STATE OF MAINE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-17-1

IN THE MATTER OF
REQUEST FOR OPINION OF THE JUSTICES
UNDER THE PROVISION OF
ARTICLE VI, SECTION 3 OF THE MAINE CONSTITUTION

ON REFERRAL OF THREE QUESTIONS
FROM THE SENATE

RESPONSIVE BRIEF OF INTERESTED PARTIES LEAGUE OF WOMEN VOTERS OF MAINE AND MAINE CITIZENS FOR CLEAN ELECTIONS

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I. INTRODUCTION

An Act To Establish Ranked-Choice Voting (the "Act") is constitutional. For it to be otherwise, this Court would need to find that the Act's opponents have "established to such a degree of certainty as to leave no room for reasonable doubt" that there exists no possible method of implementing ranked-choice voting consistent with the Maine Constitution. *See Me. Milk Producers, Inc. v. Comm'r of Agric., Food & Rural Res.*, 483 A.2d 1213, 1218 (Me. 1984); *Orono-Veazie Water Dist. v. Penobscot Cnty. Water Co.*, 348 A.2d 249, 253 (Me. 1975). Moreover, this Court must interpret the Constitution liberally, *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983), afford the Act a "heavy presumption of constitutionality," and construe its language in such a way as to comport with the Constitution wherever possible, *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996); *Me. Milk Producers*, 483 A.2d at 1218.

This standard mandates that this Court interpret the plurality and "sort, count and declare" provisions of the Constitution broadly to effectuate their purposes without placing unduly specific procedural requirements on the implementation of ranked-choice voting. *See Allen*, 459 A.2d at 1102. The Act must be read to permit any implementation that would be consistent with that broad reading of the Constitution, unless the text of Act clearly contradicts such a reading. *Me. Milk Producers*, 483 A.2d at 1218. The opponents of the Act have not met the heavy burden of showing that there is no constitutional method of implementing ranked-

choice voting, particularly in light of the liberal interpretation that must be afforded to the both the Constitution and the Act. This Court must, therefore, find the Act constitutional.

II. THERE IS NO PRECEDENT FOR FINDING THAT THIS MATTER CONSTITUTES A SOLEMN OCCASION.

If this Court reaches the merits of the questions posed by the Senate, it will constitute an unprecedented exercise of this Court's authority to issue advisory opinions. This Court has consistently held that no solemn occasion exists when the advisory opinion functions only to decide the constitutionality of an enacted law. *See Op. of the Justices*, 355 A.2d 341, 390 (Me. 1976); *Op. of the Justices*, 339 A.2d 483, 488-89 (Me. 1975).

The Attorney General cites to two decisions — *Opinion of the Justices*, OJ-98-1 (Me. July 31, 1998), and *Opinion of the Justices*, 460 A.2d 1341 (Me. 1982) — in arguing that this Court has previously advised on the constitutionality of enacted laws. (AG Br. 13.) Neither case supports finding a solemn occasion here because on both occasions the branch submitting the questions needed advice on its own authority to take specific actions in implementing the law at issue.[1] *See Op. of the*

[1] Interestingly, while the Attorney General suggests that a solemn occasion exists because the Legislature still has the "opportunity" to propose Constitutional amendments to resolve any conflicts, none of the briefs submitted by legislators — and there are three — suggest such amendments will be considered. Even if being considered, such potential amendments would be insufficient to find a solemn occasion. *See Op. of the Justices*, 355 A.2d 341, 389 (Me. 1976) (noting that even proposed legislation that is before a legislative committee does not generally present an exigency sufficient to constitute a solemn occasion). Indeed, if a solemn occasion existed

Justices, 709 A.2d 1183, 1185 (Me. 1997) (discussing this Court's refusal to find a solemn occasion where questions propounded by one branch relate to the constitutional powers of another branch).

The rule that no solemn occasion exists when this Court is asked to opine on the constitutionality of an enacted law serves to insulate this Court from political battles and preserve the integrity of the adversarial process by ensuring that decisions affecting important individual rights are decided "in a judicial proceeding, where all persons interested may have an opportunity to appear and be heard in their behalf." *Op. of the Justices*, 95 Me. 564, 51 A. 224, 225 (1901). Here, the Senate has requested that this Court wade into a partisan battle over whether to implement ranked-choice voting. Declining to do so leaves policy struggles to the political branches, preserves the independence of the judiciary, and ensures that important questions affecting individual rights are decided by the adversarial system.

