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

RESPONSIVE BRIEF OF MARSHALL J. TINKLE

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MISCELLANEOUS

ARGUMENT

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

In seeking to persuade the Justices that a solemn occasion exists within the meaning of Article VI, section 3 of the Maine Constitution, the opponents of the ranked-choice voting statute (the "Act") advance a "parade of horribles," claiming that unless the Justices immediately issue an advisory opinion on the constitutionality of the Act, the swearing-in of legislators and governor will be delayed indefinitely, there will be "havoc" in the electoral process, and a "constitutional and political crisis" will ensue. With all due respect, this sky-is-falling rhetoric does not withstand scrutiny.

First of all, the Act must be regarded as valid "until otherwise declared by the court." *State v. Poulin*, 105 Me. 224, 229, 74 A. 119, 121 (1909). *See, e.g., Board of Overseers of Bar v. Lee*, 422 A.2d 998, 1001 (Me. 1980); *Opinion of the Justices*, 281 A.2d 321 (Me. 1971). Regardless of whether the Justices answer the Questions, the officials charged with implementing the Act will be obliged to carry out its dictates pursuant to their duties to uphold the laws of Maine unless and until the *Court* declares it unconstitutional. *See Poulin*, 105 Me. at 229. There will be no reason to delay declaring the winners of ranked-choice voting elections or swearing them in.

Secondly, there is no reason to assume that the Act ever will be declared unconstitutional, not only because of the strong presumption of constitutionality and the policy against finding laws unconstitutional unless strictly necessary but also because of all the convincing arguments that have been offered in favor of the Act's constitutionality. But even if a court were to deem the Act in conflict with Maine's supreme law after elected officials took office, that would scarcely precipitate a crisis. It has long been established that the acts of officials elected or appointed under an invalid law remain valid. *Poulin*, 105 Me. at 228-33.[1] Anyone elected under the Act could carry out his or her responsibilities without being questioned unless and until the Court were to invalidate the election, and even then all prior acts would have to be respected. *See id.*

If some senators have doubts about the constitutionality of the Act, they are free to take whatever action they deem appropriate, keeping in mind, however, that the duty to regard all duly enacted laws as valid applies as much to them as to everyone else. But the mere entertainment of such doubts or disagreements about

[1] In *Poulin*, a special prosecutor had been appointed under a Prohibition law. 105 Me. at 226-27. The law was subsequently declared unconstitutional in *State v. Butler*, 105 Me. 91, 73 A. 91. The *Poulin* court nevertheless held that the acts of the prosecutor were valid. The Court explained: "To protect those who deal with officers apparently holding office under color of law, in such manner as to warrant the public in assuming that they are officers and in dealing with them as such, the law validates their acts as to the public and third persons, on the ground that as to them although not officers de jure they are officers in fact whose acts public policy requires to be construed as valid." *Id.* at 229-30. *See also D'Amato v. S.D. Warren Co.*, 2003 ME 116, ¶ 20, 832 A.2d 794, 802 (affirming continued vitality of "de facto officer" doctrine).

an existing law emphatically does not generate a solemn occasion. *Opinion of the Justices*, 355 A.2d 341, 390 (Me. 1976); *see Opinion of the Justices*, 153 Me. 216, 219-20, 136 A. 508, 510 (1957); *Opinion of the Justices*, 134 Me. 507, 508, 182 A. 17 (1935).[2]

For the Justices to answer the Questions in these circumstances would require an expansion of the concept of solemn occasion beyond any interpretation hitherto conceived in this State and would cause serious damage to the separation of powers doctrine. Since the earliest days of our Republic, it has been understood that advisory opinions run counter to the fundamental principle of separation of powers. In 1792, the United States Supreme Court affirmed that "neither the Legislature nor the Executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner." *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792).

