SUPREME JUDICIAL COURT

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BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT

IN THE MATTER OF REQUEST FOR OPINION OF THE JUSTICES

BRIEF OF THE MAINE STATE SENATE

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By submission dated February 2, 2017, and submitted pursuant to Article VI, Section 3 of the Maine Constitution, the Senate posed questions to this regarding the constitutionality of the Ranked Choice Voting Act. The Senate acknowledges this Court's invitation and Procedural Order of February 7, 2017. To facilitate the consideration of the legal issues, the Senate's brief begins with a summary of the existing electoral system and the RCVA's procedures and standards.

I. SUMMARY OF CONSTITUTIONAL FRAMEWORK FOR ELECTIONS

Consideration of Maine's voting system for State Representatives, Senators, and Governor must begin with Article II of the Maine Constitution. There, when qualified Maine citizens vote for those offices, they take on the constitutional status of "Electors". Me. Const. art. II, § 1; Me. Const. art. IV, pt. 3, §§ 17-18; *see also Id.* at § 20.

Learned authority has observed that Article II, "...establishes the framework for how the people choose who will govern them. It thus forms a thematic bridge between [Article I] which enumerates the rights of the people, and the articles to come, relating to the powers and duties of government." M. Tinkle, *The Maine Constitution*, at 65 (2d. 2013).[1] The singular status that Article II extended to

[1] Noting that neither the Massachusetts Constitution of 1780 nor the United States Constitution had a similar provision, this authority identified the Delaware

every Maine voter evidenced a determination by the drafters of Maine's Constitution that in a representative democracy voting is elemental; that in voting, citizens were performing a public act fundamental to the wellbeing of the government; and that therefore, the Constitution formally recognize them for it and protected them in the exercise of it.

Thus, under Article II, Maine citizens become constitutional officers and retain Elector status until they have completed their electoral duties. So highly did the drafters of Maine's Constitution value this role that they invested Electors with limited immunity "from arrest during their attendance at, going to, and returning [from the polling place]." *Hobbs v. Getchell*, 8 Me. 187, 189 (1832). This limited immunity is substantively identical to that the Constitution has always provided to Representatives and Senators. Me. Const. art. IV, Pt. 3, § 8.

The citizens' status as Electors under Article II is integrally entwined with the Constitution's election procedures. These provisions establish the procedures and standards by which citizens, as Electors, discharge their electoral responsibilities.

The foundational provision on voting procedures appears at Article IV, Part First, Section 5, which sets forth the procedures for electing members of the House of Representatives. This Section assigns very particular duties and processes for

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Constitution of 1792 and the Connecticut Constitution of 1818 as the probable sources of assigning Maine voters the constitutional office of "Electors." *Id.*

the determination of votes starting with local government and concluding with designated State officials and branches of government.

Article IV, Part First, Section 5 provides that , "election officials of the various towns and cities shall preside impartially at [the election] meetings." *Id.* It further directs that, while there, those officials shall "receive, the votes of all qualified electors, sort, count, and declare them in open meeting…" *Id.* Although, since the adoption of the Maine Constitution in 1820, this Article has been amended at various points, these basic requirements have not changed. *Cf.*, Me. Const. art. IV, pt. 1, § 5; Me. Const. art. IV, pt. 1§ 5 (1820). The election officials are then directed to prepare "a list of the persons voted for" which must include "the number of votes for each person against that person's name." Me. Const. art. IV, pt. 1, § 5.

Recognizing that in some instances, a particular House District may cross municipal lines, the Constitution mandates that, in such instances, the election meetings of those cities and towns must "be held at the same time" and, further, that "such meetings shall be notified, held, and regulated, [and] the votes received, sorted, counted, and declared in the same manner. *Id.*

When the local election officials have, for each of the offices at issue, prepared the required "list", the Constitution directs that they prepare "[f]air copies of the lists of votes" and that those lists "shall be attested by the municipal officers

and the clerks of the cities and the towns…" *Id.* The Constitution then requires that the attested lists must be "delivered into the office of the Secretary of State forthwith." *Id.*

The Governor is required to examine "the returned copies of such lists" and, before the constitutionally prescribed deadline, "issue a summons to such persons as shall appear to have been elected by a plurality of all votes returned, to attend and take their seats." *Id.* Article IV, Part Second, Section 3 adopts and to some extent restates the procedures in Article IV, Part First, Section 5 for the election of Senators. Me. Const. art. IV, pt. 2, § 3. The Constitution's procedures for the election of the Governor also incorporate and to some extent restate the requirements of Article IV, Part First, Section 5 with the distinction that rather than placing the lists before the Governor, the Secretary of State must lay the lists before the Senate and the House of Representatives. *Id.*

The Constitution provides that prevailing candidates for the House of Representatives, the Senate, and the Governorship are determined by a plurality of the votes reflected on the lists. Me. Const. art. IV, pt. 1, § 5; Me. Const. art. IV, pt. 2, § 3; Me. Const. art. V, pt. 1, § 3.

