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VIA HAND DELIVERY

March 3, 2017

Matthew Pollack, Executive Clerk
Supreme Judical Court
205 Newbury Street, Room 139
Portland, Maine 04104

Re: In the Matter of Request for Opinion of the Justices
Relating to Questions Posed by the Senate
Docket No.: OJ-17-1

Dear Clerk Pollack:

With regard to the above referenced matter, enclosed for filing please find the Brief of Senators Troy Jackson, Mark Dion, Shenna Bellows, Ben Chipman, Justin Chenette, Rebecca Millett, David Miramant, Eloise Vitelli.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions.

Sincerely,

Katherine R. Knox

/zpm
Enclosure

STATE OF MAINE

BEFORE THE JUSTICES OF THE
MAINE SUPREME JUDICIAL COURT

Docket No. OJ-17-1

In the Matter of Request for Opinion of the Justices
Relating to Questions Posed by the Senate

BRIEF OF
Senators Troy Jackson, Mark Dion, Shenna Bellows, Ben Chipman,
Justin Chenette, Rebecca Millett, David Miramant, Eloise Vitelli

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Attorney for Senators

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INTRODUCTION

This brief is submitted on behalf of eight current members of the Senate who opposed the resolution seeking an advisory opinion from the Justices. As members of the Legislature, they are concerned about the implications of the Senate's request for possible future efforts to ask the Justices to interpret a statute enacted by the people and already in effect. The right to ask the Justices of the Supreme Court for their opinion on important issues of law under Me. Const. art. VI, § 3 on "solemn occasions" should be used only for matters of "live gravity" and "unusual exigency." The questions posed by the Senate do not meet that standard and, if answered, would result in an unprecedented judicial intrusion into the political realm.

STATEMENT OF THE FACTS

The Citizen Referendum on Ranked Choice Voting was enacted into law on November 8, 2016 (the "Act"). The Act established a statutory scheme for the election by ranked choice voting of the offices of United State Senator, United States Representatives to

Congress, Governor, State Senator and State Representatives for primary and general elections held on or after January 1, 2018. The Act defines Ranked Choice Voting as:

> the method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected.

Act § 2 (codified at 21-A M.R.S.A. § 1, sub-§35-A). The Act defines a "Ranking" as "the number assigned on a ballot by a voter to a candidate to express the voter's preference for that candidate" with one being the highest ranking. Act § 5 (codified at 21-A M.R.S.A. § 723-A(1)). The Act defines a "Continuing candidate" as "a candidate who has not been defeated," and defines a "Continuing ballot" as "a ballot that is not an exhausted ballot." *Id.* An "exhausted ballot" is one that does not rank a continuing candidate, has its highest ranking given to more than one candidate, or contains 2 or more sequential skipped rankings before its highest ranking. *Id.*

Under this system, each voter casts a single "vote" that contains as many or as few "rankings" of that voter's preferences as that voter desires to include. The tabulation of these rankings or

"votes" then proceeds in rounds where "[e]ach continuing ballot counts as one vote for its highest-ranking continuing candidate for that round" and the last place candidate in each round is eliminated unless there are two or fewer continuing candidates, in which case "the candidate with the most votes is declared the winner." Act § 5 (codified at 21-A M.R.S.A. § 723-A(2)). This "tabulation" is performed by the Secretary of State. Act § 4 (codified at 21-A M.R.S.A. § 722(1)). During this tabulation, the Act provides generally that "[a] tie ... between candidates for the most votes in the final round or a tie between last-place candidates in any round must be decided by lot, and the candidate chosen by lot is defeated." Act § 5 (codified at 21-A M.R.S.A. § 723-A(3)).

Although the President of the Senate sought an opinion from the Attorney General concerning the same questions now posed to the Justices while the citizen-initiated bill was pending in the Legislature, neither the Senate nor the House nor the Governor chose to seek an opinion from the Justices pursuant to Me. Const. art. VI, § 3 prior to the Act becoming effective. The Senate, on a divided vote, now asks the Justices to opine on three Questions all

dealing with the constitutionality of this citizen-initiated statute *after* it has become law:

1. Does the Act's requirement that the Secretary of State count the votes centrally in multiple rounds conflict with the provisions of the Constitution of Maine that require that the city and town officials sort, count, declare and record the votes in elections for Representative, Senator and Governor as provided in the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Section 3 and Article V, Part First, Section 3?

2. Does the method of ranked-choice voting established by the Act in elections for Representative, Senator and Governor violate the provisions of the Constitution of Maine Article IV, Part First, Section 5, Article IV, Part Second, Sections 3 and 4 and Article V, Part First, Section 3, respectively, which declare that the person elected shall be the candidate who receives a plurality of all the votes counted and declared by city and town officials as recorded on lists returned to the Secretary of State?

3. Does the requirement in the Act that a tie between candidates for Governor in the final round of counting be decided by lot conflict with the provisions of the Constitution of Maine, Article V, Part First, Section 3 relating to resolution of a tie vote for Governor by the House of Representatives and Senate?