The limitation on advisory opinions is also a function of "the general and basic duty to avoid decisions on constitutional questions." 1 Rotunda & Nowak, *Treatise on Constitutional Law* § 2.13(g) at 379 (4th ed. 2007). Because judicial

[2] Other states with constitutional provisions similar to Article VI, section 3 universally agree that they are not empowered to offer advice on existing laws. *See, e.g., Answer to the Justices*, 148 Mass. 623, 627, 21 N.E. 439 (1889) ("Our 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 Justices*, 121 N.H. 280, 282, 428 A.2d 909, 910 (1981) (court is prevented "from rendering advisory opinions on the constitutionality of existing laws as distinct from the constitutionality of proposed legislation"); *see also* Note, *Advisory Opinions on the Constitutionality of Statutes*, 69 Harv. L. Rev. 1302, 1304 (1956).

review is in tension with democracy and "may result in popular disapproval of court action," the doctrine of strict necessity in addressing constitutional issues was developed to help "assure that judicial review will not take place gratuitously." *Id.* at 380. Thus, the Law Court has reiterated that it will not pass upon state constitutional questions unless strictly necessary to the determination of the case before it. *See, e.g., White v. Edgar*, 320 A.2d 668, 683 (Me. 1974); *Payne v. Graham*, 118 Me. 251, 255, 107 A. 709, 710 (1919); *see also Opinion of the Justices*, 623 A.2d 1258, 1264 (Me. 1993) (Glassman, J. & Clifford, J.) (admonishing "not to entertain constitutional questions in advance of the strictest necessity"), *quoting Parker v. Los Angeles County*, 338 U.S. 327, 333, 70 S. Ct. 161, 94 L. Ed. 144 (1949). The policy considerations for avoiding constitutional questions apply with special force in the absence of pending litigation. *See, e.g., Muskrat v. United States*, 219 U.S. 346, 362, 31 S. Ct. 250, 55 L. Ed. 246 (1911); *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 899-900, 179 P.3d 366, 383-84 (2008).[3]

[3] Justice Frankfurter emphasized that the need for a factual record and adversarial framing of the issues is so fundamental to consideration of constitutional questions that "failure scrupulously and persistently to observe these common places jeopardizes the traditional American constitutional system more than all the loose talk about 'usurpation'". Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1003 (1924); *see also United States v. Freuhauf*, 365 U.S. 146, 157 (1961) ("Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multi-faceted

Other reasons for strictly cabining the issuance of advisory opinions should also be kept in mind, *to wit*:

1) Such opinions need not be accepted, and if they are not, the authority of the judiciary is eroded.
2) They undermine the basic theory behind our adversary system – that a case or controversy is necessary to fully develop the facts and legal arguments.
3) They unnecessarily force judges to reach and decide complex constitutional issues that might be avoided in a real controversy by deciding the case on narrower grounds.
4) They increase the number of situations where unelected judges exercise the power of judicial review to an extent that is inappropriate in a democratic system of government.

See generally Rotunda & Nowak, *supra,* § 2.13(b)(iv).

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

Somewhat paradoxically, the opponents of ranked choice voting interpret the applicable provisions of the Maine Constitution and the Act both too loosely and too narrowly. They read the "plurality" provisions loosely by pronouncing that the

situation embracing conflicting and demanding interests, we have consistently refused to give"); 1 L. Tribe, *American Constitutional Law* § 3-9 (3d ed. 2000).

Constitution requires the plurality (or "simple" plurality) winner of certain elections to be determined after "one round," or "the first and only round," of vote counting and that a "vote" can only be *one* choice of *one* candidate. They further suggest that despite the longstanding practice, the Constitution prohibits the Secretary of State from playing a role in tabulating the votes. These words and phrases simply are not in the state constitution. The interpolation of terms that nowhere appear in the Constitution may be viewed at best as an imaginative construction or, in more common parlance, "making stuff up."

They similarly read the Act as requiring a "majority" winner and somehow precluding local officials from sorting, counting, declaring and recording the votes in their municipalities. Even if their interpretation were rational, it would be no less reasonable to rely on the literal wording of the statute. The forces arrayed against ranked-choice voting are asking the Justices to adopt the construction that would most likely put the Act in conflict with the Constitution. That is the antithesis of what a court examining the constitutionality of legislation is required to do.