With respect to the Governor, Article V, Part First, Section 3 provides that, in the event that the lists reflect a "tie between the 2 persons having the largest

number of votes for Governor, the House of Representatives and the Senate meeting in joint session…shall elect one of said 2 persons…" *Id.*

II. THE QUESTIONS PROPOUNDED PRESENT A "SOLEMN OCCASION" PURSUANT TO ARTICLE VI, SECTION 3 OF THE MAINE CONSTITUTION.

A solemn occasion arises "when questions are of a serious and immediate nature, and the situation presents an unusual exigency." *Opinion of the Justices*, 2012 ME 49, 40 A.3d 930. For such a solemn occasion to exist, the question propounded must concern a matter of "live gravity" and "unusual exigency." *Id.*

Accordingly, in order for the Justices to respond to questions posed pursuant to Article VI, Section 3: (1) the question or questions of law posed must be important; (2) the issue must be immediate; and (3) an unusual exigency must exist. *See id.*. Each of the foregoing factors is present here.

Question No. 1 posits the conformity *vel non* of the RCVA's electoral procedures with the constitutionally imposed procedures set forth in Article IV, Part First, Sections 5 (for the House of Representatives) and as restated and incorporated by reference into Article IV, Part Second, Section 3 (for the Senate), and, Article V, Part First, Section 3 (for the Governor).

The answer to this question requires comparison of the constitutional procedures for compiling, declaring, and authenticating the Electors' vote and those provided in the RCVA. The comparison of these provisions requires

assessments at several points. First, whether the RCVA functional procedures for "tabulating" the results of votes are consistent with the Constitutional requirements that designated election officials "receive…, sort, count, and declare [the votes]." Me Const. art. IV, Part pt. 1, § 5. Second, whether the RCVA's vote tabulating procedures are consonant with the constitutional requirement that the receiving, sorting, counting, and declaring of votes occur "in open meeting". Third, whether the RCVA's vote tabulating procedures meet the Constitution's verification—that is, accountability requirements—in which election officials are required to "attest" the "lists" compiling the election results. *Id.*

Question No. 1 also requires a comparison of the RCVA's assignment of the responsibility to tabulate the vote to the Secretary of the State with the constitutional requirement that the receipt of votes and the sorting, counting, and declaring of the results be conducted by "election officials of the various towns and cities" as well as that "municipal officers and the clerks of the cities and towns" discharge the duty of attesting those lists and causing them to be provided to the Secretary of State." This question requires an assessment of whether the RCVA unconstitutionally diminishes or effectively eliminates the role of local governments in the electoral process under Articles IV and V in favor of the Secretary of State. Conversely, it requires an assessment of whether the RCVA unconstitutionally enlarges the duties and responsibilities of the Secretary of State

under Articles IV and V, Part First, Section 3 as well as Article V, Part Second, Sections 1-4.

Question No. 2 posits the question of whether the RCVA's system of preference voting involving sequential rounds of vote tabulation is consistent with the plurality standards for determining the outcome of elections under Articles IV and V. This question concerns the meaning of a constitutionally imposed standard for determining the effect of votes cast by citizens, acting in their capacity as Electors. The significance of the citizens' status as Electors and the electoral process, itself, has been discussed above. The merits of these questions are further set forth below and the Senate respectfully submits that that discussion also bears on the threshold requirements of Article VI, Section 3. For the sake of brevity, the Senate incorporates that discussion herein by reference.

The requirements of immediacy and unusual exigency are also present. Although the provisions of the law do not apply to any election held before January 1, 2018, the current legislative session is the only one which will take place before the new methodology prescribed by § 723-A will apply. Moreover, 2018 is a gubernatorial election year.

