

# Report

## I. Current Voting System in Rhode Island

### 1. Description and History

Rhode Island's plurality voting system is the most common voting system used in the United States, with 48 states using plurality voting for at least one elected office and 36 states exclusively using plurality voting for every office and election.<sup>1</sup> (Myers presentation, 3/1/23)

Rhode Island has a partially open primary election system which allows voters to participate in any party's primary provided that, the voter is a registered member of that party. Unaffiliated voters can register with a party on election day. In addition, voters may change or revoke their party affiliation as soon as immediately after voting in a primary, or as late as 30 days before a primary election. (R.I.G.L. 17-19.1-24)

Pursuant to Rhode Island statutory law, all party primaries are elections and election laws apply to all primaries. (R.I.G.L. 17-15-43) The person receiving the largest number of votes in the primary election, even when less than a majority, shall be declared the nominated or elected person. (R.I.G.L. 17-15-20).

The General Assembly's exclusive authority to regulate voting systems is subject to the requirements of Article IV, Section 2 of the State Constitution, which reads as follows:

**Section 2. Election by a plurality.** In all elections held by the people for state, city, town, ward or district officers, the person or candidate receiving the largest number of votes cast shall be declared elected.

Rhode Island's voters originally adopted this section in 1893 to replace the previous procedure which stated, if no candidate for governor received a majority of votes the General

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<sup>1</sup> <https://electionbuddy.com/blog/2022/01/27/plurality-vs-majority-voting/>

Assembly sitting in grand committee would elect the governor from the top two vote getters. In one of the elections leading up to the amendment, the Democratic candidate received more votes than the Republican, but failed to win a majority due to a third-party candidate, but a Republican General Assembly elected his opponent. In another election, the Republican received more votes than the Democrat, but a split between a Republican Senate and Democratic House produced an impasse. These elections provided an impetus to the change.

## 2. Issues

Through the course of the Commission's hearings, speakers and Commission members considered these concerns and issues with Rhode Island's plurality voting system:

1. In plurality voting, the candidate with the most votes wins, even if it is not a majority.<sup>2</sup> As a result, elections with more than two candidates present the issue that a candidate may win with a plurality that is below a majority. The "multi-candidate" issue has arisen in several recent Rhode Island gubernatorial elections and primaries. In the 2010 election, Independent Lincoln Chafee was elected Governor with 36.1% of the vote, defeating the Republican John Robitaille (33.6%), Democrat Frank Caprio (23.1%) and Moderate Ken Block (6.5%). The outcome raised the question as to whether a majority of all voters supported candidate Chafee and whether he would have won if voters had a choice between the top two primary candidates with the most votes. Similar results occurred in the 2014 election, and in the 2002 and 2022 Democratic Party gubernatorial primaries.<sup>3</sup>

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<sup>2</sup> [https://www.canr.msu.edu/news/plurality\\_voting\\_isnt\\_the\\_only\\_option\\_for\\_elections](https://www.canr.msu.edu/news/plurality_voting_isnt_the_only_option_for_elections); "Plurality voting isn't the only option for elections", Walcott, Michigan State University Extension, 2017.

<sup>3</sup> Other examples include the gubernatorial election of 2014 (Gina Raimondo 41%/Allan Fung 36%/Robert Healey 21%) and the Democratic gubernatorial primaries in 2002 (Myrth York 39%/Sheldon Whitehouse 38%/Antonio Pires 22%) and 2022 (Dan McKee 33%/Helena Foulkes 30%/Nellie Gorbea 26%/Matt Brown 8%/Luis Munoz 3%).

When a candidate is elected without gaining a majority, voters who supported a different candidate may believe the winner lacks a sufficient popular mandate to advance their policies. This lack of a popular mandate can lead to a lack of cooperation between the executive and legislative branches of government.

2. Voter turnout is an important issue to study commission members. The constituency selecting the winner of the primary is limited to the voters in the party primary. That electorate is often significantly smaller than the voting population, first because voter participation in primaries is often lower than participation in general elections,<sup>4</sup> and second because the primary electorate by definition excludes voters who do not affiliate with the party nominating the candidate. In districts where the voters generally favor one party over the other, a candidate who wins a low-turnout primary with less than a majority of the votes may become the odds-on favorite to win the general election. (Sasse, Dufault, 4/26/23 presentation)

The Rhode Island 2022 Republican gubernatorial primary race provided an example of the “low turnout” problem. Ashley Kalus won the nomination (and a place on the November ballot) with 17,188 votes, or 84% of the total of 20,539 Republican voters. At the same time, two unsuccessful Democratic primary candidates received substantially more primary votes, namely Helena Foulkes (33,931) and Nellie Gorbea (29,811), but did not appear on the November ballot. In the general election, 357,670 voters participated, and Ms. Kalus received 38.9%, losing to Governor McKee’s 57.9%. These two outcomes raise the question as to whether the November ballot gave general election voters who did not participate in the primary a choice among the candidates who had the broadest base of support.

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<sup>4</sup> In its presentation, the People’s Primary presenters stated that fewer than 20% of Rhode Island voters participate in primaries. (4/26/23 presentation)

3. The speakers from the People's Primary listed other concerns and objections to Rhode Island's current plurality system. In particularly large candidate fields in which candidates may focus their campaigns on a certain base of voters to obtain a plurality of votes while neglecting the rest of the electorate, even if that base is well below a majority of the electorate. In voting districts where a clear and persistent majority of voters favor one party over the other, elected officials may "fear being primaried if they reach across the aisle to pass legislation." (4/26/23 presentation, Sasse & Dufault; Open Primaries Background Information)

## **II. Non-plurality Voting Systems**

Other states and municipalities have enacted non-plurality voting systems to address these and other issues. The Commission heard presentations concerning five principal alternatives, namely:

(A) Ranked Choice Voting, (B) Top Two, (C) Run Off, and (D) Approval Voting. For each of these systems, the Report will provide a description followed by an analysis of policy (guided by the three major issues just described), implementation in Rhode Island, and Rhode Island legal issues.

