STATE OF MAINE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-23-1

IN THE MATTER OF
REQUEST FOR OPINION OF THE JUSTICES

Before the Justices of the Supreme Judicial Court

BRIEF OF MAINE AFFORDABLE ENERGY BALLOT QUESTION COMMITTEE

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STATEMENT OF INTEREST

Maine Affordable Energy Ballot Question Committee ("Maine Affordable Energy") is a ballot question committee duly registered with the Maine Commission on Governmental Ethics and Election Practices to oppose "An Act to Create the Pine Tree Power Company, a Nonprofit, Customer-owned Utility," (the "Pine Tree Power Initiative") one of the four citizens' initiatives (the "Initiatives") at issue in this proposed solemn occasion. Maine Affordable Energy believes the Legislature does not have the authority to enact the Pine Tree Power in the First Special Session of the 131st Legislature. Accordingly, Maine Affordable Energy has a strong interest in the Court's consideration of this proposed solemn occasion.

STATEMENT OF THE ISSUES[1]

The Maine State Legislature has referred the following five questions to the Justices of the Supreme Judicial Court, pursuant to Article VI, Section 3 of the Maine Constitution**:**

Question 1. ls the mere transmittal of a measure by the Secretary of State sufficient to constitute "present[ation] to the Legislature" within the meaning of the Constitution of Maine, Article IV, Part Third, Section 18, Subsection 2, notwithstanding that at the time it was transmitted the measure did not exist as a legislative document, had not been printed pursuant to Joint Rule 401, had not appeared on any legislative calendar, and that neither the full House nor full Senate were made aware that the measure was in possession of the Legislature until approximately 53 days after transmittal?

[1] This Brief does not address whether the Questions propounded by the Legislature present a "solemn occasion" pursuant to article VI, section 3 of the Maine Constitution.

The answer is "Yes."

Question 2. If the answer to Question 1 is in the affirmative, did the Constitution of Maine, Article IV, Part Third, Section 18, Subsection 2 preclude the 131st Legislature, as assembled in the First Regular Session, from carrying the measure over for consideration in the First Special Session?

The answer is "No," with confirmation that "consideration" in this context does not include the authority to enact without change.

Question 3. If the answer to Question 2 is in the negative, does the Legislature's Constitutional power enumerated in Article IV, Part Third, Section I to "make and establish all reasonable laws and regulations for the defense and benefit of the people of this State" include the power to consider and enact the measure into law during the First Special Session?

The answer is "No."

Question 4. If the answer to Question 3 is in the affirmative and a measure is thus enacted by the First Special Session of the Legislature without change, must the identical measure identified in a Proclamation executed by the Governor on April 7, 2023 "not go to a referendum vote" pursuant to the Constitution of Maine, Article IV, Part Third, Section 18, Subsection 2?

The Court need not answer the question because the answer to Question 3 is in the negative, and an affirmative answer to Question 3 is a stated precondition for answering Question 4. To the extent an answer is required, the answer is "Yes."

Question 5. If the answer to Question 4 is in the negative, is a bill thus enacted by the First Special Session of the Legislature a competing measure to an identical measure placed on the ballot by proclamation of the Governor on April 7, 2023, as described in the Constitution of Maine, Article IV, Part Third, Section 18, Subsection 2?

The Court need not answer the question because the answer to Question 3 is in the negative, and an affirmative answer to Question 3 is a stated precondition for answering Questions 4 and 5. To the extent an answer is required, the answer is "No."

SUMMARY OF THE ARGUMENT

The solemn occasion sought by the Legislature concerns four citizens' initiatives provided to the First Regular Session of the current 131st Legislature by the Secretary of State after the Secretary found those Initiatives to be valid. As set forth in the Joint Order seeking this proposed solemn occasion, the Secretary in fact delivered the Initiatives to the Legislature before the First Regular Session adjourned *sine die*, delivering two of the initiatives 42 days before that adjournment and the remaining two initiatives eight days before that adjournment. The Legislature undisputedly failed to enact the Initiatives without change before it adjourned the First Regular Session *sine die*. Having done so, the Legislature cannot enact them now, in the First Special Session of the 131st Legislature.