Each gubernatorial election since 1974 has involved at least three candidates. In most instances, at least three candidates achieved significant percentages of the vote. Had the system of ranked choice voting contemplated in §

723-A been in effect during *any* of these elections, the winner of the plurality in round one might have lost the election in a subsequent round of tallying. Should that result occur in the 2018 election, a challenge to the constitutionality of the statute will almost certainly result. It is no exaggeration that this contest would create a constitutional and political crisis. Guidance from the Justices at this point would permit the Legislature and the Governor to consider approaches to any issues which the Justices may identify before the Legislature adjourns.

Moreover, if this new system is to be implemented, the legislature must, during its current session, appropriate the funds necessary to change over from the current de-centralized system of counting votes now performed by the municipalities, to a new system in which votes are counted centrally by the Secretary of State.

III. QUESTION NO. 1: ELECTORAL PROCEDURES IN ARTICLES IV AND V COMPARED TO THE RANKED CHOICE VOTING ACT PROCEDURES.

As described above, the voting procedures set forth in Articles IV, Part First, Section 5, Article IV, Part Second, Section 3, and, Article V, Part First, Section 3 set forth voting procedures in considerable detail.[2]

[2] Although, as noted above, both Article IV, Part Second, Section 3 and Article V, Part First, Section 3 repeat some of the processes specified in Article IV, Part First, Section 5, for the most part, they incorporate the requirements of that Section by reference. Therefore, references to Article IV, Part First, Section 5, should

As that discussion demonstrate, the procedures, standards, and assignment of duties for the election of Representative, Senators, and the Governor are impressive their detail and specificity. Indeed, they appear to be self-executing. *Cf.*, *State v. Bachelder*, 403 A.2d, 754, 758 (Me. 1979). (Rights listed in the Declaration of Rights are self-executing). The level of detail in these Articles is consistent with enduring importance of the electoral process to public confidence in the government. In 1879, in response to questions posed by the Governor, the Justices construed this purpose underlying Article IV, Part First, Section 5 observing that, [t]he object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against failure, either through fraud or mistake, correctly to ascertain and declare the will of the people as expressed in the choice of their officers and legislators." *Opinion of the Justices*, 70 Me. 560, 561 (1879).

The procedures required by the Act, therefore, must be compared to these longstanding Constitutional procedures, standards, and, assigned duties. Where the Act departs from them, it must, in that particular, fail. The Constitution imposes certain processes for the acceptance and determination of the Electors' votes. As has been seen above, Articles IV and V require that, when Electors vote, local election officials must receive, sort, count, and declare the results of those

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hereafter be considered to also apply to Article IV, Part Second, Section 3 and Article V, Part First, Section 3 unless otherwise specified.

votes. This sequence is so important that, even though Article IV, Part Second, Section 3 and Article V, Part First, Section 3 incorporate Article IV, Part First, Section 5 by reference, they both repeat these particularized duties. To be consistent with this constitutionally mandated sequence, the RCVA must provide the same or its constitutionally sufficient equivalent. There is no indication, however, that the RCVA does that.

It appears that the RCVA assumes that Electors will cast their votes locally, but does not go on to explain how the votes once cast will be received, sorted, counted, and declared. To the contrary, the RCVA elides these steps by simply supplementing existing statutory language with the additional direction that, for offices covered by the RCVA, "the Secretary shall tabulate the votes according to… [21-A M.R.S.] section 723-A." 21-A M.R.S. § 722(1). Yet, Section 723-A does not explain how the tabulation of votes described in Section 723-A(2) meets the constitutional requirements to receive, sort, count, and declare—not in the initial "round" or, where required, in the sequential rounds. *Id.* § 723-A(2).

The requirement that election officials "declare" the vote mean just that—the Constitution requires that those officials announce the results of their count of the Electors' votes. Thus, the Constitution makes the declaration of the vote an imperative. The RCVA does not make any apparent provision for the declaration of the results of the tabulation; not at the first round, not at such sequential rounds

as may be required, and not at the final round. Given the importance of the constitutional requirement that the result of a vote be declared, the RCVA must provide for it and, as will be seen below, must also provide for it at the close of each "round."

Aside from the act of voting, itself, Article IV, Part First, Section 5 contemplates a thoroughly public character to the voting process. It starts with the requirement that elections be held a public "meetings" held under the authority of town and city election officials who are required "preside impartially." Me. Const. art. IV, pt. 1, § 5. At these public meetings, Electors gather to cast their votes. Those same election officials must then receive, sort, count and declare the results, but they must do more than that; they are constitutionally required to "declare them in open meeting." *Id.*

The rationale behind these requirements is apparent. The highly public character of electoral process, culminating in the public declaration by authorized persons, is intended to ensure and to **demonstrate** the integrity of the process.