## **A. Ranked Choice Voting**

### **1. Description and History**

In a ranked-choice voting system (RCV)<sup>5</sup> voters rank candidates by preference on their ballots. Broadly speaking, the ranked-choice voting process unfolds as follows for single-winner elections:

1. Voters rank the candidates for a given office by preference on their ballots. If a candidate wins an outright majority of first-preference votes (i.e., 50 percent plus one), he or she will be declared the winner.
2. If, on the other hand, no candidates win an outright majority of first-preference votes, the candidate with the fewest first-preference votes is eliminated.
3. All first-preference votes for the failed candidate are eliminated, and second-preference choices on these ballots are then elevated to first-preference.
4. A new tally is conducted to determine whether any candidate has won an outright majority of the adjusted voters.
5. The process is repeated until a candidate wins a majority of votes cast.<sup>6</sup>

As of August 2023, ranked-choice voting, to different degrees, is used in three states. Maine implemented RCV in 2018 for federal and statewide elections. Alaska implemented RCV in 2022 for federal and certain statewide elections. Hawaii implemented RCV in 2023 for certain special elections.<sup>7</sup> Five states (Tennessee, Montana, South Dakota, Idaho and Florida) have

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<sup>5</sup> The terms *instant-runoff voting* and *single-transferable voting* are sometimes used synonymously with ranked-choice voting.

<sup>6</sup> [https://ballotpedia.org/Ranked-choice\\_voting\\_\(RCV\)](https://ballotpedia.org/Ranked-choice_voting_(RCV))

<sup>7</sup> Hawaii will use RCV for special elections for federal offices and local council seats. The state senator that authored the law said it is a starting point and a test to see how the RCV system works.

banned the use of RCV. Twenty-six states have never used RCV. Fifty United States municipalities<sup>8</sup> currently use RCV, and nine more have approved its use in the next few years. On the other hand, between 20 and 24 other municipalities have repealed RCV after previously adopting it.<sup>9</sup>

a. Maine

In 2012, the Maine legislature began introducing bills to implement ranked choice voting after the governor was elected with 38% of the vote in a five-way race in 2010. None of bills were enacted. However, the citizens' referendum on ranked choice voting passed in 2016. Litigation began with the enactment of ranked choice voting into law, as did further citizens' initiatives.

Pursuant to Maine's process, the 2016 citizens' referendum went to the legislature for implementation where the legislature could repeal it or change it. The state senate requested an opinion from Maine's Supreme Court as to whether the referendum was constitutional. Maine's constitution requires the elections of state senator, state representative and governor by a plurality of all votes. A unanimous court held that the Act to Establish Ranked-choice Voting was unconstitutional as to those state office holders.<sup>10</sup>

Maine's legislature introduced a bill to amend Maine's constitution to address the court's decision. It did not pass. The legislature passed a bill that delayed implementation of RCV

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<sup>8</sup> The U.S. Census Bureau reports there are 89,004 local governments in the United States but that number includes special districts like fire, library and water districts. There are approximately 35,886 local governments (cities and towns) similar to Rhode Island municipalities U.S. Census, 2012;  
<https://www.census.gov/newsroom/releases/archives/governments/cb12-161.html>

<sup>9</sup> [https://ballotpedia.org/Ranked-choice\\_voting\\_\(RCV\)](https://ballotpedia.org/Ranked-choice_voting_(RCV)); <https://www.pewresearch.org/short-reads/2021/06/29/more-u-s-locations-experimenting-with-alternative-voting-systems/>

<sup>10</sup> <https://legislature.maine.gov/doc/1739>, Opinion of the Justices, 2017 ME 100, Docket No. OJ-17-1, May 23, 2017.

unless a constitutional amendment passed by 2021; otherwise RCV would be repealed.

Following more litigation, the court struck down the unconstitutional part of RCV only. As a result, Maine voters use RCV in primary and general elections for United States Senator and Representative, and in primary elections for State Senator, Representative and Governor, but not for those state offices in the general election.

In November, 2018, voters in Maine's Second Congressional District chose among four candidates using RCV. In the first round, Republican Bruce Poliquin held a narrow lead over the Democrat Jared Golden by a margin of 46.3%-45.6%. The remaining 8.1% of votes were divided between two independents (Tiffany Bond and William Hoar). When second-choice votes were tabulated and transferred, Mr. Golden emerged the winner with 50.6% of the vote to Mr. Poliquin's 49.4%. Lawsuits were filed with the federal court which eventually ruled that the democrat had won the general election. That election result took several months to be declared. The Maine governor signed the new democratic Congressman's election certificate with the notation "stolen election". Speaker Gideon told the commission this story to "demonstrate how controversial changing a voting method can be and what it might feel like to some voters." (Gideon presentation, 5/10/23)

The City of Portland, Maine has used RCV for more than a decade. Portland's 2021 election for Charter Review Commission provided a dramatic example of RCV's impact. In the first round, Steve DiMillo won 21% of the first place votes, compared to Patricia Washburn's 4%. In the fifth and final round of tabulations, Ms. Washburn was declared the winner over Mr. Dimillo by a margin of 3,478 to 2,276. Speaker Gideon stated that there were no formal complaints filed about the results of that election. (Gideon presentation, 5/10/23)

Litigation continues in Maine around ranked choice voting, as do attempts to create a constitutional amendment to include state office holders in RCV. Speaker Gideon noted that the change to RCV has been a “confusing process” with a lot of legal action, legislative reconsideration, ballot initiatives...and these challenges follow along party lines.” (Id.)

b. Alaska

In addition to RCV in the general election, the State of Alaska enacted a top four voting system for the primary election. The primary is open to all candidates and candidates are permitted to identify their party affiliation. All candidates from all parties, as well as independent candidates, appear on the same primary ballot. Voters cast a ballot for a single candidate from this expanded field.