III. OPPONENTS HAVE OFFERED NO BASIS TO FIND RANKED-CHOICE VOTING UNCONSTITUTIONAL

The opponents of ranked-choice voting have not offered any basis to conclude that ranked-choice voting is unconstitutional. The Act does not mandate election by majority and is consistent with the Constitution's plurality provisions. Likewise, the

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whenever the Legislature has an "opportunity" to consider a constitutional amendment, every question of constitutional conflict would present a solemn occasion.

Act does not prescribe a method of sorting, counting, or declaring votes, and does not violate the Constitution's "sort, count and declare" provisions.

A. Ranked-Choice Voting Is Consistent With the Constitution's Plurality Provisions.

The Constitution states that in elections for State Representative, State Senator, and Governor, the winner is the candidate that receives "a plurality of all votes returned."[2] Me. Const. art. IV, pt. 1, § 5; art. IV, pt. 2, § 3; art. V, pt. 1, § 3. Contrary to assertions by the Act's opponents, the Act does not mandate election by majority. Instead, the Act implements a new system of counting votes that often, but not always, results in the candidate that receives the highest number of votes receiving a majority of the total votes cast.[3] Ranked-choice voting is, therefore, consistent with the plurality provisions.

The opponents of ranked-choice voting argue that the Act is unconstitutional because it disregards the results of the first round of tabulation, which they argue constitutes a plurality of "first-choice votes." (AG Br. 23; Senate Br. 20-22; House

[2] Opponents of ranked-choice voting offer a thorough depiction of the history of the plurality provision as it relates to gubernatorial elections. Ultimately, this demonstrates that the provision was implemented to ensure that the power to elect the Governor remained with the people, not the Legislature. Ranked-choice voting is not contrary to this objective. Ironically, the Legislature and certain interested parties now attempt to rely on this history to take the power to determine the method by which elected officials are chosen away from the people.

[3] There is nothing in the language of the Act that mandates that the winner of the election receive a majority of the total votes cast. *See* 21-A M.R.S.A. §§ 1, 601, 722, 723-A. Although ranked-choice voting will often result in the winning candidate receiving a majority of the total votes cast, this is not required and will not always occur. (League Br. 11 n.5.)

Repubs. Br. 7-9.) But this argument is premised on a misunderstanding of ranked-choice voting tabulation. Tabulation under ranked-choice voting is a complete process and may not be conceptually severed into a series of elections. A ranked-choice ballot is a *single vote* that consists of a set of preferences.[4] As tabulation progresses, each vote is assigned to a candidate based on the procedures outlined in the Act. Because an individual voter's decision to rank a particular candidate first does not, by itself, constitute a vote for that candidate, a plurality winner cannot be determined based on voters' first round rankings.

The problem with the opponents' characterization of ranked-choice voting is best understood from the perspective of a voter. Imagine, for example, an election with three candidates — two candidates that represent major political parties (Candidates A and B) and a third candidate from a party with very few members (Candidate C). Imagine also a voter that strongly opposes Candidate A, is neutral toward Candidate B, and strongly favors Candidate C. Under our current system, this voter may choose to vote for Candidate B primarily in an effort to ensure that Candidate A will not be elected. However, if this voter enters the voting booth knowing that a ranked-choice system will be used, this voter is likely to rank

[4] The Constitution does not define the term "vote," and past practice does not render the definition of the term immutable. Further, the definition of "vote" as used in ranked-choice voting is entirely consistent with the traditional, commonplace use of the term to mean an expression of preference. *See, e.g.*, https://www.merriam-webster.com/dictionary/vote; http://dictionary.cambridge.org/us/dictionary/english/vote.

Candidate C first and Candidate B second. This is because the voter knows that even if Candidate C is not popular, the voter's vote will be assigned to Candidate B in further rounds of tabulation, thus helping ensure that Candidate A does not win. This voter's decision to rank Candidate C first is wholly dependent on the understanding that the entire ranked-choice voting tabulation process will be completed before a determination is made as to which of the voter's preferred candidates ultimately receives the voter's vote.

