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March 17, 2017

Via Hand Delivery and Email

Matthew Pollack, Clerk
Supreme Judicial Court
205 Newbury Street, Rm. 139
Portland, ME 04101-4125

RE: Brief of the Committee for Ranked Choice Voting
Docket No. OJ-17-1

Dear Matt:

Enclosed for filing are two originals of the Reply Brief of the Committee for Ranked Choice Voting in the above-referenced matter. A copy was also be emailed to you this morning.

Please let me know if you have any questions. Thank you for your assistance with this matter.

Sincerely,

James T. Kilbreth

JTK/sab
Enclosures

STATE OF MAINE

BEFORE THE JUSTICES OF THE
MAINE SUPREME JUDICIAL COURT

Docket No. OJ-17-1

In the Matter of Request for Opinion of the Justices
Relating to Questions Posed by the Senate

REPLY BRIEF OF THE COMMITTEE FOR RANKED CHOICE VOTING

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INTRODUCTION

The various briefs challenging the constitutionality of ranked choice voting fail utterly to explain how, contrary to over 120 years of clear precedent, the circumstances here present a solemn occasion. They equally fail to identify any constitutional provision that "directs" a specific method of conducting elections or defines a "vote" in the narrow way they propose. The Justices should decline the invitation to find a solemn occasion exists; should they accept that invitation, they should reject the crabbed view of the Constitution being urged upon them.

1. Solemn Occasion. Our initial brief set out the overwhelming authority establishing that no solemn occasion exists when the Legislature asks the Justices for an interpretation of existing law, or when there is no matter of live gravity pending in the Legislature, or when one branch of government seeks an advisory opinion about the power and duties of another. *See* Br. of Committee for Ranked Choice Voting (hereafter "Committee") at 4-12.

To avoid this clear line of authority, the Attorney General and the Senate assert that "[g]uidance 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." Br. of Senate at 8; Br. of Attorney General (hereafter "AG") at 12. This invitation to the Justices to engage in the legislative process is precisely what the strict limitations on issuance of advisory opinions were meant to avoid – a trampling on the fundamental doctrine of

separation of powers. There is no question here about the Legislature's authority to propose a constitutional amendment or take other actions with respect to the statute. Nor has any issue pending before the Legislature been identified. The notion that it needs unspecified "guidance" falls woefully short of a solemn occasion.

Apparently recognizing the futility of this argument, the Attorney General cites two Opinions of the Justices for the proposition that questions about implementation of a law may present a solemn occasion. Br. of AG at 13. Far from supporting the Attorney General's position, these opinions reinforce the conclusion that no solemn occasion is presented here.

In *Opinion of the Justices*, 460 A.2d 1341 (Me. 1982), a citizen initiated referendum had been passed that called for a retroactively applied annual adjustment to eliminate inflation-induced increases in state income tax. On November 22, 1982, the Secretary of State certified the results of the election. Two days later, Governor Brennan requested an opinion, noting that he "must make a public proclamation of these results...on or before December 2, 1982. ..." *Id.* at 1343. The Justices responded on December 14, almost a month before the act became effective. Notably, the Justices declined to answer a number of the questions posed because they were either hypothetical or involved questions involving the power and authority of another branch of government:

> We must decline to answer questions 6 and 7. In both, the Governor inquires as to the powers of the Legislature. Only the Legislature, and not the Governor, is in the position

> to take immediate action on the answers. It is well established that the Justices will not answer a request made one branch of government for an advisory opinion regarding the power, duty, or authority of another branch.

Id. at 1349.[1]

Similarly, in *Opinion of the Justices*, OJ-98-1(July 31, 1998), Governor King sought the opinion of the Justices with respect to implementation of a statute relating to the sales tax with ambiguous timing requirements. Under one interpretation he was obligated to take action within three weeks to implement a reduction in the sales tax. Again, this involved a request by the Governor, not the Legislature, about his duties regarding some immediate action. Accordingly, he sought the opinion of the Justices on July 2nd and supplemented by communication on July 24th. They answered on July 31st, because his questions concerned "[the Governor's] obligations in implementing a sales tax reduction and because the timing of that reduction has significant implications with a current biennial budget." *Id.* at ¶2.