The four candidates with the highest number of votes qualify for the general election ballot. In the general election, voters use RCV to rank the four (or fewer) candidates. If a candidate gains a majority of first-choice votes, that candidate is the winner. If not, votes are redistributed following the RCV procedure until a candidate gains a majority of votes.

## **2. Policy Analysis**

On March 22, 2023, Deb Otis of FairVote, an advocacy group promoting ranked choice voting, presented to the study commission and claimed there are advantages for ranked choice voting over plurality voting including that ranked choice voting:

- Promotes voter choice;
- Reduces or eliminates vote-splitting and strategic voting;
- Promotes majority winners;



- Improves campaign civility because candidates must appeal to a broader group of voters;
- Improves representation for women and people of color.

Presenters to the study commission were asked how the various non-plurality voting systems affect voter turnout. Deb Otis, the FairVote presenter, Political Scientist, Professor Myers and Ben Williams, Program Principal, Elections and Redistricting at NCSL and the NCSL report provided by Mr. Williams, stated that there is not enough data to suggest that ranked choice voting increases voter turnout. Ms. Otis and Messrs. Sasse and Dufault from People's Primary stated that the scheduling of the elections has a greater impact on voter turnout than the different voting systems. Ms. Otis, Professor Myers, Mr. Williams, and Mr. Dufault also explained that there is not enough data available to suggest that RCV has any impact on voter trust of elections. (3/1/22, Professor Myers presentation, 3/22/23 FairVote and NCSL presentations, 4/26/22 People's Primary presentation.) Maine's former Speaker of the House, Sara Gideon, stated that RCV in Maine when RCV was adopted "doesn't seem to have had a significant impact on turnout in primaries." (May 10, 2023 presentation)

Mr. Williams from NCSL informed the commission about the results of studies of RCV. "When compared with non-runoff plurality voting, existing research indicates minimal or indeterminate impacts on overall voter turnout...This indicates that RCV's impact on low-propensity voters may be minimal, to the extent it exists at all. But without controlling for other factors like mandatory voting laws and political culture differences, such anecdotal examples [of increased voter turnout] should be taken with a grain of salt."<sup>11</sup> The NCSL report provides a

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<sup>11</sup> <https://www.ncsl.org/elections-and-campaigns/ranked-choice-voting-in-practice-implementation-considerations-for-policymakers>.

comprehensive review of currently available studies of ranked choice voting. Those studies do not provide evidence to support any of the other claims of RCV advocates. *Id.* It is assumed that with greater use of RCV, including two states now using RCV statewide, more studies of that voting system may lead to solid evidence on whether RCV has the impact its supporters state.

In addition to these claimed advantages, the Rhode Island 2023 Democratic primary for the First Congressional District revealed another possible advantage for RCV when one candidate (Don Carlson) suspended his campaign after early voting began. According to Board of Elections data, 270 voters cast early ballots for Mr. Carlson that were effectively nullified before the election took place. Had those voters used a ranked choice ballot, their second choice vote could have been counted.

### **3. Implementation**

Tabulation of the votes can take time under RCV. In 2018, Maine election officials needed eight days to conclude tabulating the votes for governor and for Congressional District 2. In 2022, Maine officials needed nine days to tabulate the votes in that Congressional district. Speaker Gideon noted that this could be an issue in Rhode Island since the primary date is late and close to the general election.

Speaker Gideon noted that voter comprehension in Maine was strong since there was a multi-faceted effort at voter education from the Secretary of State, the League of Women Voters, the ACLU, and many other advocacy groups that all came together to educate voters over the course of two years.

In addition to necessary changes in Rhode Island law described below, presenters stressed that an effective transition would require a robust voter education campaign would be needed with a suggested period of 2-4 years of education to allow voters to get acclimated to a

new system of voting. (FairVote presentation, 3/22/23, NCSL presentation, 3/22/23, Gideon presentation, 5/10/23.) Commission members, Kathy Placencia representing the Secretary of State's office and Lori Anderson, representing a municipal board of canvassers also spoke about the importance of educating the voters before a new voting system is implemented. In addition, Commission member Lori Anderson, who is also a member of the Coventry Board of Canvassers, suggested there should be education specific to elderly voters. That education of voters would include the fact that same day election results are not possible in most RCV elections.

Commission members Miguel Nunez, Kathy Placencia, Nick Lima and Lori Anderson as well as presenters stated that a change from a plurality voting system to ranked choice voting system would require additional staff at the Board of Elections, the Secretary of State's office, and at all local boards of canvassers and local polling locations. Ms. Anderson also noted that it is already difficult to get people to agree to be poll workers, so a change in the voting system which requires poll workers to explain the system to voters at the polls, would make recruiting poll workers much more difficult.

The fiscal impacts for the new software and hardware equipment, additional tabulation expenses and staff, staff and materials for voter education efforts and additional staff at all polling locations, at the board of elections and elsewhere are additional costs that must be estimated and considered.

As noted by Rhode Island Board of Elections commission member designee, Miguel Nunez, the ranked choice ballot is more complex. For each office, the ballot contains a grid, with rows containing the names of the candidates and columns for the voter's first choice, second

choice, and so on.<sup>12</sup> As a result, under an RCV system, the ballot would contain a multi-line grid for each office voted on, rather than a single line listing the names of all the candidates. This could significantly increase the size of the ballot, requiring several pages. This can generate confusion and congestion at the polls due to the longer time needed to complete a ballot. The longer ballot may require additional voting machines and booths to accommodate the additional time needed for each voter, which in turn may mean larger polling locations would need to be located and used.

