STATE OF MAINE

BEFORE THE JUSTICES OF THE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-23-1

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 FIVE QUESTIONS
FROM THE MAINE STATE LEGISLATURE

BRIEF OF THE MAINE STATE LEGISLATURE

In Response to the Court's Procedural Order
Dated May 16, 2023

Melissa A. Hewey, Bar No. 3587
David M. Kallin, Bar No. 4558
Oliver Mac Walton, Bar No. 6340
Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Tel: (207) 772-1941

Attorneys for the Maine Legislature

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Legislative Documents

INTRODUCTION

The Maine Legislature submits this brief in response to the Court's Procedural Order dated May 16, 2023. The applicable facts are set out in the questions presented. In short, pursuant to Me. Const. art. IV, pt. 3, § 18, the electors of Maine proposed four measures to the Legislature for its consideration by written petition addressed to the Legislature and timely filed with the Secretary of State. The Secretary of State verified that the petitions contained sufficient signatures and in February and March transmitted them to the 131st Legislature.

Because of unrelated budgetary matters, the first regular session of the 131st Legislature adjourned on March 30, 2023, before the measures had been produced by the Revisor of Statutes as legislative documents presented to the Legislature. Six days later, on April 5, the 131st Legislature convened a special session. Five days after that, on April 10, two of the measures, as prepared by the Revisor of Statutes, were transmitted to the Clerk of the House and ordered printed.[1] They were first presented to 131st Legislature at this time. Despite their not having yet been presented-in-fact to the full Legislature, on April 7,

[1] Subsequently, the two other measures were also transmitted to the Clerk and ordered printed, although this is not reflected in the whereas clauses. *See* L.D. 1677 (131st Legis. 2023) (printed on April 18); L.D. 1772 (131st Legis. 2023) (printed on April 25).

2023,[2] the Governor and the Secretary of State issued four proclamations that the measures would be referred to the people at the November election. The five Questions posed to the Justices all pertain to the power of the Legislature to consider those measures during the current special session, months prior to the November election.

"The powers of the Legislature in matters of legislation, broadly speaking, are absolute, except as restricted and limited by the Constitution." *Sawyer v. Gilmore*, 109 Me. 169, 83 A. 673, 678 (1912). Article IV, part 3, section 18 of the Constitution establishes three options for the Legislature when presented with a citizens' initiative. First, it can enact the measure without change, in which case the measure becomes law without the need for a statewide referendum vote; second, it can reject the measure, in which case it is sent out to referendum for the people to decide whether to accept or reject it; or third, it can propose a "competing measure", in which case both the original and competing measures are sent out to referendum so that "the people can choose between the competing measures or reject both."

[2] The whereas clauses in the questions use the date of April 11, 2023 to describe the proclamations. April 11 is the date on which the proclamations were issued by the Secretary of State, but they were executed by the Governor on April 7, 2023, which is the date used in the questions themselves.

In *Opinion of the Justices*, 680 A.2d 444, 448 (Me. 1996), the Justices stated that "unless [] legislative action at a special session directly or indirectly abridges the right of the people provided in section 18, we see no reason why the Legislature cannot consider a substitute measure," and opined that the Legislature can consider and adopt a competing measure in special session even if it has adjourned the session in which the measure was presented. Here, it would be illogical to conclude that although the Legislature is empowered to adopt a competing measure at a special session, it may not instead adopt the measure proposed by the citizens without change. This conclusion is not mandated by the Constitutional text. Just as in the case of adoption of a competing measure, the Legislature's enactment of the measure without change does not interfere with the initiative process, and there is nothing in the Constitution that restricts the Legislature's power to consider and adopt the measure originally proposed. Further, it simply makes no practical sense that the Constitution would require the Legislature to act before it has an opportunity-in-fact to do so, or would prohibit the exercise of its otherwise plenary power to enact a measure simply because it was proposed by electors rather than a legislator.

