STATE OF MAINE

BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT

DOCKET NO. OJ-17-1

IN THE MATTER OF

REQUEST FOR OPINION OF THE JUSTICES

BRIEF OF MARSHALL J. TINKLE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE NO.**

MAINE CONSTITUTION

STATUTES

BILLS AND RESOLUTIONS

MISCELLANEOUS

INTRODUCTION

In response to the Procedural Order inviting various governmental bodies and officials "and any other interested person or entity" to file briefs in this matter, I respectfully submit the following Brief, as a longtime student of the Maine Constitution and as a Maine voter, in the hope of shedding some light on the two key constitutional issues raised by the questions propounded by the Maine Senate on February 7, 2017 (the "Questions"): whether the Questions present a "solemn occasion" within the meaning of article VI, section 3 of the Maine Constitution; and whether the citizen-initiated legislation captioned "An Act to Establish Ranked-choice Voting" (the "Act") conflicts with the Maine Constitution.

First, I conclude that the Questions do not present a solemn occasion, because the Senate is merely seeking an opinion about an existing law. Second, should the Justices choose to answer the Questions anyway, I submit that the Act should be deemed constitutional.

ARGUMENT

1. The Questions do not present a "solemn occasion."

As a general rule, it is unconstitutional for members of the state judiciary to provide advisory opinions concerning legislation to either chamber of the Legislature. The doctrine of separation of powers, encapsulated in article III of the Maine Constitution, "dictates that we decline to answer questions presented by

either the Legislature or the Governor regarding matters within their respective authority." *Opinion of the Justices*, 2004 ME 54, ¶ 34, 850 A.2d 1145, 1153 (Clifford, J., Rudman, J., and Alexander, J.); *see Opinion of the Justices*, 2002 ME 169, ¶ 4, 815 A.2d 791, 794. In considering questions propounded by the Senate, the Justices have adverted to "two overriding principles binding upon the judiciary":

> First, the Constitution of Maine in Article III expressly declares the foundational doctrine of separation of powers; the executive, legislative, and judicial departments of government, and the powers thereof, are strictly separated. Second, by an otherwise universal rule the judicial power may be exercised only in an actual case and controversy; that is, only in a concrete fact situation involving adversary litigants who have an appropriate interest in developing the relevant facts and arguing the applicable legal principles.

Opinion of the Justices, 396 A.2d 219, 223 (Me. 1979).

The authorization of advisory opinions in article VI, section 3 of the state constitution has been recognized as "an unusual and therefore limited exception" to these principles. *Opinion of the Justices*, 396 A.2d at 223; *see also Opinion of the Justices*, 2002 ME 169, ¶ 5, 815 A.2d 791, 794 ("narrow exception"). Section 3 of article VI confers the "extraordinary responsibility" of rendering advisory opinions only "subject to carefully confined conditions." *Opinion of the Justices*, 460 A.2d 1341, 1345 (Me. 1982). Such opinions are authorized only "upon important questions of law," only when requested by "the Governor, Senate or House of Representatives," and only "upon solemn occasions." *Opinion of the Justices*, 396

A.2d 219, 223 (Me. 1979); Me. Const. art. VI, § 3. These limitations are jurisdictional 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).

When the Governor or either house of the Legislature requests an advisory opinion, the Justices "must first determine whether a solemn occasion arises that confers on us the constitutional authority to answer the questions propounded." *Opinion of the Justices*, 2015 ME 27, ¶ 17, 112 A.3d 926, 934; *see Opinion of the Justices*, 2015 ME 107, ¶ 4, 123 A.3d 494, 500. The Justices "will not find such an occasion to exist except in those circumstances when the facts in support of the alleged solemn occasion are clear and compelling." *Opinion of Justices*, 2015 ME 27, ¶ 18, 112 A.3d at 934; *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d 930. In other words, there is a heavy presumption against the existence of a solemn occasion, even if a majority of legislators think otherwise. *See id.; see also* Note, *"Ghosts that Slay": A Contemporary Look at State Advisory Opinions*, 37 Conn. L. Rev. 1155, 1178 (2005) ("In the event of a conflict between the narrow advisory clause and the broad scope of the separation of powers doctrine, the whale should generally swallow the minnow").