Thus, the allocation of first-round preferences is not an election in which one candidate receives a plurality of the votes and the result is set aside. Instead, tabulation is a complete process, and the number of votes a candidate receives cannot be determined until after final tabulation. Under ranked-choice voting, after tabulation is complete, the candidate that receives the highest number of votes — "a plurality of all votes returned" — is the winner. Ranked-choice voting is, therefore, consistent with the Constitution's plurality provisions.

Finally, nothing in the Arkansas Supreme Court's decision in *Rockefeller v. Matthews*, 459 S.W.2d 110 (Ark. 1970), counsels against finding the Act constitutional. The *Rockefeller* court held that a statute requiring a run-off election in the event a candidate does not receive a majority of votes was inconsistent with a provision of the Arkansas constitution providing that "the persons having the highest number of votes for each of the respective offices shall be declared duly elected." *Id.* at 111. Unlike the statute at issue in *Rockefeller*, ranked-choice voting does not

require a majority and does not require that the results of the election be set aside in favor of a second election if no candidate receives a majority. Instead, under ranked-choice voting, the candidate that receives the most votes when tabulation is complete, majority or not, is the winner.

B. Ranked-Choice Voting Does Not Violate the Constitution's "Sort, Count and Declare" Provisions.

The Constitution does not impose any specific requirements for how sorting, counting, and declaring votes is accomplished. Applying a liberal interpretation designed to carry out the broad purpose of the "sort, count and declare" provisions, this Court should hold that ranked-choice voting is constitutional without creating unduly specific procedural requirements for its implementation. Further, the Act does not prescribe any particular method of sorting, counting, or declaring votes. Because the Act must be read to permit any possible method of implementation not explicitly precluded by the Act's plain language, the Act is constitutional so long as there exists any constitutional method of implementation.

The arguments raised by opponents of ranked-choice voting ignore the fact that this Court is required to interpret the Act, if at all possible, in a manner that is consistent with the Constitution. *See Me. Milk Producers*, 483 A.2d at 1218. There is no constitutional requirement that the Act address all aspects of how sorting, counting, and declaring votes will occur under ranked-choice voting, just as there was

no requirement that prior iterations of Title 21-A address precisely how votes were previously sorted, counted, and declared.[5]

The Attorney General argues that tabulation in multiple rounds as required under ranked-choice voting violates the "sort, count and declare" provisions. (AG Br. 17.) This argument rests entirely on faulty assumptions.

First, the Attorney General assumes that the Constitution forbids the Secretary of State from counting votes, without offering any basis for this conclusion. The Attorney General cites a nonexistent constitutional requirement that there be only one round of counting votes. This requirement is not in the text of the Constitution, and no opponent of ranked-choice voting offers any explanation for where it might be found.[6]

Second, the Attorney General presumably relies on an incorrect statement in the Secretary of State's affidavit indicating that the only way to implement ranked-choice voting would be for the Secretary of State to review ballots (or images of ballots). (*See* Flynn Aff. ¶ 23.) In fact, there are a variety of ways the Secretary of State can tabulate the winner of a ranked-choice election without reviewing ballots. For example, scanners could be provided locally, regionally, or centrally for local

[5] Few, if any, of the steps outlined in the Flynn Affidavit are or were reflected in Title 21-A.

[6] The House Republican Caucus argues that this non-existent "single round" requirement applies to the tabulation (as opposed to the sorting and counting) process. (House Repubs. Br. 7.) It is equally unclear where this requirement can be found, particularly in light of the fact that the Constitution is wholly silent on the tabulation process.

officials from districts that currently hand-count votes.[7] (League Br. 19-20; Affidavit of Ann Luther ¶ 9, filed herewith; Affidavit of Gary Bartlett ¶ 15, filed with the Responsive Brief of Fairvote.) Or local officials can produce lists that capture the information contained in ranked-choice ballots and enable the Secretary of State to tabulate the winner without reviewing ballots. (League Br. 19-20; Luther Aff. ¶ 9; Bartlett Aff. ¶ 14.) The need for new scanning or tabulation systems and the potential complexity of such systems is irrelevant to the Act's constitutionality.