Pursuant to article VI, section 3 of the Maine Constitution, the Maine Legislature asks the Justices of this Court to answer five questions related to whether, following the proclamations of the Governor and Secretary of State that an election be held on four proposed measures, the Legislature still has authority in its current special session to act on those measures without change,[3] and if so, the effect of so doing. This Court issued a Procedural Order dated May 16, 2023 inviting a brief of the Legislature addressing two issues: (1) whether the Questions propounded present a "solemn occasion," pursuant to Article VI, Section 3 of the Maine Constitution; and (2) the law regarding the Questions propounded. The Maine Legislature addresses each in turn.[4]

THE QUESTIONS PRESENT A "SOLEMN OCCASION"

The Legislature seeks the Justices' advice regarding its role in the direct initiative process and the constitutionality and legal

[3] Although it is not known how the Legislature would act on any of the four measures, Questions 2 through 5 assume that it may enact one or more of the measures without change

[4] The other "constitutional prerequisites"—"standing" and an "important question of law"—are easily satisfied here. *Opinion of the Justices*, 2017 ME 100, ¶¶ 18-20, 162 A.3d 188.

consequences of specific actions that it may take in the next few months with respect to the four initiated measures. This is a solemn occasion.

The Justices have historically found questions on the Legislature's role in the referendum process to present a solemn occasion, where the Justices' advice will facilitate the "orderly administration" of the referendum process. *Opinion of the Justices*, 682 A.2d 661, 664 (Me. 1996); *Opinion of the Justices*, 680 A.2d at 447. The time-sensitivity of the Legislature's consideration of an initiated measure—the Legislature has a "constitutional duty to make a decision regarding" such measures—shows the requisite exigency. *Opinion of the Justices*, 2004 ME 54, ¶ 5, 850 A.2d 1145; *accord Opinion of the Justices*, 623 A.2d 1258, 1261-62 (Me. 1993). Indeed, a similar situation was a solemn occasion where the Governor sought to convene a special session of the Legislature "only if" that Legislature could consider a competing measure to citizen-initiated legislation. *Opinion of the Justices*, 680 A.2d at 447. Here, the Legislature is in session and seeks guidance with its regard to its authority to enact the measure without change. This occasion, like that one, is appropriate for the Justices to exercise their advisory authority pursuant to article VI, section 3.

As with those prior Opinions, the overlapping "guideposts" used to determine whether the "essence of the questions," and the events giving rise to the requesting branch's desire for advice warrant an advisory opinion, all counsel in favor of answering the questions. *Opinion of the Justices*, 2017 ME 100, ¶ 21, 162 A.3d 188.

First, the Legislature seeks advice on a matter of unusual exigency and live gravity, which is not tentative or remote. *Id.* ¶¶ 22-23, 25. The measures are currently pending before the Legislature, but the Governor and Secretary of State have proclaimed that all four measures will be on the November ballot. These Questions do not contemplate changes to these four measures—an issue previously opined on, *Opinion of the Justices*, 680 A.2d at 447—and instead are predicated on the Legislature acting on the measures without change. *See Opinion of the Justices*, 623 A.2d at 1261 n.2 (general rule against opining on a bill still pending in committee "is inapposite" for an initiated measure); *Opinion of the Justices*, 370 A.2d 654, 667 (Me. 1977). Thus, the Legislature's need for advice is not hypothetical; it is real and immediate.

Second, the Legislature inquires as to the existence and scope of the Legislature's own power to act on the four initiated measures. *See Opinion of the Justices*, 2017 ME 100, ¶¶ 24, 29, 162 A.3d 188. Importantly, the Justices may answer one branch's questions about its powers or duties even when "those duties and authorities overlap or intertwine" with those of a coordinate branch. *Opinion of the Justices*, 2015 ME 107, ¶ 7, 123 A.3d 494. Questions 1, 2, and 3 seek advice regarding the Legislature's constitutional authority to act on an initiated measure under the circumstances presented here. Questions 4 and 5 seek advice on the legal consequences that would flow from its enactment without change of an initiated measure that has not yet gone to the electors. These Questions about the effect of the Legislature exercising its own legislative prerogative in light of the proclamations issued by the executive branch may be "intertwine[d]" with a coordinate branch's actions, but this factor is still satisfied. *Id.*

Third, the Questions are specific and limited, do not implicate facts or provisions of law beyond those included in the Joint Order, and are not overly complex. *See Opinion of the Justices*, 2017 ME 100, ¶¶ 26-27, 39, 162 A.3d 188; *Opinion of the Justices*, 2012 ME 49, ¶ 9, 40

A.3d 930. The facts and sequence of events is not complicated—the chronology is linear, unambiguous, and undisputed. Indeed, the subject matter of the four measures has no bearing on the constitutional issues here, which involve the application of Section 18 to those "clear facts." *Id.*

Finally, the Questions address a "matter applicable to the general public rather than private parties," and is not subject to the tug of litigation. *Opinion of the Justices*, 2017 ME 100, ¶ 28, 162 A.3d 188.