It appears certain that, in keeping with their elevation of the voter to the constitutional office of "Elector", the drafters of the Constitution understood that, for a representative democracy, loss of public confidence in the electoral process was a peril of the first order. Any alteration of the electoral process, therefore,

must fail if it lacks the mandatory public character provided in Article IV, Part First, Section 5. When held against this standard, the RCVA fails.

Nowhere does the RCVA specifically provide for open, publicly accessible vote tabulations. There is no provision for a public declaration of results of the first round, the second round or the final round. Indeed, it is not entirely clear how from the outset and through the various "rounds" that may be required, it could do so. Without such a provision—a process by which the integrity of the voting process could not only be ensured but, as with Article IV, Part First, Section 5, **demonstrated**, the RCVA cannot pass constitutional muster.

In addition to imposing particular procedures and mandating public openness, Article IV, Part First, Section 5 also assigns duties and acts as to which particular persons may be held accountable. Thus, "qualified officials" are charged with warning the Electors of the impending election; "election officials" are required to "impartially preside" over the elections; and, after receiving, sorting, and counting the votes, those same officials are required to "declare in open meeting" the results of the election; and, when the "municipal officers and clerks" have prepared the required "fair lists"—compilations for the vote totals—for the Secretary of State, they must "attest" to those lists.

The constitutional designations of these ascertainable public officials, capped by the requirement that they solemnly attest to the lists that they forward

to the Secretary of State are intended to ensure accountability and, thereby, integrity and public confidence in the electoral process. Accountability, then, along with specified duties, wholly public proceedings, and intended to ensure in appearance and in fact the integrity of the electoral process.

Because these accountability requirements are constitutionally required and serve public policy objectives of surpassing importance, putting other issues aside. To be constitutionally valid, the RCVA must meet both their letter and their spirit. Yet, here, too, the RCVA fails.

The RCVA does not identify any particular official who is involved in the actual vote counts that occur at the various rounds. The only particular official identified is the Secretary of State, but this appears to be an *ex officio* designation with the tacit understanding that some unidentified official or officials, will conduct the required "tabulation." 21-A M.R.S. §§ 722(1), 723-A(1).

In their 1879 Opinion, the Justices noted the immediate post-election duties that the constitution imposed on the local officials as further guarantors of the integrity of the electoral process, citing, in particular, the constitutional requirement that "not only shall returns be made on the spot, in open town meeting, but a record of the vote shall be made at the same time and authenticated in the same manner." *Opinion of Justices*, 70 Me. 560 (1879). Earlier, the Justices had made clear that certain of these local duties could not be waived or relaxed;

that the requirement that constitutionally-required lists of votes be accompanied by the requisite attestation, without which, the lists simply could not be accepted. *Opinion of Justices*, 68 Me. 587 (1877), accord, *Opinion of Justices*, 70 Me. 560 (1879).

The Justices have repeatedly confirmed that the duties assigned to the Secretary of State, the Governor, and Legislature respectively, though crucial to the effectuation of the vote, do not include the roles and duties assigned to local election officials. *Opinion of Justices*, 2002 ME 169, 815 A.2d 791; *Opinion of Justices,* 64 Me. 596 (1875); *Opinion of Justices,* 25 Me. 567 (1845).

Thus, it is evident that the duties imposed by the Constitution on local municipal officials and State constitutional officers, are individually and collectively intended to ensure the integrity and reliability of the votes cast. Duties assigned to and performed at the municipal level are elemental; they constitute the foundation on which all State-level duties rest and nowhere does the Constitution provide that any other official can validly discharge them.

Moreover, where the election of members of the House and Senate and the Governor is concerned, it bears emphasis that these duties and responsibilities are assigned and must be performed in service to another constitutional officer—the Article II Elector. Me. Const. art. II, §§ 1-3.

IV. REMOVAL OF LEGISLATURE'S AUTHORITY UNDER ARTICLE IV, PART FIRST, SECTION 5

At the outset, it must be understood that the election provisions of the Constitution cannot be enlarged, diminished or otherwise altered by statute. As originally adopted in the 1820 Constitution, Article IV, Part First, Section 5 included a proviso that read as follows: "*Provided*, That the Legislature may by law prescribe a different mode of returning, examining and ascertaining the election of representatives in such classes." 1820 Maine Const., at Article IV, Part First, Section 5. (Italics in original)

In 1864, however, this proviso was removed from the Constitution. That the proviso was once a part of the Constitution and was later removed mandates the inference that the Legislature has no authority, itself, to alter the standards and processes of the Constitution's electoral provisions for the Representative, Senator or Governor. *Resolve* (eff. Mar. 24, 1864).