Rhode Island law requires that a risk-limiting audit be performed to verify the machine count by selecting a random sample of ballots to compare to the machine voting outcome. *See* R.I.G.L. §17-19-37.4. Ms. Otis of Project Fair Vote stated that there is software available to perform risk-limiting audits in RCV elections and some RCV jurisdictions are beginning to implement risk limiting audits.<sup>13</sup> (FairVote presentation, 3/22/23) NCSL's Ben Williams also noted that there is no issue with performing risk-limiting audits in RCV elections. (NCSL presentation, 3/22/23) Commission member Kathy Placencia, from the Secretary of State's office, noted that if Rhode Island were to move away from the plurality voting system upgrades would be needed to conduct risk-limiting audits. (3/1/23 presentation)

Maine has stated that the cost of running the state's primary election system has increased more than 30% since RCV from approximately \$250,000 to \$442,000 in the first year. However, all presenters, including commission members Kathy Placencia, Director of Elections with the Rhode Island Secretary of State's office and Miguel Nunez, Deputy Director of Elections with

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<sup>12</sup> Ms. Otis stated that voters typically are able to rank up to five candidates in a given election. (3/22/23 FairVote presentation) Thus, if (as was the case in Rhode Island's 2023 CD-1 primary) there were twelve candidates on the ballot, voters would rank their top five choices. The number of choices to rank would be set in law.

<sup>13</sup> *See* "Post Election Audits and Ranked Choice Voting" (Ranked Choice Voting Resource Center, September 19, 2022), viewable at <https://drive.google.com/file/d/1bCxQ7gfhT2T8uQ-uLuRSHRxXp4JLkzP/view>

the Rhode Island Board of Elections office, whose offices are responsible for informing and registering voters and purchasing and maintaining the election equipment, agreed that the current equipment and technology used in Rhode Island to vote and to tabulate the votes can be upgraded to become compatible with ranked choice and other voting methods and ballots.

#### **4. Legal Issues**

Since 1663, the Rhode Island general assembly has held exclusive jurisdiction over the conduct of elections in the state. “[T]he general assembly, at least since the royal charter of 1663, was vested with such authority not only over the elections of the state at large but also over the elections in the [municipalities].” *Opinion to the House of Representatives*, 96 A.2d 627, 80 R.I. 288 (1953) In 1843, with the adoption of the Rhode Island Constitution, that original authority was preserved in Article II, section 2 of the Rhode Island Constitution which continued the general assembly’s exclusive power to conduct elections in the state. In addition, this long history of the general assembly's exclusive authority over the conduct of elections, has been expressly reaffirmed by amendments to the constitution. *Id.*

Article II, Section 2 of the constitution further states that “The general assembly shall provide by law for the nomination of candidates...for the time, manner and place of conducting elections; for the prevention of abuse, corruption and fraud in voting...” Further evidence of the general assembly’s exclusive jurisdiction over elections is found in the Rhode Island General Laws which, since 1901 have mandated plurality voting for elections of senators and representatives in congress. R.I.G.L. 17-4-6. In 1947, the general assembly enacted laws for primary elections which mandate that plurality voting determines the person nominated or elected in primary elections. R.I.G.L. 17-15-29.

Pursuant to the requirements of the Rhode Island constitution,<sup>14</sup> the Rhode Island Supreme Court gave a written opinion in response to a request from then Governor Vanderbilt that posed three questions of law regarding a bill that was pending in the Senate and House. The bill proposed to change elections in the city of Providence so city council members would be elected via ranked choice voting, then known as the Hare System. In *Opinion to the Governor*, 62 R.I. 316, 6 A.2d 147 (1939), the Rhode Island Supreme Court, held that the legislature does not have the power, under the constitution, to establish the “Hare System”<sup>15</sup> for the city of Providence. *Id.*, 149. The Court also stated that the plurality requirement in the state’s constitution raises “serious questions” regarding the constitutionality of using ranked choice voting in Rhode Island. *Id.*, 152. The Court went on to say that the “additional difficulties” raised by the plurality requirement in the state’s constitution need not be discussed since the Court held “that the [ranked choice voting] system of proportional representation... is clearly repugnant to... our constitution.” *Id.* That ruling was based on the fact that multiple candidates were to be elected for all nine council seats but voters would effectively have only one vote in which they rank all the candidates.

In the two states that have enacted ranked choice voting for select offices, multiple lawsuits have been filed. Both Alaska and Maine endured years of litigation before and after

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<sup>14</sup> Constitution of the State of Rhode Island, Article X, Sec. 3,  
<https://www.rilegislature.gov/riconstitution/Constitution/ConstFull.aspx>

<sup>15</sup> In *Opinion to the Governor*, the Rhode Island Supreme Court referred to the definition of the Hare System set forth in *Wattles v. Upjohn*, 211 Mich. 514, 179 N.W. 335 (1920). The Hare System employs a ranked choice ballot. When there is an election for a single-representative district, the Hare System is equivalent to RCV. When used for a multi-candidate district (such as several at-large seats), the Hare system sets a threshold or “quota” equal to 100% divided by the number of seats to be chosen. In the first round, any candidate that exceeds the threshold is elected. A random selection of the “surplus” votes that a winning candidate receives in excess of the threshold are then redistributed among the other candidates, beginning with the votes for the candidate with the largest “surplus.” They are redistributed to the second-choice of those voters. Any candidate who now exceeds the “quota” also is declared elected. The process continues in a similar manner until enough candidates receive votes that exceed the quota.

each implemented the new laws. Hawaii's law, which has ranked choice voting only when certain special elections are held, became effective in 2023, and is understood to be a way to test a limited use of ranked choice voting system. Hawaii has not used or scheduled a ranked choice election in 2023.

There has been a long legal battle over RCV in Maine. Maine voters approved RCV in 2016 and its use in the 2018 election resulted in the ouster of then republican Congressman Poliquin by democratic Congressman Golden. It was the first time in US history that a federal race was decided by RCV. Maine's federal district court upheld the lawfulness of RCV in *Baber v. Dunlap*, 376 F. Supp. 3d 125, 145 (D. Me. 2018). Two years later, that court rejected a second constitutional challenge to Maine's RCV program in *Hagopian v. Dunlap*, 480 F.Supp.3d 288 (D. Me. 2020) . *See also Jones v. Sec. of State*, C.A. Nol AP 20-0016 (Maine Super. Ct. Aug. 24, 2020) (upholding lawfulness of voter petition containing a "peoples veto" of anti-RCV legislation), stay denied by the United States Supreme Court (Justice Breyer, Oct. 6, 2020, 20-A57).