THE LAW REGARDING THE QUESTIONS PROPOUNDED

I. Question 1 Should Be Answered in the Negative

Article IV, part 3, section 18(2) of the Maine Constitution provides that a citizens' initiative, "unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors together with any amended form, substitute, or recommendation of the Legislature . . . ." Question 1 seeks the opinion of the Justices as to whether a measure is "presented" when it is merely transmitted by the Secretary of State to the legislative administrators or, instead, whether presentment occurs when Legislature has an opportunity-in-fact to act on it, which in this case is at the current

special session. If the Justices conclude that the measures were first "presented" to the current special session of the Legislature, then they must answer Question 1 in the negative, and need not reach any other Question. They should so conclude.

A. The Measures Were Presented in the First Session in Which the Legislature Had an Opportunity-in-Fact to Act.

When the direct initiative and referendum provisions were added to the Maine Constitution in 1909, "the people took back to themselves part of the legislative power that in 1820 they had delegated entirely to the legislature." *Allen v. Quinn*, 459 A.2d 1098, 1098 (Me. 1983). However, the Legislature remains central to the initiative process: electors "propose to the Legislature for its consideration" an initiated measure. Me. Const. art. IV, pt. 3, § 18(1). The Legislature then has three options: (1) enact the measure without change, ending the process; (2) enact a competing measure, sending both to a popular vote; or (3) enact nothing on the subject, sending the electors' proposal to a popular vote. *Id.* § 18(2). Although sundry amendments have impacted the timing of any necessary vote, it is now held "in November of the year in which the petition is filed." *Id.* § 18(3). While the date of the vote is controlled by the year in which the petition is filed, the Legislature's

obligation to consider the measure is discussed in terms of the "session at which it is presented." *Id.* § 18(2).

Importantly, there is no Constitutional mandate that the "session at which it is presented" must be a "regular session" of the Legislature. To the contrary, the "date of convening" of each "regular session" of the Legislature merely helps calculate the final date at which a petition may be filed. *Id.* § 18(1). In other words, it sets a limit on when the *electors* may submit a proposal; in contrast, it sets no limit (temporal or substantive) on when the *Legislature* may consider such a proposal. Indeed, the Law Court has interpreted this language to allow the electors to file before such a regular session is even convened. *Allen*, 459 A.2d at 1103. The only temporal limitation on the Legislature is the vote in November of the year the petition is filed. If the Legislature enacts nothing on the subject of the electors' proposal before then, "section 18 is detailed enough to be self-executing" in its mechanism to ensure a vote on the measure that November. *Id.* (*citing* Me. Const. art. IV, pt. 3, § 22).

Thus, if a measure is not presented in the regular session of the year the petition is filed, and no special session is called, then the

Constitution assures a vote that November. However, if the measure is presented to the Legislature at a special session, "nothing in section 18 limits the authority of the Legislature to" act on the measure "at a special session," provided that it does so sufficiently in advance of the November election that it "would not interfere with the orderly printing and distribution of ballots." *Opinion of the Justices*, 680 A.2d at 445.

B. The Measure Was First "Presented" in the Current Session

In answering the Legislature's Questions, the Justices should give "a sensible interpretation to" section 18 "that will carry out its quite obvious intent, regardless of its literal language." *Allen*, 459 A.2d at 1101-02. The Law Court has repeatedly noted that "[c]onstitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." *Id.* at 1102.

1. The Legislature Defines When a Measure is "Presented"

The Legislature, by its own constitutional powers, determines its own process, *see* Me. Const. art. III; Me. Const. art. IV, pt. 3, § 4, which is codified in part in its Joint Rules. Joint Rules, Preamble, *see* Affidavit of Secretary of the Senate, Darek Grant ("Grant Aff."), ¶ 3. The

Legislature is entitled to deference as to when an initiated measure is "presented." *See Weeks v. Smith*, 81 Me. 538, 18 A. 325, 327-28 (1889) ("[W]hen the legislature has certified to a mere matter of fact relating to its own conduct, and within its own cognizance, the courts of the state [are not] at liberty to inquire into or dispute the veracity of that certificate[.]"). Likewise, its "established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character." *Okanogan, Methow Tribes v. United States*, 279 U.S. 655, 689 (1929); *accord N.L.R.B. v. Noel Canning*, 573 U.S. 513, 524 (2014).