The Justices have developed a series of rules for determining whether a solemn occasion exists. *See generally* Tinkle, *The Maine State Constitution* 137 (2d ed. Oxford 2013). A solemn occasion "arises when questions are of a serious and immediate nature, and the situation presents an unusual exigency." *Opinion of Justices*, 2015 ME 107, ¶ 5; *Opinion of Justices*, 2015 ME 27, ¶ 18. Such an exigency 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." *Opinion of the Justices*, 2002 ME 169, ¶ 6, 815 A.2d 791. Under the "live gravity" doctrine, the questions must address matters pending before the requesting body. *See Opinion of Justices*, 396 A.2d at 224; *Opinion of Justices*, 355 A.2d 341, 389 (Me. 1976); Tinkle, *supra*, at 137. "The requesting body must be faced with the necessity of performing an official act that is of 'instant, not past nor future, concern.'" *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997), *quoting Opinion of the Justices*, 260 A.2d 142, 146 (Me. 1969). The questions cannot be "tentative, hypothetical and abstract." *See, e.g., Opinion of Justices*, 2015 ME 107, ¶ 5 n. 1; *Opinion of Justices*, 2002 ME 169, ¶ 6. Moreover, the question must be sufficiently precise to allow the Justices to determine the exact nature of the inquiry. *Opinion of the Justices*, 460 A.2d 1341, 1346 (Me. 1982); *Opinion of the Justices*, 216 A.2d 656, 661 (Me. 1966).

To understand how these standards apply to the Questions being referred by the Senate, it is necessary to recall the background of the Act. Pursuant to Article IV, Part Third, section 18 of the Maine Constitution and 21-A M.R.S. §§ 901, *et seq*., the electors filed a petition proposing the Act with the Maine Secretary of State. On January 12, 2016, the Secretary transmitted the petition to the Clerk of the 127th Maine Legislature, where it was printed as L.D. 1557. The Legislature refused to enact L.D. 1557, voting instead to indefinitely postpone the bill. The initiative was then placed on the ballot for the November 8, 2016 election. The voters approved the initiative. The voter-initiated measure automatically became law 30 days after proclamation of the vote. *See* Me. Const. art. IV, pt. 3, § 19.[1] This automatic enactment requires no further action from the Senate.

[1] That section provides in pertinent part:

> Any measure referred to the people and approved by a majority of the votes given thereon shall, unless a later date is specified in said measure, take effect and become a law in 30 days after the Governor has made public proclamation of the result of the vote on said measure which the Governor shall do within 10 days after the vote thereon has been canvassed and determined; provided, however, that any such measure which entails expenditure in an amount in excess of available and unappropriated state funds shall remain inoperative until 45 days after the next convening of the Legislature in regular session, unless the measure provides for raising new revenues adequate for its operation.

Me. Const. art. IV, pt. 3, § 19. Although the Act provides that it applies to elections held on or after January 1, 2018, *see* IB 2015, c. 3, § 6, it does not postpone its effective date. It has already been incorporated into the applicable provisions of the Maine Revised Statutes. *See* 21-A M.R.S. §§ 1, 601, 722, 723-A. And although the Senate's Questions allude to a potential appropriations issue, there is no suggestion that the measure entailed expenditure in an amount in excess of available and unappropriated state funds.

The Justices have consistently declared that a legislative question concerning *existing law* does not present a solemn occasion. For example, in *Opinion of the Justices*, 674 A.2d 501 (Me. 1996), the House of Representatives had posed a series of questions about the constitutionality of an initiative relating to elections. The Justices declined to answer, because the Legislature had failed to enact the initiated bill, consequently requiring it to be submitted to the electors. *Id.* at 502. Since the question of enactment was no longer before the Legislature, a solemn occasion did not exist. *Id.*

In *Opinion of the Justices*, 339 A.2d 483, 488-89 (Me. 1975), the Justices made it clear that no solemn occasion exists when they are asked for opinions on a law that is already in effect. The Justices reiterated that principle in *Opinion of the Justices*, 355 A.2d at 390, when addressing inquiries relating to "the constitutional validity of an already effective statute." Again, in *Opinion of Justices*, 437 A.2d at 611, the Justices declined to answer questions that "request a declaration of existing law and as such do not rise to the level of a 'solemn occasion.'" The Justices have never repudiated this tenet. *See* Tinkle, *supra*, at 137 ("Thus, the justices have refused to render advice on existing statutes ….").