Over the past five years, Alaska's voting system has been shaped through court decisions. In *State v. Alaska Democratic Party*, 426 P.3d 901 (Alaska 2018), its Supreme Court held that independent candidates could not run in the Democratic Party primary; instead, the Party had the right to limit the primary ballot to Party members. In *Meyer, et al v Alaskans for Better Elections*, 465 P.3d 477 (Alaska 2020), the Court upheld the lawfulness of the form of the ballot initiative proposing the State's top four primary voting system. In *Kohlhaas v. State of Alaska*, 518 P.3d 1095 (Alaska 2022), its Supreme Court rejected a Constitutional challenge to Alaska's top four primary system of non-partisan primaries and ranked choice elections The Alaska Supreme Court held that Kohlhaas failed to show that the Alaska Constitution prohibits the



election system the voters chose and failed to show that ranked-choice voting unconstitutionally burdens the right to vote.<sup>16</sup>

The same legal issues Maine faced because that state's constitution required plurality voting could exist for Rhode Island since our constitution also requires that elections be decided by plurality vote. In order to implement RCV for general elections in Rhode Island, changes would have to be made to the state constitution, and to several chapters of the general laws, including adding definitions for ranked choice voting and the "preferential majority" of RCV which is not the same as a "majority" in a traditional election.<sup>17</sup> There is a possibility that implementing RCV elections for federal offices may not require an amendment to the state constitution. In addition, in order to implement an RCV system for primary elections several chapters of the general laws would have to be changed.

## **B. Top Two voting system**

### **1. Description and History**

The Study Commission heard presentations describing top two or open primary systems from Professor Myers and from Messrs. Sasse and Dufault from the People's Primary group. In a top-two primary, also known as an open primary, all candidates are listed on the same ballot. The top two vote-getters advance to the general election regardless of their partisan affiliation; consequently, it is possible for two candidates belonging to the same political party to win in a

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<sup>16</sup> In July, 2023, a pro-RCV group called Alaskans for Better Elections ("ABE") filed a complaint with the Alaska Public Offices Commission against an advocacy group named Alaskans for Honest Elections ("AHE"), which opposes RCV, claiming that AHE violated campaign finance laws. In a September 9, 2023 memo, the Commission staff submitted a report recommending a finding of violation. <https://www.alaskansforbetterelections.com/wp-content/uploads/2023/09/23-01-CD-2023.09.08-Staff-Report.pdf>

<sup>17</sup> <https://www.uvm.edu/~dguber/POLS125/articles/langan.htm>, "Instant Runoff Voting: A Cure That is likely Worse Than the Disease", J.Langan, William and Mary Law Review, February 2005, volume 46, issue, 4, pages 1569-1595. RCV combines first place and non-first place votes to obtain a preferential "majority".



top-two primary and face off in the general election. (Myers, 3/1/23, Williams, NCSL, 322/23 and Sasse & Dufault, 4/26/23 presentations.)

California and Washington use a “top two” primary format.<sup>18</sup> Voters in California established a top-two primary system for California's elective offices in 2010 which was first utilized in 2011. The “top-two” format uses a common ballot, listing all candidates on the same ballot. In California, each candidate lists his or her party affiliation, whereas in Washington, each candidate is authorized to list a party “preference.” The top two vote-getters in each race, regardless of party, advance to the general election. Advocates of the “top-two” format argue that it increases the likelihood of moderate candidates advancing to the general election ballot. Opponents maintain that it reduces voter choice by making it possible that two candidates of the same party face off in the general election. They also contend that it is tilted against minor parties who will face slim odds of earning one of only two spots on the general election ballot.” NCSL, [State Primary Election Types \(ncsl.org\)](https://www.ncsl.org/state-info/state-primary-election-types)

## 2. Policy Analysis

In a “top two” non-partisan primary, voters cast a ballot for a single candidate without ranking the other candidates in the same way that they vote in a plurality jurisdiction. The difference in this primary format is that two candidates emerge from a single primary rather than one candidate from each of two primaries. The outcomes of both the primary and general elections require a single tabulation, rather than the multiple tabulation rounds in ranked choice

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<sup>18</sup> Before enacting a “top two” voting system, California tried to implement a version of a blanket primary in which election ballots listed every candidate regardless of party affiliation. The candidate of each party who won the most votes became that party’s nominee for the general election. In *California Democratic Party v. Jones*, 530 U.S. 567 (2000) four different political parties whose rules prohibited nonmembers from voting in their primary filed suit against the Secretary of State. The United States Supreme Court held that California’s blanket primary violates a political party’s First Amendment right of association, because it “forces political parties to associate with” people who may not support the party and it takes away a party’s basic function to choose its own leaders. (*Id.*, 577)

voting. The “top two” system nearly guarantees that the general election winner will gain majority support in the general election.<sup>19</sup>

In terms of the three issues identified at the beginning of this report, a general election consisting of the top two vote getters solves the issue of ensuring a majority vote, as there are only two candidates on the ballot. However, if the nonpartisan primary election includes a large field of candidates with candidates affiliated with parties and independent candidates, the vote may become sufficiently fragmented so that the “top two” finishers reflect only a small percentage of the primary electorate. That would again raise the issue of the lack of a majority mandate.

Top two voting also changes the role of political parties. In Rhode Island, independent candidates and candidates from non-recognized political parties can obtain ballot access for the November election by filing a timely declaration of candidacy and obtaining the requisite number of valid signatures. In contrast, under top two voting, the November ballot is limited to the top two candidates in the primary election, even if those top two candidates are affiliated with the same political party.