The Legislature has a long-standing practice that a bill is not a bill until it has been signed by the sponsor, released from the Revisor's Office, and given a Legislative Document (L.D.) number by the Clerk of the House and Secretary of the Senate. Grant Aff., ¶ 10. By rule, every bill, including initiated measures, must be allocated to the Maine Revised Statutes and corrected by the Revisor of Statutes. Grant Aff., ¶ 4. When the Revisor's office has finished its work, the Revisor notifies the sponsor; the signature of the sponsor and delivery to the chief legislative officer triggers the presentment. Grant Aff., ¶¶ 5-9. The

initiated bills here were not released by the Revisor's Office nor given an L.D. number until the First Special Session. Grant Aff., ¶ 11. To treat the bills as having been "presented" in the first regular session would conflict with the numbering of every other bill that has since appeared as an L.D. in the current special session, and even bill drafts that are still with the Revisor's Office.

In the legislative sense, a bill is considered "presented" when it is given an L.D. number and placed on the Advance Journal and Calendar of either chamber. Affidavit of Clerk of the House, Robert B. Hunt ("Hunt Aff."), ¶ 3. Up until that point, a bill is considered to be in draft form. Hunt Aff., ¶ 4. A bill's appearance on the printed calendar is the legislators' first opportunity to consider and act upon the legislation. Hunt Aff., ¶ 5. Non-initiated bills are confidential until they are given an L.D. number. Hunt Aff., ¶ 6.

In short, no bill—including any initiated measure—can be acted upon by either chamber until it passes through these ministerial, administrative functions. A measure cannot be said to have been "presented" to the Legislature during a time when the Legislature, by its own rules, cannot act on it. *Accord Herbring v. Brown*, 180 P. 328,

330 (Or. 1919) ("[A] 'bill' is a proposed law; a document in the form of a law presented to the Legislature for enactment.").[5]

2. The History of Section 18 Supports This Interpretation

Today, the only means to initiate a proposal is to file a valid petition with the Secretary of State within certain defined timelines. Me. Const. art. IV, pt. 3, § 18(1). That has not always been true. Prior to 1975, the electors had two means to start this process: "initiative petitions could alternatively be 'filed in the office of the Secretary of State or presented to either branch of the Legislature within forty-five days after the date of convening of the Legislature in regular session.'" *Allen*, 459 A.2d at 1102 (*citing* Resolves 1949, ch. 61). In 1975, an amendment, "eliminated the option of presenting the initiative petitions directly to the legislature." *Id.* In 1980, the Constitution was amended so that the timing of any necessary popular vote would no longer key off of the timing of "the recess of the Legislature," but would occur "in November of the year in which the petition is filed." Resolves 1980, ch.

[5] Moreover, if the Justices are concerned about legislative manipulation of this nonpartisan process—a concern not supported by historical practice, nor by the factual record—the wall between the political process and nonpartisan offices is sturdy, and the officials who carry out these ministerial tasks are bound by duties of diligence and loyalty. *See Hartness v. Black*, 114 A. 44, 49-50 (Vt. 1921) (enacted bill properly presented to governor after adjournment when ministerial and administrative tasks caused the delay between enactment and presentation, because administrators' actions were presumed to be regular and legitimate).

3. The distinction between when a petition is "filed" and when it is "presented" has persisted in the Constitutional structure, and the current text makes it clear that any necessary election keys off of the year it is "filed," not the session at which it is "presented."

Similarly, today, the time period for initiating a proposal is keyed from the "date of convening" of the regular session in the year a petition is filed. Me. Const. art. IV, pt. 3, § 18(1). That has not always been so. Originally, the timing was "at least thirty days before the close of its session." Resolves 1907, ch. 121. In 1949 it changed to "45 days after the date of convening of the legislature in regular session." Resolves 1949, ch. 61. The legislative history shows this was because an "initiated measure appearing so late in the session and before a date which can never be known in advance" can "upset the entire Legislative program." Legis. Rec. 341-42 (1949). The change increased the "percentage of Legislative working time" in which to consider the initiative, as well as to align it with the "usual dead line for introduction of general bills by" legislators because it "seems fair and reasonable that the sponsors of an initiated measure should meet the same requirements." *Id.* at 342.

All of this shows that for purposes of when something is "presented" to the Legislature, there is no magic in the date it is "filed" with the Secretary or the date it is "transmitted" by the Secretary for preparation by the Revisor. Instead, it is "presented" to the Legislature when the Legislature first has an opportunity-in-fact to act on it. Here, that is in the current special session.