By the text and rhetoric of the Joint Order, it appears the Legislature seeks to revive authority it lost, arguing the Secretary did not "present" the Initiatives to the Legislature in the manner required by the Maine Constitution because, according to the Legislature, "presentment" requires more than formal transmission of the Initiatives to the Legislature but, rather, transmission plus the execution of certain additional procedures unilaterally created by and purely internal to the Legislature. But the Legislature's interpretation of the Constitution would significantly curtail, if not eliminate, the people's "absolute right" to legislate by allowing the Legislature to place citizen-initiated legislation into limbo, whereby the legislation has not been enacted but

also is not permitted to proceed to consideration by the voters. The plain language of the Constitution, the history of the relevant constitutional provisions, the Court's precedent, the Legislature's own internal rules, and analogous federal law all militate against this reading.

The Legislature declined to act when it had the clear authority and opportunity to do so. That authority now has transferred to the people and cannot be taken back.

ARGUMENT

"*[T]he right of the people to initiate and seek to enact legislation is an absolute right*."

~*McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933.

Article IV, Part Third, Section 18 of the Maine Constitution provides the people of Maine with the absolute right to initiate and enact legislation. *See McGee*, 2006 ME 50, ¶ 25, 896 A.2d 933 ("[S]ection 18 cannot be said merely to *permit* the direct initiative of legislation upon certain conditions. Rather, it reserves to the people the *right* to legislate by direct initiative if the constitutional conditions are satisfied."); *Allen v. Quinn*, 459 A.2d 1098, 1103 (Me. 1983) ("[T]he people in retaking to themselves part of the legislative power have laid out in unusual detail the procedure by which they will legislate by direct vote. Indeed, Section 18 is detailed enough to be self-executing.").

Pursuant to Section 18, "[t]he electors may propose to the Legislature for its consideration any bill, resolve or resolution . . . by written petition addressed to the Legislature or to either branch thereof and filed in the office of the Secretary of State" within certain time constraints. Me. Const. art. IV, pt. 3, § 18, cl. 1. A measure thus

proposed, "unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors." *Id.*, § 18, cl. 2.

With the foregoing powers and authority thus granted to the people, the Legislature may not take actions that thwart or otherwise interfere with the people's "absolute right" to exercise those powers. As this Court has made plain: "Neither by action *nor by inaction* can the legislature interfere with the submission of measures as so provided by the constitution." *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 911 (1948) (emphasis added). Indeed, the "self-executing" nature of Section 18 constrains the Legislature's ability to promulgate even additional procedures governing the citizens' initiative process. *Allen*, 459 A.2d at 1103. As "the people . . . have expressly detailed the procedure required to be followed, a court should infer additional procedural requirements only if they are clearly necessary to achieve consistency with other constitutional provisions or to accomplish the general purpose of the direct initiative." *Id.*

Application of these core principles provides a clear answer both to the Legislature's questions and the arguments implicit in them.

With respect to Question 1, the Secretary of State's undisputed formal transmittal of the Initiatives to the Legislature during the First Regular Session constituted presentment under the terms of Section 18. The Legislature's proffered interpretation of presentment would allow the Legislature to claim the unchecked power to determine when a citizens' initiative is "presented" and, thus, to indefinitely avoid consideration

of such an initiative, completely undermining the right of Maine people to propose legislation and contrary both to the text of Section 18 and this Court's precedent. The Court should answer Question 1 "Yes."

With respect to Question 2, the Legislature may "carry over" the Initiatives for legislative activity such as hearings or work sessions in the First Special Session or in connection with adopting competing measures during the First Special Session. While the authority to adopt or reject the Initiatives without change has passed to the people of Maine after the Legislature failed to adopt the Initiatives without change during the First Regular Session, that does not preclude the Legislature from studying the Initiatives, debating them, or taking testimony from Maine citizens concerning them in the First Special Session. The Court should answer Question 2 "No," while confirming that legislative consideration in this context does not include the authority to enact the Initiatives without change.

With respect to Question 3, the Legislature's undisputed failure to adopt the Initiatives without change during the First Regular Session precludes the Legislature from adopting any of the Initiatives without change during the First Special Session. The Legislature's general authority to "make and establish all reasonable laws" must yield to specific constraints imposed by the Maine Constitution, including those imposed by Section 18. The Court should answer Question 3 "No."

The Court need not answer Questions 4 and 5 because they are conditioned on the Court answering Question 3 in the affirmative.

I. The Court should answer Question 1 "Yes": The Secretary presented the Initiatives to the Legislature when she delivered the Initiatives to the Clerk of the House.