As noted by the National Conference of State Legislatures:

“State and federal elections in Louisiana, and legislative elections in Nebraska, share some common traits with top-two primaries, but are distinct. In Louisiana, on the general election date, all candidates run on the same ticket. If no candidate receives over 50% of the vote, then the top two vote-getters face a runoff six weeks later. One way to look at this is to say there is no primary election just a general election for all candidates, with a runoff when needed. In Nebraska, legislators are elected on a nonpartisan basis. This means they run without a party designation, and all candidates are on the same nonpartisan primary ballot.” [State Primary Election Types \(ncsl.org\)](https://www.ncsl.org/legislative-process/elections/state-primary-election-types)

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<sup>19</sup> In California and Washington, the general election between the “top two” finishers takes place even if one of them gains majority support in this primary. This is because fewer voters participate in the primary when compared to the general election. Under “top two,” it would be theoretically possible for a write-in candidate to receive more votes than the margin between the two candidates on the ballot, in which case the winner would be the candidate with the greater plurality.

Alaska has a hybrid voting system that combines the different voting systems used in California and Maine. California's top two non-partisan primary system is vulnerable to the issue of campaigns focusing on a small base of voters. When each voter casts a vote for a single candidate from a potentially large field; one or both of the top two candidates may advance to the general election with a small percentage of the votes. As the number of candidates in the primary increases, so does their incentive to appeal to a smaller number of the electorate in order to reach a sufficient number of votes needed to advance. In contrast, Alaska's top four primary system advances four candidates to the general election, reducing the risk of the general election ballot being limited to candidates with a relatively small number of supporters. In the general election, Alaska voters then use ranked choice voting to elect a candidate with an outright, first round of tabulation, majority or a ranked choice tabulated preferential majority.<sup>20</sup>

While Alaska's top four primary may have unique advantages, other issues discussed in this section and the RCV voting system section, both pro and con, could also apply to the use of Alaska's hybrid system.

### **3. Implementation**

The Public Policy Institute of California, in a 2012 report argued that California's top-two primary system contributed to the increased presence of challengers in that state's primaries:

“More incumbents faced primary challenges from within their own party this year than they have on average in the last five election cycles (42% vs. 18%). Redistricting does not fully explain this change, because incumbents in districts that changed a great deal were not substantially more likely to face a challenge than

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<sup>20</sup> <https://www.uvm.edu/~dguber/POLS125/articles/langan.htm>, “Instant Runoff Voting: A Cure That is likely Worse Than the Disease”, J.Langan, William and Mary Law Review, February 2005, volume 46, issue, 4, pages 1569-1595. RCV combines first place and non-first place votes to obtain a preferential “majority”.

those in districts that did not change so much. Instead, the top-two was probably the stronger cause, since it gives primary challengers a better chance of appearing in the fall election. Indeed, almost all of the increase in primary challenges occurred in seats where the odds of a same-party runoff were the best.”<sup>21</sup>

Richard Winger, editor and publisher of *Ballot Access News*, argued against Washington's top-two primary system in a 2010 filing in a Washington federal district court case. He stated that Washington's primary system unduly burdens minor parties and their candidates; when the only the top two vote-getters may be on the ballot in the second round inevitably means that minor party candidates will never appear in the second round.<sup>22</sup>

Peter Gemma, writing for *The Daily Caller* in 2017, argued that "a top-two primary distorts the meaning of a free and fair election," citing electoral outcomes in California as evidence of this point:

“In 2016, as a result from an open/top two primary system, seven of California’s 53 U.S. House contests offered voters a one party choice; five of 20 state Senate contests and 15 of 80 state Assembly races had two members of the same party running against each other. California’s 2016 primary for U.S. Senate resulted in liberal Democrats Kamala Harris and Loretta Sanchez the only candidates facing off in the November election.”

Other statewide ballot initiatives to enact top-two primaries include: Florida in 2020; which failed, Arizona in 2012; failed, California in 2010; won, Oregon in 2008; failed, California in 2004; failed, Washington in 2004; won.<sup>23</sup>

#### **4. Legal Issues**

In 2004, when Washington approved a top-two primary system for Washington's elective offices; three political parties including the Democratic and Republican parties filed suit against the state, contending that the top-two primary system infringed upon the associational rights of

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<sup>21</sup> <https://www.ppic.org/publication/test-driving-californias-election-reforms/> Test-driving California’s Election Reforms, McGhee and Krimm

<sup>22</sup> [https://ballotpedia.org/Top-two\\_primary#cite\\_ref-quotedisclaimer\\_7-0](https://ballotpedia.org/Top-two_primary#cite_ref-quotedisclaimer_7-0)

<sup>23</sup> [https://ballotpedia.org/Top-two\\_primary](https://ballotpedia.org/Top-two_primary)

political parties by denying them control over candidate endorsements. The United States District Court for the Western District of Washington found in favor of the plaintiffs and halted implementation of the voting system. The United States Court of Appeals for the Ninth Circuit affirmed the district court's ruling. However, in 2008, the United States Supreme Court reversed the Ninth Circuit's ruling, stating the new "election regulations specifically provide that the primary 'does not...determine the nominee of a political party'"<sup>24</sup> thereby enabling Washington to implement its top-two primary system. The top-two primary system was first utilized in Washington in the 2008 election cycle.

Some of the legal issues the state of Washington faced could also present a challenge to the adoption of a top two voting system in Rhode Island. In order to implement a top-two, or another number of the top vote getters in the primary elections, several chapters of the general laws would have to be changed. In addition, an amendment to the Rhode Island Constitution may be required for state, city, town, ward or district offices. However, there is a possibility that implementing top two primary vote getters, or a different number, for federal offices may not require an amendment to the state constitution.