II. Question 2 Should Be Answered in the Negative and Question 3 in the Affirmative.

Even if these measures were "presented" in the first regular session, the Legislature has the power to carry them over to the special session and act on them there. The power granted to the Maine Legislature "is plenary and subject only to those limitations placed on it by the Maine and United States Constitutions." *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996). The Law Court has previously recognized that section 18 "does not in any manner encroach on the prior power of the legislature to enact legislation." *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 911 (1948). The only restriction imposed by section 18 is that the Legislature may

not "interfere with the submission of measures as so provided by the constitution." *Id.*[6]

In 1996, the Justices addressed the question of whether, after the Legislature had rejected an initiated measure and then adjourned, the Legislature could enact a competing measure at a subsequent special session before the election. *Opinion of the Justices*, 680 A.2d at 445. The Justices opined that, because "nothing in section 18 limits the authority of the Legislature to enact a substitute measure at a special session," the Legislature could do so. *Id.* at 448. So long as legislative adoption of a competing measure at a subsequent special session would not "interfere with the orderly printing and distribution of ballots," there was no "adverse effect" on the people's initiative right. *Id.*

Similarly, the carrying over and enactment without any change of initiated measures in a subsequent session is not prohibited by the Constitution, and it in no way interferes with or impairs the people's ability to propose and enact legislation—indeed, it is consistent with

[6] Additional limitations should not be lightly implied. *See Opinions of the Justices*, 70 Me. 560, 562 (1879) (specific constitutional language on election procedure "is directory merely" and "does not aim at depriving the people of their right of suffrage or their right of representation for formal errors, but aims at avoiding such a result"); *Opinions of Justices*, 70 Me. 570, 598 (1880) (strict compliance with technical requirements should not be applied to "defeat the will of the people, as expressed in the election"). "The constitution is to be construed, when practicable, in all its parts, not so as to thwart, but so as to advance its main object, the continuance and orderly conduct of government by the people." *Id.*

section 18's purpose. Under the Maine Constitution, unlike in some other states, legislation enacted by popular vote does not possess super-statute or quasi-constitutional status.[7] In fact, Maine has previously considered and rejected a distinction between voter-enacted and Legislature-enacted laws. *Compare* L.D. 188 (107th Legis. 1975), *with* Con. Res. 1975, ch. 2. Statutes enacted by Maine's electors are on equal footing with statutes enacted by the Legislature, and do not receive heightened protection from subsequent repeal or amendment. *See In re Constitutionality of 1982 PA 47*, 340 N.W.2d 817, 824-28 (Mich. 1983) ("[T]he legislative power retained by the people, through the initiative and referendum, does not give any more force or effect to voter-approved legislation than to legislative acts not so approved.").

Thus, the only difference between enactment by a popular vote on the one hand, and enactment by legislative action (plus gubernatorial signature or legislative override of a veto) on the other, is that the

[7] *E.g.*, Cal. Const. art. 2, § 10(c) ("The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors . . . ."). Thus, California courts distinguish between "initiative statutes," "referendum statutes," and "legislative statutes." *People v. Prado*, 263 Cal. Rptr. 3d 79, 83 (Ct. App. 2020); *see also* Wash. Const. art. 2, § 1(c) ("No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment . . . ."); Nev. Const. art. 19, § 2 ("An initiative measure [validly] approved by the voters shall not be amended, annulled, repealed, set aside or suspended by the legislature within 3 years from the date it takes effect.").

legislative enactment will typically go into effect sooner. *Compare* Me. Const. art. IV, pt. 3, § 16, *with* Me. Const. art. IV, pt. 3, § 19. Otherwise, the laws are equal. If anything, allowing the Legislature to act in a subsequent session furthers section 18's purposes by expediting an initiated measure's effective date, and avoids the significant expense of a statewide referendum election. If the measure's opponents are sufficiently numerous that a popular vote is inevitable, then the people's veto mechanism may be invoked. But neither the text nor the purpose of section 18 prohibits the Legislature from acting on an initiated measure in a subsequent session.

Given the Legislature's plenary power to enact beneficial legislation and the absence of any constitutional text or reason to impose such a limitation, the Justices should approve this historical practice. The Maine Constitution does not preclude the Legislature from carrying over and enacting an initiated bill in a session subsequent to the session in which it was presented. The answers to Questions 2 and 3 should be "no" and "yes."