The Senate has failed to adduce any facts that would convincingly militate against application of this longstanding principle. It essentially proffers three reasons why it seeks an opinion on the constitutionality of the Act; but it fails to

develop facts that would satisfy the "clear and compelling" standard. First, the Senate asserts that failure to address the constitutionality of ranked-choice voting "would create uncertainty over the outcome of any future election contests…." *See* Questions at 3. Yet a similar "uncertainty" would arise whenever the validity of an existing law is questioned or *could be* questioned in the future. It may be likely but is by no means certain that the Act will eventually be challenged in court. Such a challenge, as of now, must be viewed as hypothetical and conjectural. Moreover, the Senate would have no role to play in resolving such a challenge. Hence, mere "uncertainty" about future elections does not create any "unusual exigency" for the Senate. *See Opinion of Justices*, 2015 ME 27, ¶ 25.

Second, the Senate suggests that it seeks guidance to determine "whether it is necessary to propose constitutional amendments" in order to implement the Act. But the Questions do *not* include any inquiry as to the Senate's duty to propose such amendments during the current legislative session. There is no indication that such a proposal is pending before the Senate. Obviously, the Legislature has the *power* to propose amendments to the state constitution "whenever two thirds of both Houses shall deem it necessary." Me. Const. art. X, § 4. It is equally obvious that the Legislature is never *required* to seek a constitutional amendment, even if it believes that a particular piece of legislation may be constitutionally infirm. The Senate cannot have any "serious doubts" on whether it can propose constitutional

amendments, *see Opinion of Justices*, 2004 ME 54, ¶ 3; what it is really saying is that it has doubts about the constitutionality of an existing law; but, as noted above, such a doubt does not present a solemn occasion.

Furthermore, there are no exigent circumstances. If the Legislature failed to pass a resolution to amend the state constitution in the current session, or even if it passed such a resolution but the proposed amendment were turned down at the polls, the consequence would simply be the continuation of the *status quo*. That is, certain elections would be subject to a law that (like many other laws affecting electoral procedure) *could be*, but might not be, challenged some day on constitutional grounds. The outcome of such a challenge (if ever pressed) cannot be known and could not be known even if the Justices issued an advisory opinion on the subject, since such an opinion would have no binding effect, *see, e.g.*, *Opinion of Justices*, 2012 ME 49, ¶ 4. Hence, these hypothetical concerns do not constitute an immediate or pressing quandary for the Senate that would justify the invocation of Article VI, section 3 of the Maine Constitution.

The Senate's third rationale for seeking an advisory opinion is that the Legislature must determine "whether to authorize and appropriate in excess of $1,500,000 in the biennial budget for the period beginning July 1, 2017 to implement the Act…." It is less than obvious, however, what the connection is between the constitutionality of the Act and the Legislature's ability to fund it.

Like every existing law, the Act enjoys a strong presumption of constitutionality. *Guardianship of Chamberlain*, 2015 ME 76, ¶ 8, 118 A.3d 229, 234-35. There is no constitutional or statutory impediment to the appropriation of adequate funds to implement a duly enacted law, even if that law hypothetically could be found unconstitutional in the future.

Conversely, there is no constitutional or statutory *requirement* that the Legislature ensure adequate funding for a particular legislative program. By statute, an initiative submitted to the voters must include a fiscal impact statement, *see* 1 M.R.S. § 353; 21-A M.R.S. § 901(5)[2], but this statement does not bind a subsequent legislature. *See Opinion of the Justices*, 673 A.2d 693, 695 (Me. 1996). Although the Legislature must submit an initiated bill to the voters even if it is unconstitutional, once it is enacted it is on the same footing as every other law. *See id.* at 695-697.

A judicial opinion on the constitutionality of the Act might help influence the Legislature in deciding what steps, if any, to take next vis-à-vis the subject of

[2] In this instance, the fiscal impact statement furnished by the Maine Office of Fiscal and Program Review estimated that the Secretary of State's office would need $761,344 in fiscal year 2017-18 and $641,444 in fiscal year 2018-19 and that the Department of Public Safety would need a General Fund appropriation of $75,926 and a Highway Fund allocation of $72,948 in fiscal years 2017-18 and 2018-19 to implement the initiative. To place these amounts in context, projected General Fund appropriations for the next biennium (2018-19) come to $7,314,432,659.00, and projected Highway Fund appropriations account for an additional $1,010,926,269.00. *See* State of Maine 2018-2019 Governor's Budget Overview 28-29 (Jan. 6, 2016).

the Act[3]; but that is not a sufficient foundation for a "solemn occasion." If it were, then legislative or gubernatorial questions concerning existing laws would always furnish a solemn occasion. The separation-of-powers doctrine does not permit the judicial branch to act as an all-purpose sounding board regarding which existing laws may or may not be problematic.