Third, the Attorney General assumes that the Secretary of State reviewing ballots would constitute "counting votes." Once local officials have sorted, counted, and declared the votes, the Secretary of State's further use of ballots in the tabulation process would be just that: a component of tabulation. The Constitution is silent on the tabulation process,[8] and the assertion that the Secretary of State does not currently "tabulate" votes is nonsensical. The only way to determine the winner of statewide or multi-district offices is for the Secretary of State to add, i.e. tabulate, the results from the various districts. The Secretary of State will be doing nothing conceptually different under ranked-choice voting.[9]

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[7] The text of the Constitution does not preclude local officials from using ballot scanners that are physically located outside the borders of the municipality. (League Br. 19.)

[8] The Attorney General suggests that the Constitution only permits the Secretary of State to compile lists, not tabulate results. (AG Br. 17.) However, the compilation of lists, without adding up the votes reflected on those lists, does not result in determination of election results.

[9] Because it is constitutional for the Secretary of State to review the ballots after they have been sorted, counted, and declared by local officials, the Secretary of State's affidavit provides a practical

As noted in the Senate's brief, the key purpose of the "sort, count and declare" provision is to ensure the integrity and transparency of elections. (Senate Br. 11); *see also Op. of the Justices*, 70 Me. 560, 561 (1879). There is nothing in the Act to suggest that ranked-choice voting cannot be accomplished in a fair, transparent manner. This Court should, therefore, hold that ranked-choice voting is constitutional so long as it is implemented in a way that preserves the integrity of the election process and involves procedures that constitute — broadly speaking — local officials sorting, counting, and declaring the vote in open meetings.

Because the Act contains no limitation on what methods may be used to sort, count, and declare votes at the local level, the Act cannot be said to require a method that violates the Constitution. To the contrary, there exist methods of implementing ranked-choice voting that are plainly consistent with the "sort, count and declare" provisions. Likewise, the Act does not require election by majority and does not result in a plurality winner being determined and discarded, and is, therefore, consistent with the plurality provisions. In sum, the Act does not conflict with the "sort, count and declare" or plurality provisions, and is, therefore, constitutional.[10]

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explanation of a straightforward, constitutional method of implementing ranked-choice voting. (Flynn Aff. ¶ 31.)

[10] To the extent certain prior changes to the voting system have been implemented by constitutional amendment, this fact has no bearing on the constitutionality of ranked-choice voting. Further, the suggestion that changes to election procedure must be implemented by constitutional amendment ignores the existence of Title 21-A.

Date: March 17, 2017

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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Procedural Order of this Court, dated February 7, 2017, I have, on March 17, 2017, filed the original and two copies of this Responsive Brief of Interested Parties League of Women Voters of Maine and Maine Citizens for Clean Elections with the Clerk of the Supreme Judicial Court and simultaneously emailed it in the form of a single text-based pdf file to: lawcourt.clerk@courts.maine.gov.

Rachel M. Wertheimer

STATE OF MAINE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-17-1

IN THE MATTER OF
REQUEST FOR OPINION OF THE JUSTICES
UNDER THE PROVISION OF
ARTICLE VI, SECTION 3 OF THE MAINE CONSTITUTION

Affidavit of Ann Luther in Support of Reply Brief of Interested Parties League of Women Voters of Maine and Maine Citizens for Clean Elections

I, Ann Luther, being duly sworn, hereby depose and state as follows:

1. I am the currently the Treasurer of the Board of the League of Women Voters of Maine (the "League") and have held this position since 2009. Prior to serving as Treasurer, I was President of the Board from 2003 to 2007, and co-president from 2007-2009. I have been a member of the League for nineteen years and have served on its Board for fourteen years.

2. In March 2011, after three years of study of ranked-choice voting, the League concurred with the League of Women Voters of Minnesota in favor of ranked-choice voting. Other state Leagues that have endorsed ranked-choice voting include Arizona, California, North Carolina, Vermont and Washington.

3. As part of my role with the League of Women Voters of Maine, I participated in the aforementioned three year study of ranked-choice voting and attended meetings and conferences across the state on this subject.