They also construe the Constitution narrowly by arguing, in effect, that it forbids the adoption of any voting system that differs from that which held sway in the nineteenth century. The Justices should be very wary of this argument. First of all, it is not supported by the text, which far from specifying a particular voting

system, broadly lays out a few basic steps in the ballot aggregation process designed to foster accuracy, transparency, and integrity so that the election results will reflect the will of the electors. There is no evidence that ranked-choice voting will impede any of these goals. To the contrary, it is designed to *better* reflect the popular will in the election results. Whether it is the best method of achieving that end is not at issue here. The question is whether the Constitution should be interpreted as forbidding any attempt to improve the election system.

Like the federal constitution, our state constitution "should not be interpreted with the strictness of a municipal code, because that would be contrary to the original intent." 1 Rotunda & Nowak, *supra*, § 1.1 at 27. As Justice Story memorably exhorted:

> The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of its powers, as its own wisdom, and the public interests, should require.

Martin v. Hunter's Lessee, 14 U.S. 304, 326, 4 L. Ed. 97 (1816); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407, 4 L. Ed. 579 (1819) ("we must never forget that it is a *constitution* we are expounding"); *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 312, 35 N.E.2d 222, 230 (1941) (in expressing challenge to change in vote counting procedure, "We must always be careful in approaching a constitutional question dealing with principles of government, not to be influenced by old and familiar habits, or permit custom to warp our judgment. We must not shudder every time a change is proposed."), *quoting Johnson v. New York*, 274 N.Y. 411, 430 9 N.E. 2d 30 (1937); *Commonwealth v. Blackington*, 41 Mass. 352, 356, 24 Pick. 352, 355-56 (1833) ("In construing this [state] constitution, it must never be forgotten, that it was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times…") (Shaw, C.J.).

The Act's opponents read too much into the history of the "plurality" amendments. Everybody agrees that the purpose of these amendments was to rescind and replace the original majority-vote requirement. Under that requirement, any election in which no candidate received more than fifty percent of the votes was a failed election. No victor emerged, and the contested seat remained vacant. New elections had to be called: either (in the case of state representatives) an indefinite number of successive elections by the same electors

who had been unable to reach a majoritarian result until such a result were somehow obtained, or (for senators and governors) elections not by the people but by some combination of the House and Senate.

This is nothing like what happens under ranked-choice voting. In the new system, every election will produce a winner. Do-over elections will not occur. Within a single election, more than one round of ballot tabulation may occur; but that is fundamentally different from a system entailing multiple rounds of elections, in all of the ways that matter. Ranked-choice voting avoids the various pitfalls of the majority-vote requirement: failed elections, the substantial delay and redoubled expense of supersessive elections, disruption of the electoral process, usurpation of the people's power to vote in their elective officers, and frustration of the popular will. Hence, the ranked-choice voting procedure is nothing like the old majority-vote requirement. It is, rather, a more sophisticated (and admittedly more complex) method of determining which of more than two candidates has obtained the most electoral support – *i.e.*, a "plurality."

Ultimately, the Senate's Questions come down to this: First, does the Act's tabulation procedure unmistakably and inevitably conflict with the Constitution's directives that prior to tabulation, the votes be received, sorted, counted, declared and listed by municipal officials? The answer is in the negative. Second, does the Act's revamped plurality voting system unmistakably and unavoidably contravene

the Constitution's "plurality" clauses? Again, the answer is no. Finally, is there anything more than a hypothetical conflict between the Act's general provision regarding tie votes and the Constitution's call for election of the Governor by the Legislature in the event the two leading gubernatorial candidates receive precisely the same number of votes? Once more, the answer is no.

CONCLUSION

For all of these reasons, the Justices should decline to answer the Questions, or, in the alternative, should answer them in the negative.

Respectfully submitted,

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