The determination of whether to provide funds for voter-initiated legislation is ultimately a political question, not a constitutional one. Both the allocation of such funds and the refusal to allocate them would be within the legislative prerogative; yet a refusal would doubtless carry political costs. It is easy to see why the Senate would desire an opinion of the Justices for "political cover"; however, such use of the judicial branch does not fall within the narrow mandate of Article VI, section 3 of the Maine Constitution and, indeed, is prohibited by Article III.

2. <u>The Act does not on its face violate the Maine Constitution.</u>

As noted previously, the Act was approved by plebiscite pursuant to Article IV, Part Third, section 18 of the Maine Constitution, providing for direct initiative of legislation. "The initiative is a device by which any person or group may draft a

[3] The Questions reflect considerable confusion about what legislative response would be triggered by an advisory opinion that the Act conflicted with the Maine Constitution. At one extreme, the Senate implies that it is prepared to approve and recommend amendments to the Constitution in order to "save" the Act. At the other extreme, it suggests that it would refuse to appropriate funds necessary to implement the Act, effectively killing it. It is difficult to see how the Legislature could pursue both of these options in the same session.

statute and, by submitting a petition containing the required number of signatures, cause the measure to be submitted to the electorate at a general or special election." Tinkle, *supra*, at 103. The relevant procedures governing the initiative, as prescribed by the Constitution, are as follows:

> The electors may propose to the Legislature for its consideration any bill, resolve or resolution … by written petition addressed to the Legislature or to either branch thereof and filed in the office of the Secretary of State….
>
> … The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both….
>
> … The Governor shall, by proclamation, order any measure proposed to the Legislature as herein provided, and not enacted by the Legislature without change, referred to the people at an election to be held in November of the year in which the petition is filed.

Me. Const. art. IV, pt. 3, § 18.

Thus, by definition, a law enacted by initiative is one that has been rejected by the Legislature (either expressly or by refusal to take action) but has found favor with the people of Maine. Opposition by the Legislature or by other governmental officials in no way affects the law's validity. The Law Court has reiterated that

> the right of the people to initiate and seek to enact legislation is an absolute right. It cannot be abridged directly or indirectly by any action of the Legislature.

McGee v. Secretary of State, 2006 ME 50, ¶ 21, 896 A.2d 933, 940; *see also Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983) ("By section 18 'the people, as sovereign, have retaken unto themselves legislative power,' and that constitutional provision must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate."), *quoting Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971); *Kelly v. Curtis*, 287 A.2d 426, 428 (Me. 1972) ("right of the people … to enact legislation … is an absolute one and cannot be abridged directly or indirectly by any action of the Legislature"); *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 911 (1948) (same).[4]

[4] Section 18 was added to the Maine Constitution by Amendment XXXI in 1909. *See* Tinkle, *supra*, at 98, 103. By amendment XXXI, the people took back legislative power that they had earlier delegated entirely to the Legislature and made it clear that they were ultimately the "real arbiters" of litigation. *See Moulton v. Scully*, 111 Me. 428, 448, 89 A. 944, 953 (1914); Tinkle, *supra*, at 74. The history of the amendment demonstrates that in voting to submit it to the electorate, the legislators were quite aware that they were ceding ultimate lawmaking authority to the voters. Typical of the remarks in support of the measure are the following:

> [The amendment] will work a very radical change in legislation in this State…. I believe that the more truly democratic we make our State government the more certain we are of peaceful progress. I believe the people of Maine can be trusted.

Legis. Rec. 638-39 (statement of Rep. Johnson).

> An essential function of government – the making of laws – is now a close monopoly in the hands of a selected few. Under the present nature of our law making machinery, it is possible for a few senators to defeat any measure, no matter who nor how many want it….
>
> …The rights and welfare of the people can be guarded and promoted, only by the people themselves; never by a selected few.

Id. at 643-644 (statement of Rep. Cobb). The Amendment garnered bipartisan support. *See id.* at 638-47, 648-49; Edward E. Chase, *A History of the Operation of the Initiative and Referendum*