## **C. Run-Off Elections**

### **1. Description and History**

A runoff election is a second election held to determine a winner when no candidate in the first election met the required threshold for victory. Runoff elections can be held for both primary elections and general elections.<sup>25</sup> The United States Department of Interior describes

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<sup>24</sup> *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008)

<sup>25</sup> The states that have runoff elections are mostly, but not exclusively, in the South: Alabama, Arkansas, Georgia, Mississippi, North Carolina, Oklahoma, South Carolina, South Dakota and Texas.

how, in 1964, Georgia implemented the majority vote, runoff elections law in an effort to preserve white political power in the white majority state by requiring a majority vote of over 50%.<sup>26</sup>

Seven states require a candidate to win a primary with a majority of the votes which is sometimes called absolute majority voting. To make that happen, primary runoff elections are used. Georgia is the only state that requires runoff elections for both the primary and general elections. Six of the nine states that have runoff elections use ranked choice voting ballots for their Uniformed and Overseas Citizens Absentee Voting due to the time constraint of turning around a runoff election. The three states with runoff elections that do not use RCV for their overseas voters are: North Carolina, South Dakota and Texas. (NCSL)

In Louisiana, on the general election date, all candidates run on the same ticket. If no candidate receives over 50% of the vote, then the top two vote-getters face a runoff six weeks later. One way to look at this is to say there is no primary election just a general election for all candidates, with a runoff when needed.

In addition, two more states—North Carolina and South Dakota—require runoffs in special circumstances: North Carolina will hold a primary runoff if requested by a second-place candidate, and the first-place candidate received less than 30% of the votes cast. In South Dakota, a primary runoff is required when no candidate wins more than 35% of the vote in a race with three or more candidates.

## **2. Policy Analysis**

Issues with runoff elections include voter fatigue from voting for the same elected office 2-4 times over the course of a short time period and the campaigning each election entails.

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<sup>26</sup> [https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights\\_VotingRights.pdf](https://www.nps.gov/subjects/tellingallamericansstories/upload/CivilRights_VotingRights.pdf)

Fewer voters cast ballots in runoff elections than in general elections since general elections have multiple offices up for election and include ballot measures. In addition, the cost of having a second election, either after a primary or after a general election is an issue. (Myers, 3/1/23, Otis, 3/22/23 presentations)

### **3. Implementation**

The mechanics of implementing a runoff election are not an issue but the additional cost and resources required, including staff, are the issues. Once the trigger for the runoff election is met, the actual election is run the same as the original election except that only the two runoff candidates are on the ballot. In other words, a run-off system may double the number of elections that have to take place if there is no majority winner at the primary and/or the general election stage. This will cause added expense, although the runoff election may be slightly less expensive than the original election due to a shorter ballot and there may be fewer polling places depending on whether it is a statewide seat or limited to a specific district.

### **4. Legal Issues**

In order to implement a runoff voting system in Rhode Island's general elections, changes would have to be made to the state constitution. There is a possibility that implementing runoff elections for federal offices may not require an amendment to the state constitution. In addition, in order to implement a runoff voting system for primary elections several chapters of the general laws would have to be changed.



## **D. Approval voting**

### **1. Description**

Approval voting is an electoral system in which voters may vote for any number of candidates that they find acceptable. The candidate receiving the most votes wins. Approval voting may be used in single-winner systems and multi-winner systems.

As of June 2021, approval voting had been implemented in two U.S. cities for local elections: Fargo, North Dakota, and St. Louis, Missouri.

In 2018 the voters in Fargo, North Dakota enacted approval voting and, in June 2020, Fargo became the first location to utilize the approval voting system in the United States.<sup>27</sup> It was used in the city commissioner election which resulted in voters casting an average of 2.28 votes per ballot—42,855 votes across 18,805 ballots.<sup>28</sup>

Approval voting was approved in St. Louis in 2020 and first used in St. Louis' 2021 top-two mayoral primary election. Candidates ran in the primary election without partisan labels. Voters could choose any number of candidates to vote for and the two candidates that received the most votes advanced to the general election.

In the mayoral primary, 44,571 people voted and cast 69,661 total votes—an average of 1.56 votes per ballot. Tishaura Jones was selected on 25,388 ballots. Fifty-seven percent (57%) of voters selected her on their ballots, and she received 36% of the total number of votes cast. Cara Spencer was selected on 20,659 ballots, coming in second. She was picked on 46% of ballots, and she received 30% of the total votes.

### **2. Policy Analysis**

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<sup>27</sup> <https://www.mprnews.org/story/2022/06/06/vote-for-everyone-you-like-fargo-tests-approval-voting>

<sup>28</sup> [https://ballotpedia.org/Approval\\_voting#What\\_approval\\_voting\\_looks\\_like](https://ballotpedia.org/Approval_voting#What_approval_voting_looks_like)



The Center for Election Science (CES) is an electoral reform advocacy organization that advocates for approval voting and helped pass approval voting in Fargo and St. Louis. CES argues that approval voting would elect more consensus winners than ranked choice and runoff elections would. The Center states that approval voting is simpler than ranked choice voting, ballots look the same, except you may vote for a number of candidates, results are easy to understand, and approval voting tends to elect consensus candidates and alternate candidates get a more accurate measure of support.

Approval voting advocates also say it “produces winners that reliably maximize voter satisfaction.”<sup>29</sup> More specifically, approval voting accomplishes this feat by allowing voters to not only choose their favorite candidate but also hedge their bets by selecting other candidates that they also deem viable. For example, a voter can choose a second candidate (or more) who is between their own favorite candidate and a less preferred candidate but still within their range of acceptability.”<sup>30</sup>

Some argue that approval voting elects the least disliked candidate over the most liked candidate.

### 3. Implementation

Aaron Hamlin and Whitney Hua, from CES, wrote an article in the academic journal *Constitutional Political Economy*, stating that approval voting is easy to implement and avoids administration concerns, including factors such as education, ballot design, voting machines, tabulation procedures, and risk-limiting audits. (Id.)