Nothing could be less relevant to the circumstances here – there is nothing that requires the immediate action of the Legislature since there is nothing pending before it. To the extent that the Senate seeks "guidance" as to how the Secretary of State should implement the statute, that request impermissibly seeks an opinion with respect to the duties and obligations of another branch of government.

The claims of the Attorney General and the Senate that a solemn occasion

[1] Also: "That a response to a question would merely aid a governor in proposing measures to the Legislature does not present a solemn occasion...Until the Legislature has under active consideration a bill to amend or modify the initiated measure, the question of the powers versus the Legislature lacks live gravity; until then, the question is tentative, hypothetical and abstract." *Id.* (internal citations omitted).

exists based on the Legislature's obligation to fund implementation of the statute also fall woefully short. The Legislature has plenary authority over appropriations and decisions to fund or not. *See, e.g.*, 20-A M.R.S.A § 15752 (mandating State funding of 55% of K-12 education, a goal never achieved).

Indeed, the funding argument rings particularly hollow. Although the Attorney General and the Senate talk about a $1.5 million price tag, Secretary of State Dunlap at the February 28, 2017 appropriations hearing on his budget testified as follows:

> "We know what we have to do now. As we begin to explore the implementation of ranked choice voting, what that will take for resources right now, will really require more ideas than people...When we get to next year, January 1st, we are supposed to be ready to implement ranked choice voting. Of course, that won't really matter to anyone until the June [2018] primaries. But I think by that time we will have a much better idea of what our resource needs will be if they are any different from what they are now. I think at that point we can come to [the Appropriations and Financial Affairs Committee] with a lot of confidence in what our request would be for supplemental budget in the future."[2]

There plainly is no immediate concern in this session about the need for funding.

Finally, the assertions about chaos are wildly overblown, *see* Committee Br. at 9-12, particularly in light of the persuasive arguments about the Act's constitutionality. And, as pointed out by Marshall Tinkle in his Reply Brief discussing *State v. Poulin*, 105 ME 224, 74 A. 119 (1909), even if the Act were ultimately declared unconstitutional with respect to any election, the acts of anyone elected under the Act would continue to be valid.

For all these reasons, as well as the reasons identified in our initial brief, the Justices should decline to answer the questions posed by the Senate.

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[2] Transcribed from audio recording available here: https://www.youtube.com/watch?v=FnviGr4zSSc.

2. Plurality. The briefs of the opponents assert that the Constitution "directs" that there can only be a single round of ballot counting and a single expression of preference.[3] Although this assertion sounds definitive, the briefs point to no constitutional provision that bars multiple tabulation rounds as contemplated by the Act or that defines a vote as only a single expression of preference. Accordingly, the only way to conclude, as these briefs do, that ballot counting must be confined to a single round limited to an expression of preference for a single candidate is if some constitutional provision by necessary implication leads to that result.

No such necessary implication can be found. Indeed, the only real argument advanced by the opponents to support this claim is that "this is the way we've always done it." But discomfort with change is not a constitutional argument. The cases interpreting ranked choice voting fully support the concept that a ranked choice vote is a vote,[4] so there can plainly be no "necessary implication" to the contrary to be drawn from the word "vote."

Given this Court's and the Justices' longstanding view of the Constitution as an evolving document with the flexibility to adapt as society changes, there simply is no reason to construe the word "vote" so narrowly. If the narrow

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[3] *See* Br. of AG at 17; Br. of House Republican Caucus and Maine Heritage Policy Center (hereinafter "Caucus") at 7; Br. of Senate at 21-23.

