are enacted:

- Increased primary ballot printing and delivery costs—For legislative and gubernatorial races, if 30% of the State's approximately 362,000 unenrolled voters participate in each party's primary election, there will be an increase of \$108,000 in ballot printing costs and between \$10,000 and \$15,000 in ballot delivery costs. For presidential primaries, there would be an increase of \$66,960 in ballot printing costs and between \$8,000 to \$10,000 in ballot delivery costs.
- Programming costs—currently, the CVR does not have a field for entering data regarding which primary ballot an unenrolled voter selects. Unless the bills' effective dates are delayed until 2024 or later, after a new CVR system has been purchased and customized for Maine, it will cost approximately \$10,000 to make this programming change.

D. Maine Town & City Clerks' Association

Voter education. The Association requested that the State conduct a public education and outreach program prior to implementing either bill, to help alleviate the following potential sources of confusion: (1) enrolled voters—including those in the Green Independent Party—may not vote in another party's primary election; (2) voters who change their party enrollment from one party to a new party within the 15 days preceding the election may not vote in the primary election; (3) voters who withdraw from a party do not have the option of selecting a different party's ballot in the primary election.

TECHNICAL AND DRAFTING ISSUES

1. Section 3 of each bill states that an *unenrolled voter's* participation in a primary election is “subject to the restrictions of §144.” This phrasing is somewhat confusing because [21-A M.R.S. §144](#) only imposes primary-voting limitations on a voter who *changes enrollment from one party to another*:

3. Restrictions during change of enrollment. Except [when the voter concurrently changes the voter's municipality of registration], a voter may not vote at a caucus, convention or primary election for 15 days after filing an application to change enrollment. A voter may sign a primary nomination petition during the 15-day period after filing an application to change enrollment, and the voter's signature must be counted as valid, as long as the 15-day period has elapsed by the time the petition is certified pursuant to section 335, subsection 7 and the voter otherwise is qualified to sign a petition for that office. ...

If the Committee wishes to similarly prevent a voter who has *withdrawn from a political party*—and is now an unenrolled voter—from voting in a party primary for 15 days after filing the application to withdraw enrollment, it should consider amending [21-A M.R.S. §145](#), the statute governing party withdrawals. In the 129th Legislature, the VLA Committee's majority (11-2) [amendment](#) to [LD 211, An Act To Open Maine's Primaries and Permit Unenrolled Voters to Cast Ballots in Primary Elections](#)—the original text of which was identical to LD 303—took this approach:

Sec. 2. 21-A MRSA §145, sub-§§3 and 4 are enacted to read:

3. Restrictions after withdrawal. A voter may not vote at a caucus, convention or primary election for 15 days after filing an application to withdraw enrollment unless the voter withdraws from enrollment at the same time that the voter changes the voter's voting residence as provided in subsection 4. A voter prohibited from voting at a caucus, convention or primary election for 15 days under this subsection may sign a primary nomination petition during the 15-day period after filing an application to change enrollment, and the voter's signature must be counted as valid, as long as the 15-day period has elapsed by the time the petition is certified pursuant to section 335, subsection 7 and the voter otherwise is qualified to sign a petition for that office.

4. Change of residence. When a voter who is enrolled in a party changes residence from one municipality to another and establishes a new voting residence, that voter may choose not to enroll in a party when the voter submits a new voter registration application.

2. Section 3 of each bill also directs the Secretary of State to establish procedures for offering a ballot to an unenrolled voter during primary elections. If these procedures are intended to be judicially enforceable, the Committee should consider either enacting those procedures in statute—as in Senator Maxim’s proposed amendment to LD 231—or requiring the Secretary of State to adopt these procedures by rule. *See* [5 M.R.S. §8002\(9\)\(A\)](#) (defining a “rule” as “the whole or any part of every . . . agency guideline or statement of general applicability . . . that is or is intended to be judicially enforceable and implements, interprets or makes specific the law administered by the agency . . .”).
3. **Conflicts with LD 1363.** Several provisions of the bills conflict with other legislation this session, most notably LD 1363. If LD 1363 and one of these bills are enacted, it might be possible to address these conflicts through the errors bill. Otherwise, these conflicts must be addressed next session.

FISCAL IMPACT

Not yet determined. *But see* information provided in Secretary of State’s [testimony](#) (discussed above).