(the "Questions").

The Justices, pursuant to a procedural order issued on February 7, 2017 invited representatives of the Maine Senate, the House of Representatives, the Governor, the Secretary of State,

the Attorney General and any other interested person to submit briefs addressing:

1. Whether the Questions propounded present a "solemn occasion," pursuant to article VI, section 3 of the Maine Constitution; and
2. The law regarding the Questions propounded.

This brief relates solely to the first of these two issues. In answer to the Justices' request, none of the Questions propounded presents a "solemn occasion."

SUMMARY OF THE ARGUMENT

None of the Questions presented present a "solemn occasion" under Maine law. First, no issue of "live gravity" exists before the Senate. Second, members of the Senate may not ask Questions related to duties or obligations of another branch of Maine government. Finally, the Justices of this Court do not opine on enacted legislation in this manner, absent litigation of an actual case or controversy. This Court should conclude that no "solemn occasion" exists.

LEGAL ARGUMENT

I. No Solemn Occasion Exists For Any of the Questions Propounded.

No solemn occasion exists for any of the Questions propounded for at least three reasons: (1) there is no issue of "live gravity" before the Senate regarding any of the Questions; (2) the members of the Senate cannot ask Questions regarding the duties or obligations of any other branch; and (3) the Justices do not opine on already enacted legislation because their opinions are advisory only and have no precedential effect with regard to any case or controversy subsequently arising under that statute.

These issues "are jurisdictional in nature and must be strictly observed in order to preserve the fundamental principle of the separation of the judicial from the executive and the legislative branches of government." *Opinion of the Justices*, 437 A.2d 597, 610–11 (Me. 1981)

(1) There is no issue of "live gravity" before the Senate regarding any of the Questions

"A solemn occasion exists only when [the Justices] are

presented with matters of "live gravity" in the sense that the body asking the question requires guidance in the discharge of its obligations." *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997). A solemn occasion refers to an

> unusual exigency, such an exigency as exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the Constitution or under existing statutes.

Id. (*quoting Opinion of the Justices,* 95 Me. 564, 567, 51 A. 224, 225 (1901)). The requesting body must be faced with the necessity of performing an official act that is of "instant, not past nor future, concern." *Id.* (*quoting Opinion of the Justices,* 260 A.2d 142, 146 (Me.1969)). Even when "questions pose important issues of law," the Justices must still decline to answer the questions where "no solemn occasion exists because no immediate action on the part of the [asker] depends on the answers." *Id.* at 1186.

No immediate action on the part of the Senate depends on the answers to any of the Questions propounded. Instead, a divided Senate asserts three circumstances: (1) that failure to answer the questions "before the end of the current legislative session would

create uncertainty over the outcome of any future election contests involving more than 2 candidates," as if the Justices answers to any of these questions could provide certainty as to the winner of some future election for which the candidates aren't even yet known; (2) that "the Senate requests guidance from the Justices ... so that it may determine, during the current legislative session, whether it is necessary to propose constitutional amendments," as if the Senate has any "doubts as to its power and authority" to propose constitutional [or legislative] amendments without first obtaining the opinion of the Justices; and (3) that "the 128th Legislature must also determine during the current legislative session whether to authorize and appropriate" funds "for new voting equipment and computer software, staff positions, ballot printing and transportation and storage of ballots for counting in a central location," as if the Senate has any "doubts as to its power and authority" to appropriate funds (or not).

The absence of an issue of "live gravity" is particularly apparent with regard to the third Question propounded by the Senate, but is an infirmity common to all the Questions. That

third question relates only to the statistically almost impossible scenario of a tie vote between "the two persons having the largest number of votes for Governor." No potential similar issue arises for any tie between "last-place candidates in any round" of ranked choice voting tabulation for Governor, nor between ties for first or last place in any primary or general election for United States Senator, United States Representatives to Congress, Governor, State Senators, or State Representatives.

Apart from the fact that a tie has never happened, nothing interferes with the Legislature's ability to take action with respect to this provision at any time (one proposal has already been introduced, LR 302, An Act To Clarify the Procedure for Breaking Ties in Gubernatorial Elections – Rep. O'Neil of Saco). Accordingly, it seems unlikely that the proper resolution of a tie would be in question in the extremely unlikely event that it ever happens, or that it would ever require judicial resolution. Moreover, any need to decide whether the election officials should decide the outcome of a tie vote by lot or by the Legislature, should it decide pursuant to

Me. Const. art. V, pt. 1, § 3[1] presents an easily resolvable question that does not seem likely to create any chaos or uncertainty.

No need exists for the Senate to have that question answered in this legislative session. It couldn't possibly affect its decision to appropriate funds. Nor could it resolve any "doubts as to [the Senate's] power and authority" to propose either a constitutional amendment or clarifying legislation.