Once an initiated bill is approved by the people, it generally takes effect 30 days after proclamation and is then on the same footing as any law enacted by the Legislature. *Opinion of Justices*, 673 A.2d at 695; Tinkle, *supra*, at 103; Me. Const. art. IV, pt. 3, § 19. All legislation is presumed constitutional. *See, e.g.*, *Bouchard v. Department of Public Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92, 96; *Common Cause v. State*, 455 A.2d 1, 18 (Me. 1983) (referendum measure). This is a "presumption of great strength." *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1, 10 (Me. 1973); *Baxter v. Waterville Sewerage District*, 146 Me. 211, 214, 79 A.2d 585, 587 (1951). Anyone challenging the constitutionality of a statute bears the "heavy burden" of overcoming the presumption by demonstrating a violation of the state constitution "by strong and convincing reasons." *Ford Motor Co. v. Darling's*, 2014 ME 7, ¶ 33, 86 A.3d 35, 47. All reasonable doubts must be resolved in favor of constitutionality. *Bouchard*, 2015 ME 50, ¶ 8; *Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 5, 997 A.2d 92. Put another way, the unconstitutionality of a law must be proved "beyond a reasonable doubt." *State v. Poulin*, 105 Me. 224, 228-29, 74 A. 119, 121 (1909), *quoting Soper v. Lawrence*, 98 Me. 268, 280, 56 A. 908, 911 (1903).

in Maine from 1907 to 1951 at 3 (monograph). The voters passed it at the 1908 election by more than a two-to-one margin. Chase, *supra*, at 4-5.

These principles, like the restrictions on advisory opinions, stem from the separation of powers doctrine enshrined in Article III:

> The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons.

Laughlin v. City of Portland, 111 Me. 486, 489, 90 A. 318, 319 (1914). Moreover, the burden on the challenger is even greater when it is alleged that the statute is unconstitutional on its face. Under a facial challenge, it must be established that *no set of circumstances exists* under which the Act would be valid. *Dorr v. Woodard*, 2016 ME 79, ¶ 25, 140 A.3d 467, 473.

The question, then, is whether the Senate, or any other party filing a brief in this matter, has shown beyond a reasonable doubt that the only rational way of construing the Act and the Maine Constitution is that they are unambiguously and ineluctably in conflict. The Senate, piggybacking on the Attorney General's opinion, posits that the Act conflicts with three sets of provisions of the Maine Constitution concerning the election of state representatives, state senators, and the Governor: (1) that votes be sorted, counted, declared and recorded by municipal officials; (2) that candidates be elected by a "plurality" of the votes; and (3) that if a gubernatorial contest results in a tie, then the Legislature will hold an election

between the tied candidates. Because the Act is not in clear and irreconcilable conflict with any of these provisions, however, it may not be declared unconstitutional.

a. Municipal involvement.

Article IV, Part First, section 5 of the Maine Constitution addresses the election of representatives and provides in pertinent part:

> The meetings within this State for the choice of Representatives shall be warned in due course of law by qualified officials of the several towns and cities 7 days at least before the election, and the election officials of the various towns and cities shall preside impartially at such meetings, receive the votes of all the qualified electors, sort, count and declare them in open meeting; and a list of the persons voted for shall be formed, with the number of votes for each person against that person's name…. Fair copies of the lists of votes shall be attested by the municipal officers and the clerks of the cities and towns and the city and town clerks respectively shall cause the same to be delivered into the office of the Secretary of State forthwith. The Governor shall examine the returned copies of such lists and 7 days before the first Wednesday of December biennially shall issue a summons to such persons as shall appear to have been elected…. All such lists shall be laid before the House of Representatives on the first Wednesday of December biennially, and they shall finally determine who are elected.

Article IV, Part 2, section 3 states that the meetings "for the election of Senators shall be notified, held and regulated and the votes received, sorted, counted, declared and recorded, in the same manner as those for Representatives"; and Article V, Part First, section 3 contains a similar clause for election of Governor.

Thus, in each case, the initial task of receiving and counting votes and making a list of how many votes each candidate received is assigned to municipal officials. This feature has basically gone unchanged since the Maine Constitution was adopted. *See* Me. Const. art. IV, pt. 1, § 5; art. IV, pt. 2, § 3; art. V, pt. 1, § 3 (1819); *see generally* Tinkle, *supra,* at 79. In 1819, it could hardly have been otherwise. Before the advent of trains, cars, computers and automated voting machines, it was unthinkable that votes for state officeholders could be received and counted in Augusta. The aim of these provisions was not to minimize the role of state officials but, rather, to furnish safeguards against a failure to correctly ascertain "the will of the people as expressed in the choice of their officers and legislators." *Opinion of the Justices,* 70 Me. 560, 561 (1879).