A. "Constructual Precepts" of Interpretation Reinforce Preserving the Legislature's Central Role

In answering these questions, the Justices should give "a sensible interpretation to" section 18 "that will carry out its quite obvious intent, regardless of its literal language." *Allen*, 459 A.2d at 1101-02. As the Law Court has explained, "[t]he overall intent of section 18(3) is clear; any required popular vote on an initiative measure should be held at the November election coming next after the adjournment of the regular session to which it was presented." *Id.* at 1102 n.13. The Legislature does not frustrate that intent by taking up the measure in a special session prior to that November election. "Neither by action nor by inaction can the legislature interfere with the submission of measures as so provided by the constitution." *Farris*, 143 Me. at 231, 60 A.2d 908.

Just three years ago, in *Payne v. Secretary of State*, the Law Court again interpreted a facially ambiguous constitutional provision in order to facilitate the actual presentation and consideration of a people's veto, rather than adhere to impossible deadlines that might be imposed if the constitutional text were read literally. 2020 ME 110, 237 A.3d 870. The Court addressed the question of whether, for purposes of the ninety-day deadline to submit a people's veto petition after a law is passed, the law

is "passed" when the Legislature votes or, instead, when any requisite gubernatorial action occurs. *Id.* ¶¶ 13-15. The Court observed that, although neither interpretation was "perfectly reconcilable" with the text of section 17, the greater period made more sense in light of the "clear purpose of the ninety-day period to afford the time to invoke a people's veto until a law's effective date." *Id.* ¶¶ 23, 27.

Here, two fundamental purposes of section 18 are evident: (1) that the Legislature shall have suitable opportunity to consider the bills proposed to it by the electors; and (2) that the electors are able to vote in November if the Legislature does not enact their proposal without change. Adopting an interpretation that would prevent the Legislature from having any opportunity to consider the measure would frustrate the first purpose and not advance the second. In contrast, the better reading of the Constitution furthers both.

B. Constitutional Chaos Will Not Result From Considering Initiated Measures in a Special Session

There is no reason to expect constitutional chaos if an initiative is acted upon in a special session. Indeed, the Legislature has previously done just that, without issue. *See Noel Canning*, 573 U.S. at 524. Adjournment of the regular session followed immediately by a special

session has never prevented the Legislature from carrying over or acting on measures proposed by the electors. For example, in 2021, the 130th Legislature was presented with an initiated measure in its first regular session. *See* L.D. 1295 (130th Legis. 2021); 1 Legis. Rec. H-159, H-197, S-308 (1st Reg. Sess. 2021). For the same budget-related reasons that led to this case, the Legislature adjourned *sine die* before acting on L.D. 1295, but carried it over into the first special session. *See* 1 Legis. Reg. H-196, H-199, S-324 (1st Reg. Sess. 2021). In the first special session, L.D. 1295 was reported out of committee as "ought not to pass," which the House accepted; the measure subsequently appeared on that November's ballot. *See* 1 Legis. Rec. S-485 to -486 (1st Spec. Sess. 2021). No one ever suggested that the Legislature lacked the power to act on L.D. 1295 after it was carried over into a subsequent session.

Similarly, in 2004, the second special session of the 121st Legislature considered and acted on L.D. 1893 and L.D. 1938, both initiated measures. There appears to be no dispute that those measures were "presented" in that special session, as the Secretary did not even certify the number of signatures until after adjournment of the prior regular session. But there, too, no constitutional mischief arose from the

Legislature's consideration of the measures in a subsequent session, and although the Legislature declined to adopt any of those measures, there is no reason to think that there would have been a legal or practical crisis had one or more of them been enacted without change.

III. Question 4 Should be Answered in the Affirmative and Question 5 in the Negative.

If the Justices reach Questions 4 and 5, they should conclude that the unambiguous text of the Constitution, as well as the structure and purposes of the initiative and people's veto processes, mean that if a measure is enacted without change, it must not go to the ballot. The meaning of the penultimate sentence of section 18(2) is unmistakable: if an initiated measure "is enacted by the Legislature without change, it shall not go to a referendum vote unless in pursuance of a demand made in accordance with [section 17]." Full stop. This simple text reflects a simple concept: when the Legislature enacts an initiated bill, the purpose of the initiative process has been fulfilled, and there is no need to hold a popular vote.