[4] *See Dudum v. Arntz*, 640 F.3d 1098, 1107 (9th Cir. 2011) (contrasting the single "vote" of a multi-preference ballot with a new round of voting in a runoff election); *Minnesota Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 692-93 (Minn. 2009) (a multi-preference ballot that counts toward one candidate at a time is one vote); *See also* Br. of FairVote at 17-20; Br. of Professor Dmitry Bam at 12-13.

interpretation of "vote" urged by the opponents, which ultimately amounts to "this is how we have always done it," were the constitutional standard applied in Maine, then the Court and the Justices would not have concluded that women could be appointed to government positions or that the meaning of the public use doctrine evolves with the times. *See Opinion of the Justices*, 119 Me. 603, 113 A. 614, 616-17 (1921); *Opinion of the Justices*, 231 A.2d 431, 433 (Me. 1967). This constitutional flexibility has been the hallmark of the Court's jurisprudence. In combination with the clear recognition by courts across the country that a ranked choice vote is a vote, this flexibility requires honoring the people's power to enact ranked choice voting.[5]

The one case cited in any of the briefs to suggest a contrary view is

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[5] The Attorney General suggests that major changes in the election process have always been done by constitutional amendment, implying the myriad statutes in Title 21-A must be minor, citing as examples Me. Const. art. II, §4, authorizing absentee voting, and art. II, §5, authorizing use of mechanical voting machines. The legislative debate regarding absentee voting shows that the legislatures viewed this amendment as anything but a major or important change to the election process. During the debate, Representative Chase stated the following:

> Now some may think that this is not a very important matter. The sole purpose of this resolve is to eliminate from the Constitution more than one entire page which relates to nothing except voting by troops in the field during the Civil War.
> Now there are two reasons which I think should be controlling that this ought to pass...This is the section of the Constitution which fixes the election date in September, and I should think it would very much encourage the Democrats because if this section can be changed in one respect, they might have ground for hope that some day it could be changed in another. (Laughter)
> Now, furthermore, and this is the reason which should appeal to the entire House, if we can eliminate from the Constitution this more than one page which begins on page 4, then the next reprint of the Constitution which will be made in the statutes to be revised at the next session would move over onto page 4 the provisions of the Constitution relating to the apportionment of Representatives, which might make it more likely that the members of the Legislature would read the Constitution up to that point some day. (Laughter)

2 Legis. Rec. H-2158, 2158 (Reg. Sess. 1951). No mention is actually made about absentee ballots. Little is known of the perceived need for the voting machines amendment because of an absence of legislative debate, but Tinkle refers to its purpose as "[a]dapting to technological change". Tinkle, *The Maine State Constitution: A Reference Guide* 58 (1992). Clearly, the significance of the change to the election process bears no correlation to the vehicle of the change, whether it be by constitutional amendment or by statute.

Rockefeller v. Matthews, 459 S.W.2d 110 (Ark. 1970). Tellingly, that case is not about ranked choice voting. Rather, it involved a statutory requirement that there be a runoff election in the case of no majority winner in the general election. The Arkansas Supreme Court held that the Legislature could not by statute require a runoff election to achieve a majority, where the Constitution declared the winner of the original election was to be by a plurality. Ranked choice voting does not suffer from that defect – it determines a winner by a plurality in a single election.

The Attorney General misleadingly uses speculation to try to show that ranked choice voting is somehow not a plurality system. In her table on page 8 of her brief, she makes assumptions about how ballots would be cast to demonstrate that the ultimate winner would have a majority. Apart from the fact that her tabulation confuses ballots and expressions of preferences, even accepting her assumptions, it is easy to see how a "plurality winner" could emerge. For example:

A	100	eliminated			
B	250	+70	320	+120	440
C	150	eliminated			
D	300	+60	360	+130	490
E	200	+95	295	eliminated	
	1,000	25 exhausted	975	45 exhausted	930

As the table shows, the ultimate winner here received 49% of the 1,000 ballots cast—a plurality, not a majority. In any case, the use of plurality in the Constitution, as many have pointed out, obviously cannot exclude a winner

receiving the most votes just because it was also a majority, nor could it exclude somebody who won with all the votes in an unopposed election. This simply puts more freight on the word plurality than the word can possibly bear.[6]

Finally, the history behind the plurality provisions of the Constitution in fact supports rather than disallows use of ranked choice voting: "[t]he object of the constitutional provisions respecting elections is to furnish as many safeguards as may be against a 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." *In re Opinions of the Justices*, 70 Me. 560, 561 (1879). Ranked choice voting seeks to ascertain and declare the broad will of the people and is consistent with the Constitutional mandate of election by a "plurality of all votes returned."