What these provisions do *not* say is notable. They do not specify any particular voting system or method. They do not prescribe *how* votes are to be sorted and counted. More significantly, they do not specify how the data on all the lists is to be tabulated or who may perform the tabulations. Although the Governor is directed to "examine the lists and summon the winners, and each chamber of the Legislature must ultimately determine who has been elected,[5] the Constitution is silent as to who takes the divers municipal lists and tabulates the results for each

[5] *See Opinion of the Justices*, 2002 ME 169, ¶¶ 15, 19, 815 A.2d 791, 796-97; *Opinion of the Justices*, 143 Me. 417, 421-22, 88 A.2d 151, 153-54 (1948).

senatorial and representative district. Nor does the Constitution specify any role for the Secretary of State other than as the depository of the lists[6]. Yet the Secretary has long been authorized by statute to tabulate the election returns for each of these offices. *See* 21-A M.R.S. § 722.[7]

The lacunae in the Constitution should be viewed as a deliberate drafting choice, in order to give legislators leeway to adapt election procedures to changing times. *See Allen*, 459 A.2d at 1102 ("Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend.")[8] Indeed, as originally adopted, section 5 of the first part of Article IV contained additional procedural detail but ended with the proviso:

> *Provided*, That the Legislature may prescribe a different mode of returning, examining and ascertaining the election of the representatives in such classes.

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[6] For gubernatorial elections, the Secretary is to "lay the lists… before the Senate and House of Representatives to be by them examined…." Me. Const. art. V, pt. 1, § 3.

[7] *See also* 21 M.R.S. § 1092 (1984); R.S. 1954, c. 3-A § 122. Notwithstanding Article IV, pt. 1, § 5, the Governor must accept the tabulation of the Secretary of State as the sole basis for determining what persons to summon. *Opinion of Justices*, 2002 ME 169, ¶ 22, 815 A.2d at 798. The Constitution generally authorizes the Secretary of State to perform whatever duties "shall be required by law." Me. Const. art. V, pt. 2, § 4.

[8] *Cf. League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) ("When the people enact legislation by popular vote, we construe the citizen initiative provisions of the Maine Constitution liberally in order to facilitate the people's sovereign power to legislate").

Me. Const. art. IV, pt. 1, § 5 (1819). When the latter part of this section was redrafted in 1864, the proviso disappeared, for reasons unknown.[9] However, six years later, in 1870, the provision was added to the Constitution to authorize the Legislature to divide towns into voting districts and "*prescribe the manner in which the votes shall be received, counted, and the result of the election declared.*" Me. Const. art. IX, § 12 (emphasis added); *see* Res. 1989, c. 91; Res. 1919, c. 22.

Hence, the Constitution does not restrict the method of aggregating and tabulating votes, as long as the municipalities are not deprived of their initial functions of receiving, sorting, counting and listing the votes for these three offices. Nothing in the Act takes away this municipal function. Rather, it changes the method of casting and tabulating votes by instituting ranked-choice voting. "Ranked-choice voting" is "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." 21-A M.R.S. § 1(35-A). Besides changing the ballot form, the only changes effected by the Act are to tabulation procedures *after* the votes have been received, sorted, counted and recorded at the local level. It prescribes a new method by which the Secretary of State tabulates votes; but the

[9] The primary purpose of this Civil War amendment was "to allow soldiers absent from the state to vote for Governor, Senators, Representatives and County Officers." *See* Res. 1864 c. 344. No mention was made of the proviso. *Id.*

tabulation of votes for all state elections has long been the Secretary's responsibility. *See id.*, § 722(1). The Act says nothing at all about the initial receiving, sorting, counting or recording of votes.

Hence, it must be assumed that under ranked-choice voting, the same municipal officials will still be receiving, sorting, counting and recording votes as they are cast. According to the Senate and the Attorney General, the tabulation methodology runs afoul of the Constitution because the multi-round tabulation is done on a ballot-by-ballot basis, requiring the Secretary to examine the ballots. However, nothing in the Constitution bars the Secretary from viewing ballots, and the absence of any express authorization is quite different from a prohibition.[10] The Act provides that the Secretary of State is to tabulate the votes according to the specified ranked-choice voting method. *See* §1B 2015, c. 3, § 5; 21-A M.R.S. 722(1). That method involves tabulating votes in rounds, with some ballots consulted in more than one round and other ballots "exhausted." 21-A M.R.S. § 723-A(2). This does not necessarily mean, however, that the actual ballot-counting is performed by the Secretary of State's office. This is not what the Act says, and statutes must not be interpreted in a way that could conflict with the Constitution if

[10] The Secretary would be viewing the ballots not to assess their validity but simply to tabulate the appropriate data. *Cf. Opinion of Justices*, 2002 ME 169, ¶ 18-22 (Governor's authority to examine returns is ministerial and does not include ability to accept or reject ballots). There is no constitutional bar to review of ballots in Augusta. The Legislature may examine ballots for governor. Me. Const. art. V, pt. 1, § 3.

at all possible. *See Nader v. Maine Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551, 558. The existing voting scheme requires the ballots to be delivered to and retained by the town clerk, *see* 21-A M.R.S. § 698(4), and the Act makes no change in this provision. Hence, it appears that the "counting" of votes in each round will be done by municipal officials and not the Secretary.[11]

In short, nothing in the Act clearly and convincingly conflicts with the constitutional provisions regarding local officials' involvement in State elections.

b. Plurality.