The same principles apply to Questions 1 and 2, which are similarly limited to a mere subset of the elections that must be conducted pursuant to ranked choice voting. The Legislature will already be appropriating funds "for new voting equipment and computer software, staff positions, ballot printing and transportation and storage of ballots for counting in a central location," for the applicable federal elections and state and federal primaries—none of which are implicated by any of the Senate's Questions—and all of which must be conducted by ranked choice

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[1] "The House of Representatives and the Senate meeting in joint sessions, and each member of said bodies having a single vote, shall elect one of said two persons having so received and equal number of votes and the person so elected by the Senate and House of Representative shall be declared the Governor."

voting on or after January 1, 2018. Nor does the Senate have before it any pending proposed constitutional or statutory amendment to the Act that could be opined on by the Justices.

In short, "no solemn occasion exists because no immediate action on the part of the [Senate] depends on the answers" to any of the three questions. *Opinion of the Justices*, 709 A.2d at 1186.

(2) The members of the Senate cannot ask Questions regarding the duties or obligations of another branch

The separation of powers, and comity for the branch that "is in position to take immediate action on the answers," have long been held to require that the Justices decline to answer a request "made by one branch of government for an advisory opinion regarding the power, duty, or authority of another branch." *Opinion of the Justices*, 709 A.2d at 1185; *Opinion of the Justices*, 460 A.2d 1341 (1982).

Question 1 asks about the duties of municipal officials to "sort, count, declare and record" the votes in a certain subset of elections, and asks whether those responsibilities conflict with the Act's requirement that "the Secretary of State shall tabulate the

votes according to the ranked-choice voting method." Act § 4 (codified at 21-A M.R.S.A. § 722(1)). Again, it is unlikely that the Court would even find any issue of "live gravity" regarding an inconsistency between the Constitutional and statutory provisions at issue. But even if there were one, it would be the executive officials—either the municipal officials or the Secretary of State—and not the Senate who would be "in position to take immediate action on the answers." Accordingly, the Justices should decline to answer the Question as propounded by the Senate.

(3) The Justices do not opine on already enacted legislation

Interpretations of existing law are resolved through litigation of an actual case or controversy on a developed record and do not present a solemn occasion for an advisory opinion. In such situations, the Justices have consistently observed that their opinion, if given, "would not in any way affect the power of the House to repeal these sections, or to amend them, or declare the meaning of them, if there is doubt about the meaning." *Opinion of the Justices*, 339 A.2d 483, 488 (1975) (*quoting Answer of the*

Justices, 148 Mass. 623, 21 N.E. 439 (1889)). The Justices in that case noted that simply because some members of the Legislature differ in their views as to the construction of the statute, and if the Justice's "opinion is given, it may affect the views of some members as to the necessity or propriety of amending it," it has long been understood that "this is not an unusual exigency, and does not create or present a solemn occasion within the fair meaning of the Constitution." *Id.* (*quoting Answer of the Justices*, 148 Mass. 623). The Justices concluded in 1975 that the "power of the legislative body to pass a proposed bill" was not in question and "the doubt entertained by members of the legislative body related only to the proper interpretations of an existing statute." *Id.* at 489. Accordingly, "to answer the questions would require us to disregard the limitations expressly placed on our authority." *Id.*

The same principles apply with regard to questions of the constitutional validity of a statute. *Opinion of the Justices*, 355 A. 2d 341 (1976). In the 1976 case, the specific question related to the constitutionality of the existing statutory jury trial waiver that was already enacted legislation, which was not the subject of proposed

amendments before the Legislature that propounded the questions. The Justices determined that "no solemn occasion exists when the Justices are asked to give their opinions on the law which is already in effect." *Id.* at 390.

The Justices have consistently reached that conclusion in response to other requests:

> We respectfully decline to answer Questions 1 and 2 because they request a declaration of existing law and as such do not rise to the level of a "solemn occasion." As our predecessors said five years ago, in declining to assess the constitutionality of a proposed law only cosmetically different from an existing statute it was intended to supersede, "no solemn occasion exists when the Justices are asked to give their opinions on the law which is already in effect."

Opinion of the Justices, 437 A.2d 597, 611 (Me. 1981). Moreover, the Justices have recognized the dangers of issuing an advisory opinion regarding existing law:

> [A]t their root, all of the questions seek from the Justices an interpretation of an existing statute. This creates grave doubts as to the existence of a solemn occasion. First, the Legislature in any event may by amendatory enactment eliminate any ambiguity it finds in an existing statute. Such amendment would have the force of law. An advisory opinion has no such force. It is merely the opinion of the individual Justices, not the binding decision of the Supreme Judicial Court sitting as the Law

> Court. Second, an advisory opinion interpreting an existing statute, though not having the force of law, may jeopardize private rights and public interests created by such statute. As the Justices said in 1936, "any expression of opinion might prejudice the question before the arising of any occasion for its legal determination."

Opinion of the Justices, 396 A.2d 219, 225 (Me. 1979).

Accordingly, the Justices should follow the long line of well-reasoned cases that avoids the potential mischief created by an advisory opinion on an existing statute, and decline to find a solemn occasion.

CONCLUSION

For all these reasons, the Justices should decline to respond to the Senate's Questions. The separation of powers demands no less.

Dated: March 3, 2017

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