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Re: Ranked Choice Voting Trigger

Dear Jon:

We represent Jared Golden in connection with the 2024 Second Congressional District race. I understand that questions have been raised about the trigger for using Ranked Choice Voting (RCV) to determine the winner in the Second Congressional District, and that you are counsel to the Secretary of State on election issues. I provide you with this letter to set forth our perspective.

Based on my read of the relevant statutes and regulations, if a candidate receives more than 50% of the votes that contain a first choice, RCV is not used to determine the winner. Thus, if the first choice on a ballot is left blank, that would not be considered in determining whether the candidate exceeded the 50% threshold.

Elections determined by ranked-choice voting are those “in which 3 or more candidates have qualified to be listed on the ballot for a particular office or at least 2 such candidates plus one or more declared write-in candidates have qualified for that particular office.” 21-A M.R.S. § 1(27-C). Because there were two candidates and a declared write-in candidate who otherwise qualified for that particular office, the 2024 Second Congressional District race is an election subject to the RCV rules and regulations.

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The RCV statute gave the Secretary of State authority to promulgate regulations. 21-A M.R.S. § 723-A(5-A). Under those regulations: “If no candidate receives more than 50% of the first choice votes based on the election returns provided by municipalities under subsection 1 of this section, the RCV count must be conducted under the supervision of the Secretary of State in successive rounds[.]” 29-250 C.M.R. ch. 535, § 4(2)(A) (emphasis added). The regulations do not describe the trigger as 50% of the ballots cast. The trigger, therefore, is the failure to receive more than 50% of the first-choice votes, not 50% of the total ballots cast.

In determining the 50% trigger, it plainly would include votes for the two declared candidates on the ballot. The natural reading of this rule would also include other individuals who received first-choice votes. In my view, that would include not only any declared write-in candidates who qualified for that particular office, *see* 21-A M.R.S. § 722-A, but would also include anyone else who received a first-choice vote regardless of whether they were a declared write-in candidate, e.g., “Mickey Mouse.”

On the other hand, in calculating the 50% threshold, it would not include ballots in which there is *no* first-choice vote, *i.e.*, blank ballots, and it would not include ballots that were invalidated because they contained multiple first-choice votes. *See* 29-250 C.M.R. ch. 535, § 4(2)(B)(1). The exception to this rule would be “if the voter did not mark any candidate for the first ranking, but marked a continuing candidate for the second ranking, then the second ranked choice is counted in the first round of the RCV count.” 29-250 C.M.R. ch. 535, § 4(2)(B)(2).

Applying this analysis to the race would mean that, based on currently available results, Jared Golden exceeded the 50% threshold and thus it would not proceed to a RCV tabulation:

| Name | Total | Percentage |
|------------------|--------------|-------------------|
| Jared Golden | 182,186 | 50.2% |
| Austin Theriault | 179,691 | 49.5% |
| Other Write-ins | 1,238 | 0.3% |

In sum, under the governing RCV statutes and rules, to calculate whether a candidate exceeded the 50% threshold, only the ballots that contain a first-choice vote

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should be considered. Properly calculated, Jared Golden should be declared the winner of the 2024 Second Congressional District race without further ado. Thank you for your consideration in this matter.

Very truly yours,

/s/ Peter J. Brann

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