It appears, moreover, that the Legislature has recognized the effect of the removal of this proviso on that authority. In 1935, the Legislature reported a constitutional amendment to allow for the use of voting machines. This amendment was ultimately adopted and incorporated into the Constitution as Section 5 of Article II.

That the Legislature evidently concluded that it lacked the power to authorize voting machines by statute and that a constitutional amendment was

required is consistent with the earlier removal of the proviso from Article IV, Part First, Section 5. As will be seen below, the Act alters and to some extent extinguishes constitutionally assigned electoral roles. Although the statutory alteration of fundamental law runs afoul of the Constitution, that rule applies with especial force where the Constitution once recognized a measure of legislative authority and then withdrew it. The Act consistency *vel non* with the Constitution must be viewed against this history as well.

With this in mind, a comparison of Title 21-A M.R.S. § 722 before and after the enactment of the Act is in order. The Act did not change the first sentence of Section 722(1) provides that the Secretary "shall tabulate all votes that appear by an election return to have been cast for each question or candidate whose name appears on the ballot." 21-A M.R.S. § 722(1). Because this part of Section 722(1) pre-dated the Act, where the election of Representatives, Senators, and the Governor is concerned, it must take its meaning from the governing provisions of Articles IV and V of the Constitution. Therefore, the word "tabulate" in this sentence must have meant the Secretary's receipt and review of the "fair copies of the lists" required of and attested by particular local officials under Articles IV and V. Yet, the tabulation duties that the Act imposes on the Secretary differ significantly from those provided for in the pre-Act version of Section 722(1).

Under the Act, the Secretary is now directed to "tabulate" the votes in accordance with Section 723-A. *Id.* § 722(1).

Under the Act, the role of the Secretary of State is central. Under Sections 722, as amended, and Section 723-A, the Secretary would perform electoral tasks that are new and much enlarged over those that the Secretary previously assumed. In particular, Section 723-A(2) mandates that the Secretary conduct some kind of vote counting in each of the sequential "rounds". *Id.* § 723-A(2); *see also Id.* § 1(35-A), § 723-A(1)(J). These requirements appear entirely different from the Secretary's "tabulation" duties before the enactment of the Act. Section 723-A(2), itself, makes it clear that the Secretary's "tabulation" duties under Act are materially different from this originally provided for in Section 722(1).

Under the Act, the Secretary has primary responsibility for the sequential rounds of voting and must somehow ensure that the votes in each round are "counted." That is far different from the Secretary's pre-Act tabulation duties.

In addition, the Act's use of the word "count" in Section 723-A(2) has constitutional significance. As noted above, under Articles IV and V, the duty to count the votes is assigned to local election officials. Where the election of Representatives, Senators, and, the Governor is concerned, the word "count" in Section 723-A(2) must have the same meaning as it has in the Constitution. That being so, the counting duties that the Act assigns to the Secretary amount to a

either a removal of that authority from local officials or an addition to the assignment of the duties of the Secretary. As will be seen below, neither is constitutionally permitted. Neither the Legislature nor the Electors by referendum can enlarge or diminish the duties and authority that the Constitution assigns to a constitutional officer. *Ross v. Hanson*, 227 A.2d 608, 610-611 (Me. 1967).

The Act's enlargement of the role of the Secretary in the election of Representatives, Senators, and the Governor nowhere addresses the particular duties and responsibilities that the Constitution assigns to local election officials. See, Ranked Choice Act, *passim.*

The foregoing discussion demonstrates that the Act centralizes vote tabulating and vote counting responsibilities in the Secretary of State. The Act flatly provides that the tabulation and counting of votes is done by the Secretary. See, 21-A M.R.S. §§ 722(1), as amended, 723-A(2).

The Act reserves no role for local election officials in this process and, certainly, not tabulation and determination of sequential "rounds" of voting. This centralization of electoral authority cannot be accomplished by statute and concomitant diminution or elimination of constitutionally assigned roles to local election officials cannot be accomplished by statute.