While the Legislature argues that its own internal rules should govern when and whether citizen-initiated legislation is deemed "presented" to the Legislature, such an interpretation would thwart the people's "absolute right" to propose and enact such legislation. The Court should reject this approach, consistent with its holdings in *Farris*, *Allen*, and *McGee*.

The Legislature does not dispute that the Secretary of State "transmitted" the Initiatives "to the Legislature to be produced by the Office of the Revisor of Statutes as legislative documents by consideration by the Legislature." *See* S.P. 768 (131st Legis. 2023) ("Joint Order") at 1. Nor does it dispute that two of the Initiatives were transmitted on February 16, 2023—42 days prior to the adjournment of the First Regular Session on March 30, 2023—and that the other two were transmitted over a week prior to that adjournment. *Id.* Nor does it assert that any further action by the Secretary of State was necessary to provide custody and control over the Initiatives to the Legislature. *Id.* Instead, the Legislature appears to argue that such "mere transmittal" is not sufficient to constitute "present[ation] to the Legislature" pursuant to Section 18, Clause 2 of the Maine Constitution, *id.* at 2, but, rather, that the Legislature's "own rules of procedure" regarding the printing and calendaring of bills "establish[] the manners in which initiated bills may be presented to the Legislature," *id.* at 1.

As an independent branch of Maine's government, the Legislature has plenary authority over its internal rules and procedures. *See* Me. Const. art. IV, pt. 3, § 4 ("Each House may determine the rules of its proceedings."). When, or even if, a citizen-initiated bill is given a "legislative document" or "L.D." number, has been printed, appears on the Legislature's calendar, or has been disseminated to each member of each house are all matters left purely to the Legislature's discretion. *See* Joint Order at 2; *see also* Senate Rule 301 (131st Legis.) (Secretary of the Senate shall "number any bills and resolves . . . and enter them upon the calendar); House Rule 301 (131st Legis.) (Clerk of the House shall "[p]repare a daily calendar of bills"); Joint Rule 401 (131st Legis.) (Secretary of the Senate and Clerk of the House are "responsible for the printing and initial distribution of legislative documents"). Accordingly, if the execution of any such procedures governs when and whether citizen-initiated legislation has been "presented" to the Legislature for action, then the people's "absolute right" to enact Legislation is no longer "absolute" at all, but, instead, completely subordinate to the Legislature's authority.

The plain language, purpose, and history of Section 18, this Court's past interpretation of when a bill is "presented," the Legislature's own internal procedures, analogous federal law, and public policy all weigh against the Legislature's position.

a. Plain Language

When interpreting the Maine Constitution, the Court will "apply the plain language of the constitutional provision if the language is unambiguous," and "[i]f the

provision is ambiguous," will "determine the meaning by examining the purpose and history surrounding the provision." *Voorhees v. Sagadahoc Cnty.*, 2006 ME 79, ¶ 6, 900 A.2d 733. With respect to Section 18 specifically, this Court has recognized that "[t]he broad purpose of the direct initiative is the encouragement of participatory democracy"; accordingly, Section 18 "must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *Allen*, 459 A.2d at 1103 (quoting *Opinion of the Justices,* 275 A.2d 800, 803 (Me.1971)); *see also Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 14-15, 237 A.3d 882.

Looking first to the plain language of the Constitution, the word "present" has been defined as: "to give or bestow formally," "to bring to one's attention," *Present*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/present, and "to give, provide, or make something known," *Present*, Cambridge Dictionary, available at https://dictionary.cambridge.org/us/dictionary/english/present. In short, the drafters of the Maine Constitution used a simple word with a straightforward definition, no aspect of which implies a need for any procedural action by the Legislature for "presentation" to be complete in this circumstance. To the contrary, the plain language of the term "present" implies that an initiative has been "presented" to the Legislature when it is *given formally* to the Legislature.[2]

[2] The Legislature itself appears to view "presentation" as akin to "submission," which similarly lacks any implication that procedural action by the Legislature is required. *See* 21-A M.R.S. § 907 (public