This interpretation is not inconsistent with the mandate that "[t]he measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to

the electors together with any amended form, substitute, or recommendation of the Legislature." Me. Const. art. IV, pt. 3, § 18(2). Although a literal reading might suggest that a measure enacted between the "session in which it is presented" and the election date must always go to the ballot, the Law Court has cautioned that, in interpreting section 18, it will "carry out its quite obvious intent, regardless of its literal language." *Allen*, 459 A.2d at 1101. And as in 1996, legislative action during the summer of 2023 would not "interfere with the orderly printing and distribution of ballots." *Opinion of the Justices*, 680 A.2d at 448.

Further supporting this pragmatic view is the fact that the status of a Maine statute does not depend upon the mode of its enactment. Thus, once enacted by the Legislature, the measure has become law and the initiative process has run its course. And regardless of its outcome, a popular vote on an already-enacted law pursuant to the initiative procedure would have no effect. A favorable vote would be meaningless because the law was already enacted, and an unfavorable vote would be meaningless because the procedure would not have complied with the process for a people's veto.

Indeed, it would not only be meaningless, but would generate serious confusion among the electorate. Many voters will undoubtedly be aware that the measure has already become law—by the time of the November election, it may well already be effective—and will be unclear why they are being asked if they want to re-enact the law. Voters who favor the law may see no reason to cast a meaningless vote, and voters who disapprove of the law may mistakenly believe that a vote against the measure would veto it. Adhering to the clear constitutional distinction between the *affirmative* initiative procedure and the *negative* people's veto procedure would comport with the constitutional text and make it far more likely that the will of the people will be effectuated. The answers to Questions 4 and 5 should be "yes" and "no."

CONCLUSION

The power of the Legislature, in matters of legislation is "absolute, except as restricted and limited by the Constitution." *Sawyer,* 83 A. at 678. The Legislature's enactment of a proposed measure months prior to the November election, during the session in which it is first presented in proper form, is not restricted by the Constitution but fulfills section 18's purpose. The Justices should so opine.

Respectfully Submitted,

Dated: May 26, 2023

/s/ Melissa A. Hewey
Melissa A. Hewey, Bar No. 3587
mhewey@dwmlaw.com

/s/ David M. Kallin
David M. Kallin, Bar No. 4558
dkallin@dwmlaw.com

/s/ Oliver Mac Walton
Oliver Mac Walton, Bar No. 6340
owalton@dwmlaw.com

Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Tel: (207) 772-1941

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Procedural Order of this Court dated May 16, 2023, I have, on May 26, 2023, filed the original and one copy of this Brief of the Legislature with the Clerk of the Supreme Judicial and simultaneously emailed in the form of a single text-based pdf file to: lawcourt.clerk@courts.maine.gov.

/s/ Melissa A. Hewey

Melissa A. Hewey, Bar No. 3587
Drummond Woodsum & MacMahon
84 Marginal Way, Suite 600
Portland, ME 04101-2480
Tel: (207) 772-1941

ADDENDUM

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. OJ-23-1

In the Matter of Request for Opinion of the Justices

AFFIDAVIT OF DAREK GRANT

I, Darek Grant, do depose and swear:

1. I have served as Secretary of the Maine Senate since 2018. My duties as Secretary include keeping the Senate's records, transmitting messages from the Senate to the Governor or the House, numbering bills and resolves and maintaining the Senate's calendar, supervising the preparation of the permanent Senate journal, and otherwise providing administrative assistance to the Senate in carrying out its legislative functions.

2. Through my role as Secretary, I am intimately familiar with the Senate Rules, the Legislature's Joint Rules, parliamentary procedure, and the Legislature's history and practice.

3. The Joint Rules are adopted by each Legislature, pursuant to Article IV, part 3, section 4 of the Maine Constitution, and "take precedence over statutes enacted by a prior Legislature relating to the proceedings of the Legislature." 131st Maine Legislature, Joint Rules, Preamble. The Joint Rules are available on the Legislature's website, at legislature.maine.gov/joint-rules.

4. Joint Rule 210 reads: "All bills and other instruments, including bills proposed by initiative, must be allocated to the Maine Revised Statutes as appropriate and corrected for form, legislative style and grammar by the Revisor of Statutes before printing."

5. Joint Rule 211 reads:

The Revisor of Statutes shall notify the primary sponsor of a bill or resolve when the bill or resolve is ready in final form for signature. The primary sponsor is responsible for obtaining signatures from cosponsors. The primary sponsor shall sign the bill or notify the Revisor of Statutes of any changes that are necessary within deadlines established by the presiding officers. The primary sponsor shall present the signed cosponsor sheet to the Revisor of Statutes. If the primary sponsor does not contact the Office of the Revisor of Statutes within this period, the bill is void.