V. QUESTION NO. 2: RCVA VIOLATES THE REQUIREMENT THAT ELECTIONS FOR HOUSE OF REPRESENTATIVE, SENATE, AND GOVERNORSHIP MUST BE DECIDED BY

PLURALITY, AS SET FORTH IN ARTICLES IV AND V OF THE CONSTITUTION.

A. Origin and Purpose of Plurality Standard

As originally adopted, the Maine Constitution provided that "any person [who is a candidate for the House of Representatives] shall be elected by a majority of all the votes…" Me. Const. art. IV, pt. 1, § 5 (1820). Where no candidate attained a majority of the votes, Section 5 mandated that another election be held. *Id.* This same standard was imposed on candidates for the Senate and Governor. *Id.* at Article IV, Part Second, § 3; *see also Id.* at Article IV, Part Second, § 4; *Id.* at Article V, Part First, § 3.

However, the majority vote requirement was expressly phased out of the Constitution through many calculated amendments. On August 4, 1847, Article IV, Part First, Section 5 was amended by removing the phrase "a majority of all the", wherever that phrase appeared in that Section, and replacing it with the words "the highest of". Resolves 1847, Ch. 45, amending Me. Const. art. IV, pt. 1, § 5 (eff. July 29, 1848). By this Amendment, a new constitutional standard of plurality was adopted. After that point, plurality was the standard implemented.

Ultimately, in 1864, the Constitution was amended by removing the phrase "the highest number of votes" cast in elections for the House of Representatives and replacing the phrase with "a plurality of all votes returned". Resolves 1864, ch. 344 (eff. Oct. 6, 1864). Following suit, in 1875, the standard for the election of

Senators was changed from "a majority of all votes cast" to "by a plurality of all the votes returned". Resolves 1875, ch. 98 (eff. Jan. 5, 1876).

Finally, in 1880, the Constitution was officially amended to replace the phrase "by a majority of all the votes returned" with the word "plurality." Resolves 1880, ch. 159 (eff. Nov. 9, 1880). This amendment completed the shift from the majority standard to the plurality standard in determining elections for House, the Senate, and Governorship. This plurality standard was arrived at deliberately by the Legislature and the electors systematically through the series of amendments set forth above.

B. Rank Choice Voting Procedure

While the Constitution expressly requires that candidates for the House of Representatives, Senate, and Governor be chosen by a plurality of votes cast, the RCVA prescribes a process under which first round candidates must succeed by a *majority* of votes cast in order to prevent an instant-runoff. The word "majority" means "a number more than half of the total"-i.e., more than 50%. *American Heritage Dictionary of the English Language* (4th ed. 2000) at 1056. In contrast, "Plurality" means a number that "exceeds that of the closest opponent. *Id.* at 1351. Accordingly, the Act is inconsistent with the plaint terms of the Maine Constitution. The Justices have previously advised that constitutional language

"should not. . . be extended beyond its plain and ordinary meaning." *Opinion of the Justices*, 152 Me. 449, 132 A.2d 44 (1957).

The RCVA allows for a plurality determination only in situations where "there are 2 or fewer continuing candidates, the candidate with the most votes [i.e, a plurality] is declared the winner of the election." However, in situations where "there are more than two continuing candidates, [only] the last-place candidate is defeated and a new round begins." 21-A M.R.S. § 723-A (2)(A)&(B). This directly subverts the Constitution's imperative that the candidate who receives a plurality of the votes cast must be declared the winner. *Id.*

In an election contest with multiple candidates, unless there is a tie, one candidate will *always* receive the requisite *plurality* based on the initial tally. According to the plain and ordinary meaning of the word "plurality" the Constitution requires that this end the election process and that the winner be declared. Accordingly, the RCVA requires the conclusion that that the plurality achieved by the candidate with the most votes after the first count does not have a plurality within the meaning of the Constitution. Simply put, at that stage, a plurality is not a plurality.

This conclusion, inherent in, and necessary to, any saving construction of the RCVA ignores the plain language of the Constitution. The Senate anticipates that the Proponents will argue that while the constitution requires that the candidate

who achieves a plurality must be declared the winner, it does not mandate that the *first* candidate to reach a plurality be elected must not be accepted as it ignores the traditional meaning of "vote" which has been accepted and in practice since the enactment of the Constitution.