Opponents of ranked-choice voting claim that it conflicts with the Maine Constitution's references to election by a "plurality" of the votes.[12] This claim would be tenable only if the terms "plurality" and "votes" were assigned specialized meanings not found in the Constitution. These terms are undefined, and they have not been judicially construed in the context of Articles IV and V of the Maine Constitution. To discern the meaning and intent of these

[11] In the Attorney General's March 4, 2016 opinion, she acknowledges that it is "theoretically" possible for local election officials to count the ballots for each round of ranked choice voting but assumes (incorrectly, in my view) that the Act requires "central processing by the Secretary of State." Op. Me. Att'y Gen. (Mar. 4, 2016) at 7 n. 13.

[12] The section on the election of representatives calls for the Governor to issue a summons "to such persons as shall appear to have been elected by a plurality of all votes returned…." Me. Const. art. IV, pt. 1, § 5. The corresponding provision for Senators likewise instructs the Governor to issue a summons "to such persons, as shall appear to be elected by a plurality of the votes in each senatorial district." *Id.*, art. IV, pt. 2, §§ 4, 5. Similarly, the Constitution provides for the Senate and House of Representatives to determine the votes cast for Governor "and in case of a choice by plurality of all of the votes returned they shall declare and publish the same." *Id.*, art. V, pt. 1, § 3.

terms, it is useful to look at their history. *See Opinion of Justices*, 673 A.2d 1291, 1297 (Me. 1996).

Each of the four provisions in question originally referred to a *majority* of the votes.[13] The question of what to do if no candidate achieved a majority vote was handled in different ways. For representatives, the selectmen and assessors had to call a new election, "and the same proceedings shall be had at every future meeting until an election shall have been effected." Me. Const. art. IV, pt. 1, § 5 (1819). For vacant Senate seats, the Representatives and those Senators who did get elected were to elect by joint ballot, "from the highest numbers of the persons voted for … equal to twice the number of Senators deficient," the "number of Senators required." *Id.*, art. IV, pt. 2, § 5. If no gubernatorial candidate received a majority, first the House would choose two of the candidates from the top four vote-getters and then the Senate would elect one of them. *Id.*, art. V, pt. 1, § 3.

It did not take long for dissatisfaction with this dispensation to take hold. In 1847, an amendment was submitted to modify each of these provisions by deleting "majority" and substituting "highest number." Res. 1847 c. 45 (amend. VII). The

[13] *See* Me. Const. art. IV, pt. 1, § 5 (1819) ("in case any person shall be elected by a majority of all the votes, the selectmen or assessors shall deliver the certified copies of such lists to the person so elected"); *id.*, art. IV, pt. 2, § 4 (Governor and Council shall issue summons to such persons "as shall appear to be elected by a majority of the votes in each district"); *id.*, art. IV, pt. 2, § 5 (Senate shall "determine who are elected by a majority of votes to be Senators in each district"); *id.*, art. V, pt. 1, § 3 ("in case of a choice [of Governor] by a majority of all the votes returned," Senate and House of Representatives "shall declare and publish the same").

proposal somehow passed with respect to representatives but not for senators and governors. In 1864, when the latter part of section 5 of Article IV, Part First was repealed and replaced, the word "plurality" appeared for the first time. Res. 1864, c. 344 (amend. X). There is no reason to suppose that anyone perceived any substantive difference between that term and "highest number"; rather, they appear to be used synonymously.[14] In 1875, "plurality" was substituted for "majority" in Article IV, Part Second, pertaining to the election of Senators (Res. 1875, c. 98; Me. Const. amend. XV); and in 1880, the same substitution was made with respect to Governors (Res. 1880, c. 159; Me. Const. amend. XXIV).