During the First Regular Session of the 131st Legislature, the Secretary of State undisputedly "gave" all four of the Initiatives to the 131st Legislature for reproduction by the Office of the Revisor of Statutes. *See* Joint Order at 1 (Initiatives transmitted February 16 and March 22, 2023).[3] The Secretary of State gave the Initiatives to the Legislature "formally" by way of directing her official certification of the Initiative petitions to the Clerk of the House, *see Communications*, Advance Journal and Calendar of the House of Representative (Apr. 11, 2023), available at https://legislature.maine.gov/house/house/HouseActivities/HouseCalendarDetails/205#Cal_22899_Section_11901 (reproducing February 16 communications from the Secretary of State to the Clerk of the House), which is undoubtedly the office charged with receiving documents presented to the Legislature. *See* House Rule 301 (131st Legis.) (Clerk of House's duties include "hav[ing] responsibility for all the documents and papers of any kind confided in the care of the House"). In short, by the plain language of the Constitution and in accordance with the liberal construction required of terms within Section 18, the Initiatives were "presented" to the 131st Legislature

hearing required upon "submi[ssion]" of an initiative by the Secretary of State "to the Legislature in accordance with the procedure established by the Constitution of Maine, Article IV, Part Third, Section 18, Subsection 1"); *see also Submit*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/submit (defining "submit" as "to deliver formally").

[3] The Legislature notes that two of the four initiatives were ordered printed with the statement "Transmitted to the Clerk of the 131st Maine Legislature by the Secretary of State on April 10, 2023 and ordered printed." Joint Order at 2. However, this date of transmittal by the Secretary of State is incorrect. By the Legislature's own admission, two of the Initiatives were transmitted by the Secretary of State on February 16, 2023, and the other two Initiatives were transmitted on March 22, 2023. *Id.* at 1.

when the Secretary of State formally gave them to the Clerk of the House during the First Regular Session.

b. Amendment History

The amendment history of Section 18 demonstrates that presentment means formal delivery to the Legislature—not formal delivery plus the execution of the Legislature's internal procedures. As this Court has recognized, "[p]rior to 1975[,] initiative petitions could alternatively be 'filed in the office of the Secretary of State or *presented* [by the electors] 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 (quoting Resolves 1949, ch. 61, available at http://lldc.mainelegislature.org/Open/Laws/1949/1949_RES_c061.pdf) (emphasis added). Following the electors' "presentation" of a petition to either the Secretary of State or the Legislature, the Secretary of State counted the signatures on the petition, and the Judiciary Committee of the Legislature determined the validity of those signatures. *See* Report of the Judiciary Committee on the Initiative and Reform Process (1974) at 2, 8-9, available at http://lldc.mainelegislature.org/Open/Rpts/kf4881_z99m22_1974.pdf. In discussing this procedure, the Legislature's Judiciary Committee described "presentation" as being analogous only to "filing" and not the execution of any additional legislative procedures. *See id.* at 5 ("The petitions must be *filed* with the Secretary of State *or the Legislature* within forty-five days after the convening of a regular session of the Legislature." (emphasis

added)). The Judiciary Committee, in recommending the 1975 constitutional amendment, concluded that "the Legislature's role should be limited" with respect to reviewing petitions, explaining that legislative review of signatures was contrary to "the intent of the initiative and referendum process," which is "to enable the people to exercise legislative power independently of the Legislature." *Id.* at 22. Instead, the Committee explained, the "Secretary of State should have this authority." *Id.* Accordingly, the 1975 amendment, *inter alia*, removed the option for direct presentation of initiative petitions to the Legislature. *See* Const. Res. 1975, ch. 2, *passed* in 1975, available at http://lldc.mainelegislature.org/Open/Laws/1975/1975_CR_c002.pdf.

Despite this change, the constitutional language at issue in this matter, which refers to the "session at which [an initiative] is presented," remained within Section 18.[4] Accordingly, "presented" should be read in light of the history of direct "presentation" of petitions to the Legislature, which the Legislature itself previously determined to be mere "filing" and not filing plus various additional legislative procedures. When placed into this historical context, it is plain that "presentation" occurs when the Secretary of State delivers valid measures to the Legislature—just as the electors would have delivered those measures directly prior to 1975 by filing them with the Legislature.