If changes are requested, the Revisor of Statutes shall notify the primary sponsor when changes have been made and the bill is available for signature; the primary sponsor and cosponsors shall sign the bill within the established deadlines. The sponsor shall propose any further changes to the committee of reference. If the primary sponsor does not sign the bill within this period, the bill is void. If cosponsors do not sign the bill within either period, their names must be removed from the bill.

6. Joint Rule 401 reads:

Every bill or resolve submitted by a Legislator must be printed unless withdrawn by the sponsor before printing. After it is printed, a bill or resolve is considered to be in the possession of the Legislature and may not be withdrawn by the sponsor. Every bill presented for reference to committee or to be engrossed without reference to committee must be printed before appearing on the Advance Journal and Calendar of either chamber.

Every amendment must be printed and distributed before being taken up in either chamber. Every committee amendment must indicate the committee making the report.

The Secretary of the Senate and the Clerk of the House are responsible for the printing and initial distribution of legislative documents and amendments.

7. Joint Rule 406 reads:

All endorsements on papers passing between the 2 chambers must be under the signature of the Secretary of the Senate or the Clerk of the House, respectively; but after the final passage of bills and resolves they must be signed by the presiding officer of each chamber.

When one chamber has passed upon a legislative paper and forwarded it to the other, the receiving chamber shall promptly, upon receipt, place that paper on its calendar.

8. Senate Rule 401-7 reads: "Members or members-elect who present a bill, resolve or a petition shall place their signatures on the bill, resolve or petition and a brief descriptive title of its contents."

9. Mason's Manual of Legislative Procedure, Chapter 68, Section 725-2, reads: "A bill is not regarded as having been introduced until it has been delivered to the chief legislative officer, given a number and read." The House and the Senate use Mason's as their parliamentary procedure manual.

10. The Legislature has a longstanding practice and understanding that a bill is not a bill, and is not capable of being acted upon, until it is released from the Revisor's Office, given an L.D. number by the Clerk of the House and Secretary of the Senate, and printed.

11. The four initiated measures at issue in this case were not released by the Revisor's Office, nor given an L.D. number, until the First Special Session.

I swear and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: 5/24/2023

Darek Grant

STATE OF MAINE
COUNTY OF Kennebec, ss. May 26 2023

Personally appeared before me the above-named Darek Grant and made oath that the statements contained in this Affidavit are made on the affiant's personal knowledge and are true.

Before me,

Notary Public / Attorney
Print Name: Rosemarie D. Smith
My Commission Expires: 1-6-2030

STATE OF MAINE

SUPREME JUDICIAL COURT Docket No. OJ-23-1

In the Matter of Request for Opinion of the Justices

AFFIDAVIT ROBERT B. HUNT

I, Robert B. Hunt, do depose and swear:

1. I have served as Clerk of the Maine House of Representatives since September, 2014. My duties as Clerk include keeping the House's records, supervising the House's documents and papers, authenticating the House's orders and proceedings, transmitting messages from the House to the Governor or the Senate, preparing the daily calendar, supervising the preparation of the permanent House journal, and otherwise providing administrative assistance to the House in carrying out its legislative functions.

2. Through my role as Clerk, I am intimately familiar with the House Rules, the Legislature's Joint Rules, parliamentary procedure, and history and practice.

3. In the legislative sense, a bill is considered to be "presented" or "introduced" only after it has been printed, given a Legislative Document (L.D.) number, and placed on the Advance Journal and Calendar of either chamber.

4. Until a bill is printed, given an L.D. number, and placed on the calendar, the bill is considered to be in draft form.

5. A bill's appearance on the calendar initiates the legislators' opportunity to consider and act upon the legislation.

6. Non-initiated bills are confidential until they are given an L.D. number.

I swear and affirm under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: 5/26/23

Robert B. Hunt

STATE OF MAINE
COUNTY OF Kennebec, ss. May 26, 2023

Personally appeared before me the above-named Robert B. Hunt and made oath that the statements contained in this Affidavit are made on the affiant's personal knowledge and are true.

Before me,

~~Notary Public~~ / Attorney
Print Name: EDWARD A. CHARBONNEAU
My Commission Expires: BAR # 007677