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<sup>29</sup> Quinn, J. (2021). Voter Satisfaction Efficiency (VSE) | vse-sim. Working paper. <https://electionscience.github.io/vse-sim/VSE/>

<sup>30</sup> <https://link.springer.com/article/10.1007/s10602-022-09381-x#ref-CR30>, Hamlin, A., Hua, W. The case for approval voting. *Const Polit Econ* 34, 335–345 (2023). <https://doi.org/10.1007/s10602-022-09381-x>

Education campaigns for approval voting simply involve letting voters know that they may choose as many candidates as they wish and simple ballot directions give voters a reminder.

Ballot design for elections that use approval voting requires small adjustments from currently used plurality systems. The name-bubble design commonly used in plurality elections across the U.S. is employed by approval voting, with the only change being that voters are instructed that they can select more than one candidate. This would limit extra costs and strain on ballot printing. Most voting machines in use in the U.S. are able to handle approval voting in their current software implementation. The machines do need to be adjusted to allow voters to cast “overvotes,” which many machines are designed to prevent in their current operating software.

Tabulation procedures for approval voting are done precisely as they are in plurality elections; election officials simply add up the votes. The difference inherent to approval voting is that more than one vote is possible from each voter.

Finally, approval voting would allow risk-limiting audits to be conducted. *Hamlin and Hua, fn 16, citing Sarwate, A., Checkoway, S., & Shacham, H. (2011). Risk-limiting audits for nonplurality elections Technical Report for the Defense Technical Information Center and Sarwate, A. D., Checkoway, S., & Shacham, H. (2013). Risk-limiting audits and the margin of victory in non-plurality elections. Statistics Politics and Policy, 4(1), 29–64.*

#### **4. Legal Issues**

Approval voting may run counter to the “one person, one vote” edict of the United States Supreme Court and, as a result, could prompt a legal challenge.<sup>31</sup> In order to implement approval voting for general elections in Rhode Island, changes would have to be made to the

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<sup>31</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

state constitution; and to several chapters of the general laws. There is a possibility that implementing approval voting elections for federal offices may not require an amendment to the state constitution. In addition, in order to implement an approval voting system for primary elections several chapters of the general laws would have to be changed.

In 2023 the North Dakota legislature passed a bill banning approval voting in the state but the governor vetoed that bill. The House overrode the governor's veto however, the senate fell four votes short of the two-thirds majority needed to override that veto so the approval voting system remains in effect in Fargo.<sup>32</sup>

There is an effort to bring approval voting statewide in Missouri but advocates say that the first step is a constitutional amendment which they are working to get on the 2024 ballot.<sup>33</sup>

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<sup>32</sup> <https://www.kvrr.com/2023/04/19/fargos-approval-voting-system-lives-on-after-state-senate-fails-to-override-veto/>

<sup>33</sup> <https://spectrumlocalnews.com/mo/st-louis/news/2023/01/13/missouri-political-notebook>

### **III. Findings and Recommendations**

(NOTE TO MEMBERS: Any other findings? Findings to be agreed upon or owned. Members to determine whether to raise any findings to a recommendation and what, if any, recommendations to make.)

---Key questions to ask before enacting electoral reform in the primary or general elections include: what is the impact of the reform on voter turnout? Are there socioeconomic or other disparities that may result from using a new voting system? Will the reform generate more contested elections? Will the reform encourage candidates to focus on addressing and solving problems? Will the reform enhance voter trust? (People's Primary presentation, 4/26/23; Prof. Myers presentation, 3/1/23.)

---According to the People's Primary presentation, over the last 20 years, 45% of General Assembly seats were decided in the primary because the general election for the seat was uncontested by a second party.

---Chair Zurier and several speakers noted that increasing turnout at primaries is an important goal. Senator Raptakis spoke about the bill he sponsored, S-2023-115, which allows unaffiliated voters to vote in either party's primary without declaring a party so there would be no need to disaffiliate after voting. This may result in more people voting on primary day.

---Several presenters stated that the scheduling of the elections has a greater impact on voter turnout than the different voting systems. (3/22/23 presentation by FairVote, Deb Otis as well as the 4/26/23 presentation by Gary Sasse and Guy Dufault's from the People's Primary)

---Senator DeLuca stated that any change to how Rhode Islanders vote should come from the voters through a referendum presented to the voters of the state. The general assembly should not legislate a change to how Rhode Islanders vote.

---The study commission was not equipped to survey RI voters to determine the level of public support voters may have for non-plurality voting and runoff elections. The study commission finds that a survey of Rhode Island voters would assist legislators in determining whether a new voting system is warranted. Perhaps the RI Foundation or a similar statewide non-profit, non-partisan group can conduct a statewide survey of Rhode Island voters with assistance from the SOS.

---Testimony from several speakers and from documents presented to the commission show that a healthy timeline be included into any legislation recommending a change in voting systems for any election in the state. The agreed upon recommendation by all if RCV were to be implemented in Rhode Island is a minimum of two years and up to 4 years to prepare for the change in voting. (FairVote presentation, 3/22/23, NCSL presentation, 3/22/23, Gideon presentation, 5/10/23.)

---Fourteen members of the public either spoke to the commission in person and/or sent in written comments to the commission. Each of the fourteen expressed support for changes to the voting system in Rhode Island. Some support RCV, others support approval voting and some support open primaries with top two or four vote getters advancing to the general election. Jane Koster of the Rhode Island League of Women Voters told the commission members that the League has plans to conduct a study on RCV.

--- In terms of the three issues identified at the beginning of this report, a general election consisting of the top-two vote getters in the primary election would ensure that the winner in the general election would receive a majority of the votes, since there are only two candidates on the general election ballot. However, if the nonpartisan primary election includes a large field of candidates both affiliated with parties and/or independents, the vote may become sufficiently

fragmented so that the top two finishers reflect only a small percentage of the primary electorate.

- That would again raise the issue of the lack of a majority mandate.