[4] This "session at which it is presented" language has been part of the Constitution since the direct initiative process was added to the constitution. *See* Resolves 1907, ch. 121, available at http://lldc.mainelegislature.org/Open/Laws/1907/1907_RES_c121.pdf.

c. Law Court Interpretation

This Court's previous interpretation of the steps needed to "present" an initiative to the Legislature further undermines the Legislature's argument. In *Avangrid Networks, Inc. v. Secretary of State*, the Court considered whether the Secretary of State could lawfully place a citizens' initiative on the ballot. 2020 ME 109, 237 A.3d 882. In discussing the procedural history of the initiative, the Court noted that "the Secretary [of State] *presented* the proposed initiative to the Legislature in a communication dated March 16, 2020," and cited the March 17, 2020, Senate Journal for the 129th Legislature for this proposition. *Id.* ¶ 6 (emphasis added). A review of the cited Senate Journal reveals Secretary of State Matthew Dunlap formally gave his official certification of the initiative petition to the Clerk of the House on March 16, 2020, and that communication—along with a similar communication sent to the Secretary of the Senate—was "read and ordered placed on file" on March 17, 2020. Sen. Jour. (129th Legis. Mar. 17, 2020) at S-1585, S-1595-96, available at https://legislature.maine.gov/uploads/visual_edit/80-03-17-2020r2.pdf (communicating H.P. 1548 and S.C.1058). Following the reading of this communication on March 17, 2020, the accompanying bill was "ordered printed." *Id.* at S-1596. The Legislature adjourned *sine die* the same day. *Id.* at S-1609.

While the Legislature now contends that an initiative is not "presented" until "after it is printed," *see* Joint Order at 2 (quoting Joint Rule 401 (131st Legis.)), the Court has not previously interpreted Section 18 in this manner. Instead—consistent with the

plain language of Section 18—this Court has looked to the date the Secretary of State "communicat[es]" the initiative to the Legislature to determine when that initiative was "presented." *Avangrid*, 2020 ME 109, ¶ 6, 237 A.3d 882.[5]

This Court also has discussed the constitutional meaning of the term "presented" in the context of Article IV, Part Third, Section 2 of the Maine Constitution, which provides that "[e]very bill or resolution, having the force of law . . . which shall have passed both Houses, shall be *presented* to the Governor." Me. Const. art. IV, pt. 3, § 2. The Court has framed this provision as requiring that bills be "sent to the Governor." *Opinion of the Justs.*, 231 A.2d 617, 619 (Me. 1967); *see also Stuart v. Chapman*, 104 Me. 17, 70 A. 1069, 1072 (1908) (noting the Legislature had "sent [bills] to the Governor for approval"). For example, in one instance where the Legislature itself stated that a resolve passed by both Houses was "forwarded to the Governor" on June 27, 1969, this Court concluded that "present[ation]" to the Governor had occurred on that same date. *Opinion of the Justices*, 261 A.2d 53, 54, 57 (Me. 1970); *see also id.* ("The Legislature erred in *sending* Legislative Document No. 24 to the Governor for his approval."

[5] Notably, neither the Court nor, apparently, the Legislature, previously has expressed concern as to whether the Legislature needs an appropriately long "opportunity to act" on a measure placed before it by the electors. With respect to the initiative at issue in *Avangrid*, the Legislature adjourned *sine die* the day after the initiative was presented—and the same day it was printed—and yet did not argue that the *de minimis* time it had to consider and/or enact the initiative affected whether the initiative had been properly presented. *See Avangrid*, 2020 ME 109, ¶ 6, 237 A.3d 882; *see also Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 5, 256 A.3d 260 (noting that initiative "was presented to the 130th Legislature during its first regular session, and the Legislature adjourned *sine die* on March 30, 2021, without enacting the measure"); Sen. Jour. (130th Legis. Mar. 30, 2021) at S-308, available at https://legislature.maine.gov/uploads/visual_edit/05-03-30-2021r2-4.pdf (initiative at issue in *Caiazzo* "ordered printed" the same day the Legislature adjourned *sine die*).

(emphasis added)). Given that this Court—and, it appears, the Legislature—view "presentation" of legislation to the Governor as an act of mere sending or forwarding, it follows that presentation of an initiative to the Legislature is complete when the Secretary of State sends the initiative to the Clerk of the House.

d. Internal Procedures

The Legislature hinges much of its argument regarding the "presentation" of initiatives on its constitutional authority to "determine the rules of its proceedings." *See* Me. Const. art. IV, pt. 3, § 4; *see also* Joint Order at 1 (citing the preceding provisions for Legislature's "exclusive authority to set its own rules of procedure, including such rules establishing the manner in which initiated bills may be presented to the Legislature for consideration"). Specifically, the Legislature contends that under its internal procedures—namely, Rule 401 of the Joint Rules—an initiative is not presented to the Legislature until it "after it is printed." *See* Joint Order at 2 (quoting Joint Rule 401 (131st Legis.)).

