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

REPLY BRIEF OF SECRETARY OF STATE

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The Secretary of State offers the following points relating to election procedures, in response to the initial briefs filed by other parties to this proceeding on March 3, 2017. The Secretary also joins the legal arguments set forth in the Attorney General's responsive brief.

1.   The brief filed by the League of Women Voters and Maine Citizens for Clean Elections ("the League") asserts that under ranked-choice voting ("RCV"), municipal officials "will sort and count the total number of ballots; and the officials will declare the votes authentic and properly cast." League Br. at 17.   The League adds that "[s]o long as these actions are conducted in an open meeting, this process satisfies the election officials' Constitutional responsibilities." *Id.* There are several problems with these statements.

First, the Constitution mandates that *votes* be received, sorted, counted and declared "in open meeting" at municipal voting places. Me. Const. art. IV, pt. 1, § 5. Counting the total number of ballots is not sufficient. Second, it is unclear what the League means by "authenticating" since that concept does not exist in Article IV or in Maine's election laws. Counting votes or voter preferences involves determining voter intent, not authenticity. *See* 21-A M.R.S.A. § 696.[1]

The League's suggestion that this would satisfy the open meeting requirement of the Constitution fails to acknowledge that many steps in the

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[1] If, by authenticity, the League means to suggest that local officials would determine the validity of each voter preference marked on each ballot cast, according to the rules set forth in 21-A M.R.S. § 696, that would appear to make little sense to do at the outset since the need to count voters' lower-ranked choices will depend on the outcome of round one of RCV.

RCV tabulation process are not actually performed in view of the public in a manner comparable to the current election system. As described below and in the Julie Flynn Affidavit attached to the Secretary's initial brief, the cast vote records for machine count towns cannot be generated at the local level. The cast vote records are invisible to the public, as is the process of running algorithms using computer software. *See* Flynn Affidavit, ¶¶ 24-27. This contrasts with current procedures under which the tabulating machine tally tapes are examined in public and the totals from those tapes are recorded on the warden's tally, in public. *See* Flynn Aff., ¶¶ 10-14 and Exhibits B – G.

2.   The League contends that "[c]urrently, a number of towns count votes outside the physical boundaries of the municipality." League Br. at 19 n. 8. This is not accurate. There are only two small towns (Talmadge and Hersey) that currently have no suitable voting place and thus conduct their elections at a voting place located in another town. In both instances, the town officials perform all the functions required by the Constitution with respect to receiving, sorting, counting, and declaring the votes cast by voters in their respective jurisdictions. Voters in unorganized townships with no voting place are authorized by law to register to vote and to vote in another town that is more easily accessible to them. 21-A M.R.S.A. § 156. Currently, the voters of four plantations cast ballots in another host town. *See* voting places and poll opening times at

http://www.maine.gov/sos/cec/elec/data/index.html

3.   Contrary to the League's assertions, under RCV as described in the Act, the Secretary will not "tabulate the result of the election - in the same way that under the current system the Secretary tabulates the result by aggregating the votes from around the state and determining which candidate received the most votes." League Br. at 17. First, the current system involves aggregating the total votes listed for each candidate based on a single count tallied and submitted by each municipality. *See* Ex. J to Flynn Aff. It does not involve reallocating voter preferences, and computing new tallies in multiple rounds, as required under RCV. Second, the tabulations prepared by the Secretary of State under the current system reflect data shown on the face of paper lists that have been prepared, verified for accuracy, and attested to by the municipal clerks based on a complete paper trail from the ballot clerks and election wardens in each voting place. The Act does not provide anything comparable under the RCV methodology.

4.   The League presents a sample chart on page 19 of its brief, which it claims is "functionally identical to the list produced under our current system indicating how many votes each candidate received." The chart is deceptively simple, however. It depicts results for 100 ballots in a three-way race, and assumes no skipped rankings on any voter's ballot, or questionable voter intent for lower ranked choices. If one were to attempt to create a tally sheet for ranked-choice voting in hand-count towns, it would be far more complex. *See* Flynn Aff. ¶ 30. Also, municipalities in Maine are handling not

100 ballots, but many hundreds, or thousands, or tens of thousands of ballots. http://www.maine.gov/sos/cec/elec/results/index.html

For machine-count towns, the data saved on a memory device from a DS-200 tabulating machine has to be translated by specialized computer software in order to produce a spreadsheet that can be printed as a "cast vote record" report. Thus, municipal officials could not generate a list of results in the form of a cast vote record (let alone attest to it). Municipalities would have to ship each memory device to the Secretary of State in order for those functions to be accomplished. *See* Flynn Affidavit, ¶¶ 24-27.

5. In response to Question 1, several briefs have suggested that RCV comports with the Constitution because the multiple rounds of counting *could* occur at the local level. *See, e.g.*, Committee for Ranked Choice Voting Br. at 17-18; League Br. at ; Marshall J. Tinkle Br. at 20 & 23 n. 17. To accomplish this, however, the Secretary of State's Election Division would have to aggregate the results of the first round of counting; declare which candidates had been eliminated, and which were "continuing"; direct municipal officials across the state (in a gubernatorial race) or legislative district (for a Senate or House race) to re-sort their ballots, segregate those indicating a first-choice for a defeated candidate and then redistribute the second (or potentially third) ranked choices of those voters for any continuing candidate; then receive new tallies from the towns reflecting this second count; aggregate and declare the results; and repeat that process for a third round, if necessary.

This would obviously be an extraordinarily cumbersome, time-

consuming process, fraught with potential for human error. There would be no results to "declare" on election night, and it still would not be consistent with the election procedure outlined in the Constitution, Article IV, pt. 1, § 5.

In summary, it is not accurate to portray RCV as the functional equivalent of the methods currently used to receive, sort, count, and declare votes in each municipality, or the aggregation of those results in a statewide tabulation.

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Respectfully submitted,

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