The plurality change to House elections occurred decades before the changes to the Senate and Governor. As highlighted by a legislative committee investigating an early proposal: "it is often times difficult, if not impossible, to effect a choice" by majority in house elections. "Some districts met last year, thirteen or fourteen times, without effecting a choice...This state of things certainly demands a remedy" for House elections. [7] Although the proposed

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[6] As numerous of the supporting briefs have pointed out, a ranked choice vote allows people to express their preferences in a more nuanced and expansive way than a single preference system; how it will be implemented and what the results will be are hypothetical and speculative at this point. One actual example of how it has worked is Portland, which has conducted two mayoral elections using ranked choice voting. In both those elections, the candidate leading after the first round ultimately won the election. In the first election it was by a plurality after several rounds (there were 15 candidates) and in the second by a majority after the first round.

[7] REPORT AND RESOLVE NO. 38, 24th Leg. Senate, at 8 (1844). A copy is attached.
In contrast, for elections for Senator and Governor, that same report concluded that, unlike the repetitive

amendment considered by the voters in 1847 included a proposal to change majority to plurality in elections for the Senate and Governor as well as the House, the voters adopted only the plurality provisions related to the House, not the Senate or Governor. *See* Berry, Peter Neil, "Nineteenth Century Constitutional Amendment in Maine" (1965), Electronic Theses and Dissertations, Paper 2385, at 85-94.[8] Changes to senatorial elections continued to be proposed several times before ultimate adoption in 1875, "reflect[ing] the growing sentiment toward a final determination of governmental officers by the people." *Id.* at 87.

As our initial brief demonstrated, it was political mischief by the Legislature that led to the eventual replacement of the majority requirement with the plurality requirement for Governor. Br. of Committee at 21-25. Contrary to the conclusion drawn by the House Republicans, Br. of Caucus at 24 & n. 19, the reaction to the outrageous behavior of the politicians is what finally convinced the people to eliminate the majority requirement and wrest control over elections from the politicians. The history of each of these changes supports, rather than precludes, the implementation of ranked choice voting, which determines the outcome, in a single election, by a plurality of all the votes returned, using a method that captures a more nuanced expression of the voters' preferences.[9]

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meetings that had frustrated elections of House members, for "Governor and Senators, the constitution provides that but one popular election should be held, inasmuch that, in case of no choice the Legislature are directed make it according to prescribed rules." *Id.*

[8] Excerpts attached, available in its entirety at http://digitalcommons.library.umaine.edu/etd/2385.

[9] Contrary to the suggestion of some, Br. of Caucus at 13-14, the 1864 removal of the constitutional provision regarding Legislative authority to "prescribe a different mode of returning, [footnote continues] examining and ascertaining the election of the representatives" cannot be read to preclude statutory

3. Sort, Count and Declare. The Committee supports and adopts the arguments of FairVote and the League of Women Voters with respect to the constitutionality of the sort, count and declare provisions. The experience of other jurisdictions demonstrates that, contrary to the claim of the Deputy Secretary of State, there are ways to conduct a ranked choice election with local sorting, counting and declaring and central tabulation. *See* Affidavit of Jeanne Massey, ¶¶ 2-8 (detailing how voters' preferences are counted in a highly transparent process at the local precinct level in Minnesota, with spreadsheets detailing all the rankings created; only the tabulations, as in Maine, are done centrally). Because the opponents have the burden of proving that there is no way to interpret the statute that satisfies the Constitution, *Aseptic Packaging Council v. State*, 637 A.2d 457, 459 (Me. 1994), the Justices accordingly cannot find that the statute is facially unconstitutional, particularly since the Secretary of State has broad discretion in implementing the statute.

CONCLUSION

For the foregoing reasons, as well as those in our initial brief, the Justices should decline to answer the Senate's questions. If any answers are to be given, however, they must be in the negative and uphold the people's right to determine how to conduct their elections.

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enactment of a new method of vote casting and tabulation since, in 1870, this legislative authority was restored to "prescribe the manner in which the votes shall be received, counted, and the results of the election declared," for all offices, as was explained in the Brief of Marshall Tinkle at 17-18.

Dated: March 17, 2017

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