The Legislature's contention that it has the unilateral authority to determine when and how an initiative is presented would allow the Legislature to indefinitely avoid the "absolute right" of the people to place proposed legislation on the ballot in direct contradiction to this Court's holdings in *Farris*, *Allen*, and *McGee*. *McGee*, 2006 ME 50, ¶ 21, 896 A.2d 933. Despite this Court's plain warning that procedural requirements beyond those enumerated in Section 18 should be inferred "only if they are clearly necessary to achieve consistency with other constitutional provisions or to accomplish

the general purpose of the direct initiative," *Allen*, 459 A.2d at 1103, the Legislature now claims an unbridled authority to impose procedural hurdles between the people and the ballot box. Such authority exists nowhere in the Constitution or this Court's interpretation of the same.

In support of its argument, the Legislature claims it lacked time to "consider the[] measures" transmitted by the Secretary of State, and that such consideration is required by Section 18 of the Constitution. Joint Order at 2. While neither the Legislature nor this Court have previously sought or imposed a minimum amount of time for the Legislature to consider a citizen's initiative before the initiative is placed on the ballot, *see supra* n. 5, in this instance the Legislature had 42 days to consider two of the measures and over a week to consider the other two. *See* Joint Order at 1. Although for much of this time the measures were apparently left "among the working papers and drafts in the possession of the nonpartisan staff office the Office of the Revisor of Statutes," *id.*, the Office of the Revisor of Statutes is a legislative office firmly within the control of the Legislature. *See* 3 M.R.S. § 163 ("The duties of the Executive Director of the Legislative Council are . . . To coordinate, direct and oversee, subject to the control of the Legislative Council, the activities of the nonpartisan legislative staff offices . . . ."); Maine State Government Annual Report 2021-22 at 195, available at https://www.maine.gov/budget/sites/maine.gov.budget/files/inline-files/2021-2022%20Maine%20State%20Government%20Annual%20Report.pdf (listing the Office of the Revisor of Statutes under the Legislative Department); Legislative Council

Agenda (131st Legis., Jan 28, 2021) at 4, available at https://legislature.maine.gov/doc/5249 (appointing Revisor of Statutes and setting his salary). The Legislature's unilateral decision to delegate preparation of initiatives to a staff office within its control—apparently without imposing any time frame in which the initiatives must be prepared—cannot restrict the people from exercising their right to submit valid initiatives to the electors. *See Farris*, 143 Me. at 231, 60 A.2d at 911 ("Neither by action *nor by inaction* can the legislature interfere with the submission of measures as so provided by the constitution." (emphasis added)).

Finally, even if the Legislature *could* restrict the people's right to initiative by virtue of its internal rules, it has not done so. Joint Rule 401—the only specific rule of procedure the Legislature cites in support of its argument—applies on its face only to a "bill or resolve *submitted by a Legislator*," Joint Rule 401 (131st Legis.) (emphasis added), and addresses when such a bill may be "withdrawn by [its] sponsor," *id.*[6] By its own terms, Joint Rule 401 does not apply to initiatives submitted to the Legislature by the people via the Secretary of State.

On the other hand, Chapter 8 of the Maine Legislative Drafting Manual—which is published by the Legislature—expressly notes that a valid initiative filed with the Secretary of State must be "transmitted . . . to the Clerk of the House, who sends it to

[6] Moreover, Joint Rule 401 places the responsibility for printing and distributing legislative documents on the Secretary of the Senate and the Clerk of the House, both of whom, like the Revisor of Statutes, are well within the control of the Legislature. *See* Senate Rule 301 (establishing duties of the Secretary of the Senate); House Rule 301 (establishing duties of the Clerk of the House).

the Office of the Revisor of Statutes for transcription. From that point on no changes may be made, as the Constitution of Maine provides that the Legislature must consider the bill in the exact form presented by the petition. If the Legislature fails to enact the bill, it goes out for referendum." Maine Legislative Drafting Manual (revised through Nov. 2022) at 171, available at https://legislature.maine.gov/doc/9564. In other words, the Legislature itself has recognized that its duty to either enact an initiative without change or send the initiative out for referendum is triggered following transmittal to the Clerk of the House by the Secretary of State.