Since 1820 the electors have gone to the polls and cast votes in which they ***make a choice*** for one candidate over other candidates for the same office. This choice between alternatives has been the functional definition of what it means to cast a vote. That this has been the practice is unsurprising given that Vote is defined by the Oxford English Dictionary to mean "[a] formal indication of ***a choice*** between two or more candidates or courses of action, expressed typically through a ballot or a show of hands." Oxford English Dictionary (emphasis added).

Decisions of the Law Court likewise suggest that the word "votes" within the relevant constitutional provisions must be interpreted such that it means a single choice between alternatives rather than the simultaneous selection of multiple candidates in order of preference wherein none of those selections rise to the status of a "vote" until the final round of counting is complete. In *Allen v. Quinn*, the Law Court held that when interpreting constitutional provisions, "[i]t is the approval of the people of the State which gives force to a provision of the constitution . . . and in construing the constitution we seek the meaning which the

words would convey to an intelligent, careful voter." 459 A.2d 1098, 1100 (1983) (quoting *Kuhn v. Curran*, 294 N.Y. 207, 217, 61 N.E. 2d 513, 517-18 (1945)).

Since its beginnings, the electors of Maine have gone to the polls to cast votes in which they ***make a choice*** for one candidate over one or more other candidates for the same office. Accordingly, when approving the constitutional amendments discussed above fixing the threshold for electing Representatives, Senators, and the Governor at a plurality of the "votes" cast, the "intelligent careful voter," whose understanding must govern the construction of constitutional provisions would have had only this understanding of "votes" in mind. The RCVA alters this longstanding practice and understanding which would be held by the "intelligent, careful voter" and changes the definition of what it means to cast a vote from the making of a definite choice-- to the ranking of preferences. No such practice has ever been countenanced within the meaning of "vote" as that term is used in the Constitution. Simply put, acceptance of the Proponents' argument requires the Justices to determine that votes cast during what the first round of tallying under the RCVA are inchoate and not actual complete "votes" as contemplated by the Constitution but that they are only some lesser expression of electoral preference. That the RCVA would require this amorphous understanding is ineluctable if the Act is to be deemed consistent with the Constitution. Otherwise, the simple and obvious conclusion that the candidate who receives the

highest number of votes, i.e., one vote more than his or her nearest challenger has achieved the plurality of votes mandated by the constitution and must be declared the winner of that office.

For the foregoing reasons, the Senate believes that the RCVA is inconsistent with the Constitutional requirement that for House, Senate, or Governorship, the candidate achieving a plurality of the votes cast must be declared the winner.

VI. QUESTION NO. 3: RCVA's REQUIREMENT THAT A TIE BETWEEN CANDIDATES FOR GOVERNOR BE DECIDED BY LOT, CONFLICTS WITH THE PROVISIONS OF ARTICLE V OF THE CONSTITUTION.

There is a clear textual conflict between the method prescribed in the Maine Constitution to break a gubernatorial tie and the method prescribed by the Act. The Maine Constitution provides that "[i]If there shall be a tie between the 2 persons having the largest number of votes for Governor, the House of Representatives and the Senate meeting in joint session . . . shall elect one of said 2 persons having so received an equal number of votes and the person so elected . . shall be declared the Governor." Me. Const. art. V, Pt. 1, § 3.

However, under the Act , 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. 21-A M.R.S. § 723-A (3).

Generally, "[a]ll acts of the legislature are presumed to be constitutional and this is 'a presumption of great strength'". *Baxter v. Waterville Sewerage Dist.,* 146 Me. 211, 214, 79 A.2d 585, 587 (1951). However, "the presumption of constitutionality is not absolute and it must give way when the statutory language shows a clear and undoubted legislative intent running counter to some constitutional inhibition." *Orono-Veazie Water Dist. v. Penobscot Cty. Water Co.,* 348 A.2d 249, 253 (Me. 1975); *Ace Tire Co., Inc. v. Municipal Officers of Waterville*, 1973, Me., 302 A.2d 90, 101. In such an instance, "[t]he Court is duty bound to declare invalid an act which violates an express mandate of the Constitution, even if the Legislature presumably found the act expedient or otherwise in the public interest." *Id.*

With respect to the tie breaking provision of the RCVA for gubernatorial candidates, the provision clearly falls beyond the limits of the Constitution. The Law Court has indicated, the method prescribed by the Constitution must prevail. *Id.*

VII. CONCLUSION

For the reasons stated above, the Rank-Choice Voting Act fails to comply with the Maine constitutional requirements for the election of representatives, senators, and governor.

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The Maine State Senate

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