4. Following the League's endorsement of ranked-choice voting, it became one of its earliest supporters in Maine, was a key member of the coalition that put the issue on the 2016 ballot, and supported two bills in the 126th Legislature (2013-2014). It has also spent considerable resources advocating for and educating the public regarding ranked-choice voting.

5. Through the aforementioned study, advocacy, and education for ranked-choice voting in Maine, I became educated on the methodology for tabulating the results of an election that utilizes ranked-choice voting.

6. I have reviewed the Affidavit of Julie L. Flynn submitted in support of the Secretary of State's Brief in opposition to the constitutionality of ranked-choice voting in Maine and, based upon my knowledge of ranked-choice voting gleaned from the League's study, advocacy, and education efforts for ranked-choice voting, disagree with certain of her statements regarding the tabulation of ranked-choice voting ballots.

7. Ms. Flynn states that tabulation of ranked-choice ballots cannot be accomplished by reviewing the election returns submitted by municipal election officials, and that the only way the Secretary of State can tabulate results from

ranked-choice ballots is to examine the actual ballots or electronic images of those ballots.

8. Ms. Flynn is incorrect. As Ms. Flynn herself concedes, municipalities that use optical scanners can produce a cast vote record of the ranked-choice ballot. The cast vote record captures the full array of preferences expressed by the voter on the ballot, and reduces it to digital form. The cast vote records of all municipalities that use optical scanners can be compiled in order to tabulate results. Municipalities with optical scanners currently use tallies created by the scanners to tabulate local election results. In the case of ranked-choice voting, the municipalities will use the same machines they currently use to produce a tally to produce a cast vote record reflecting the ranked preferences of voters.

9. Municipalities that currently hand count ballots can also provide cast vote records or lists to the Secretary of State for use in tabulating results such that the Secretary of State would not need to review the actual ballots from that municipality. These hand-count municipalities can either use an optical scanner located in a different municipality to create a cast vote record, or they can sort ballots by hand (as they currently do) to create a voting record manually.

10. Assume an election with three candidates — A, B, and C. The voting record from Town A might look like the following:

Candidate	**First Choice**	**Second Choice**	**Third Choice**
Candidate A	41	Candidate B: 6 Candidate C: 35	Candidate B: 35 Candidate C: 6
Candidate B	40	Candidate A: 30 Candidate C: 10	Candidate A: 10 Candidate C: 30
Candidate C	19	Candidate A: 15 Candidate B: 4	Candidate A: 4 Candidate B: 15

Town B might have the following voting record:

Candidate	**First Choice**	**Second Choice**	**Third Choice**
Candidate A	30	Candidate B: 21 Candidate C: 9	Candidate B: 9 Candidate C: 21
Candidate B	45	Candidate A: 30 Candidate C: 15	Candidate A: 15 Candidate C: 30
Candidate C	26	Candidate A: 15 Candidate B: 11	Candidate A: 11 Candidate B: 15

The voting records of Towns A and B (indeed, the voting records of all municipalities) could be compiled by the Secretary of State into the following voting record:

Candidate	First Choice	Second Choice	Third Choice
Candidate A	71	Candidate B: 27 Candidate C: 44	Candidate B: 44 Candidate C: 27
Candidate B	85	Candidate A: 60 Candidate C: 25	Candidate A: 25 Candidate C: 60
Candidate C	45	Candidate A: 30 Candidate B: 15	Candidate A: 15 Candidate B: 30

Based on the compiled votes, Candidate C would be eliminated and Candidate A would win with 101 votes to Candidate B's 100 votes. In this illustration, the voting records from the two towns would be conveyed to the Secretary of State, but the actual ballots need not be.

11. In sum, methods exist for municipal election officials to sort, count and declare votes that do not involve the Secretary of State reviewing actual ballots or images of ballots.

Dated: March 16, 2017

Ann Luther

STATE OF MAINE

~~CUMBERLAND~~ COUNTY, SS. March 16, 2017
HANCOCK

Personally appeared the above-named, Ann Luther, and made oath that the foregoing Affidavit by her is true and correct to her own personal knowledge or upon information and belief, and as to those matters based upon information and belief, she believes such information to be true.

Before me

Jeri L White

Notary Public

JERI L. WHITE
Notary Public • State of Maine
My Commission Expires July 9, 2018