Thus, in each instance, "plurality" was inserted into the Constitution in order to eliminate the majority-vote requirement. The focus was strictly on the *percentage of votes needed to win an election*, not on the type of voting *system*. Voting systems vary with respect to how votes are cast and how they are counted;[15] but regardless of which voting system is used, the separate question remains as to what percentage of votes determines the winner. Though some kinds of votes require a "super-majority," the only options that have been considered in voting for elective offices are a simple majority or a plurality. In the period from 1847

[14] In the voting context, a plurality is "a number greater than another" or "an excess of votes over those cast for an opposing candidate," *see* www.Merriam-Webster.com/dictionary/plurality.

[15] *See* O'Neill, *Everything That Can be Counted Does Not Necessarily Count*, 2006 Mich. St. L. Rev. 327, 339.

through 1880, Mainers chose the plurality option for legislative and gubernatorial elections in order to eliminate the problems produced by the majority-vote requirement whenever more than two candidates were running and nobody received a majority: either a succession of do-over elections (in the case of representatives) or (for senators and governors) the anti-democratic solution of transferring the right of the people to choose their leaders to a small clique of politicians.[16] Allowing candidates to be elected by a plurality (or highest number) of the votes solved these problems by virtually assuring that every election would produce a winner.

The use of the term "plurality" cannot be understood as intending to lock in forever the voting *system* then in use because, first of all, alternative voting systems were not on anyone's radar at the time of these amendments[17] and, secondly, alternative systems like ranked-choice voting do require successful candidates to receive a plurality, as opposed to a majority, of all the votes *as cast*

[16] For example, the 1880 amendment allowing the Governor to be chosen by a plurality of the votes came close on the heels of the failed gubernatorial election of 1878, in which the Legislature, after nobody received a majority of the popular vote, elected the third-place finisher, with disastrous results. *See* Tinkle, *supra*, at 12.

[17] The ranked-choice voting system adopted by the Act was invented by an MIT professor in the 1870s but was not implemented in the United States until the early twentieth century, when five states used it. *See Dudin v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011); S. Issacharoff, P. Karlin & R. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 1133, 1175 (3d ed. 2007); O'Neill, *supra*, at 334. It gained new momentum early in the last fifteen years. *See id.*

and determined under the rules of that system. The Act is clear that at the end of the tabulation process "the candidate *with the most votes* in the final round is elected." 21-A M.R.S. § 1(35-A) (emphasis added). Because the Act authorizes voters to cast multiple votes on a ranked basis, the determination of plurality will naturally be different from the present one-vote-per-voter system – often labeled the "first past the post" system in psephological circles[18] - but the goal is still to determine the plurality winner under its own set of rules. When opponents of the Act claim that the winner of a ranked-choice voting election will not necessarily have achieved a plurality of the votes, what they really mean is that the winner would not necessarily have gained a plurality *under the present first-past-the-post system*. However, nothing in the state constitution mandates the use of the first-past-the-post system or prohibits the use of any alternative voting system that satisfies basic equal protection and due process norms.[19]

For these reasons, the Act does not conflict with the state constitution's "plurality" provisions.

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[18] *See, e.g., Dudin*, 640 F.3d at 1103; Issacharoff, *supra*, at 1132; D. Farrell, *Electoral Systems: A Comparative Introduction* 19 (2001).

[19] Every court that has considered constitutional challenges to ranked-choice-type voting has rejected them. *See, e.g., Dudin*, 640 F.3d at 1106-17; *McSweeney v. City of Cambridge*, 422 Mass. 648, 665 N.E.2d 11 (1996) (similar "single transferable vote" system); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009).

c. Tie Votes.

The Act provides that tie votes generally are to be resolved by lot. *See* 21-A M.R.S. § 723-A(3). Yet the Maine Constitution provides that if a gubernatorial election results in a tie, the Legislature is to elect the winner. Me. Const. art. V, pt. 1, § 3. This clause of the Constitution has never been invoked, because there has never been a tied election for governor, and, statistically, the chance of such a tie occurring in the future is virtually nil. Should such a wondrous event occur, however, and if the Act and Maine's supreme law were deemed in conflict, the Act would have to be read as containing an implicit exception for ties for governor. *See Nader*, 2012 ME 57, ¶ 19, 41 A.3d at 558; *cf. Molleur v. Dairyland Insurance Co.*, 2008 ME 46, ¶ 11, 942 A.2d 1197, 1201 (insurance contract must be read as incorporating relevant statutory provisions). The Act would not be deemed unconstitutional even in those circumstances and certainly should not be declared unconstitutional at this juncture. *See Maine Milk Producers v. Commissioner of Agriculture*, 483 A.2d 1213, 1218 (Me. 1984).

Respectfully submitted,

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