Because the Legislature's internal procedures cannot abridge the peoples' right to consider the Initiatives—and because, regardless, the procedure cited by the Legislature is inapplicable—the Legislature's key argument is unavailing.

e. Analogous Federal Law

Federal law regarding the presentment clause of the United States Constitution also weighs against the Legislature's argument. *See* U.S. Const., art. 1, § 7, cl. 2-3 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated."). For instance, in *Eber Brothers Wine & Liquor Corp. v. United States*, the United States Court of Claims sought to determine whether President Eisenhower—who had left the country to travel abroad—could direct his staff to postpone presentation of bills sent to him by Congress until his return. 337 F.2d 624,

625-26 (Ct. Cl. 1964). The Court first noted that both the President and Congress could agree on an informal method of presentation, and in fact had typically operated under such an agreement. *Id.* at 629. However, while the President can "initially determine how and when bills are presented to him, . . . his choice is always subject to be overridden by a Congress which wishes to accelerate presentation by personal delivery to the President or his immediate entourage." *Id.* at 630. The court determined that allowing the President to unilaterally dictate when presentment occurred would thwart Congress's lawmaking authority:

> In this way there is full play to the overall constitutional mechanism of checks and balance as incorporated into the veto provisions. . . . Congress can, if it wills, prevent a President—insufficiently attentive to legislative needs or desirous of unduly delaying his action on a bill—from using the device of an absence from Washington or the country as an excuse for postponing action; Congress can start the constitutional period running by seeking out the President and presenting the bill to him wherever he is.

Id. at 630-31.

Similarly, in *Wright v. United States*, the Supreme Court sought to determine whether the President had properly returned a bill to Congress with his objections by delivering the bill to the Secretary of the Senate during a period when the Senate had taken a temporary recess. 302 U.S. 583, 585-87 (1938). The Court determined that Congress could not prevent the timely return of a bill from the President by virtue of a temporary adjournment. *Id.* at 598. In reaching this conclusion, the Court noted that to hold otherwise would be "to ignore the plainest practical considerations and[,] by implying a requirement of an artificial formality[,] to erect a barrier to the exercise of a

constitutional right." *Id.* at 591. Accordingly, the Court determined the President had effectively returned the bill when he timely "delivered the bill with his objections to the appropriate officer of the House." *Id.* at 598.

Both *Eber Brothers* and *Wright* provide instructive guidance to this Court. The Legislature cannot—based on its own lack of attention to an initiative or its desire to delay placement of the initiative on the ballot—indefinitely postpone action on an initiative proposed by the people of Maine by unilaterally determining the procedures for "presenting" such an initiative. Instead, to prevent the Legislature from erecting barriers to the "right of the people to initiate and seek to enact legislation," *McGee*, 2006 ME 50, ¶ 21, 896 A.2d 933, the Secretary of State must be able to effectuate presentation of an initiative by delivering the initiative to the appropriate officer of the Legislature.

f. A Bright-Line Rule is Necessary to Prevent Ambiguity As to Which Department of Government has Jurisdiction Over a Citizen's Initiative

The question of when presentation to the Legislature occurs cries out for a bright-line rule. Just as bright-line rules "promote[] clarity and ease of administration," "discourage[] evasive and ambiguous statements," and "reduce[] guesswork" within the context of courts' jurisdiction, *Walker v. Trailer Transit, Inc.*, 727 F.3d 819, 824 (7th Cir. 2013), such rules are equally preferable in the present context. *See Graiser v. Visionworks of Am., Inc.*, 819 F.3d 277, 286 (6th Cir. 2016) (bright-line rules "prevent gamesmanship" (internal quotation marks omitted)).

Where, as here, the "absolute right" of the people to initiate legislation is at issue, the Court should seek to reduce ambiguity as to which department of government has authority over an initiative. The Legislature's approach would introduce significant ambiguity by giving the Legislature free rein to determine when its responsibility to either enact an initiative without change or pass the initiative to the voters begins. Instead, the Court should follow the lead of the federal courts and adopt a bright-line rule that presentation to the Legislature is complete upon the initiative's delivery by the Secretary of State to the Clerk of the House. *See Eber Bros.*, 337 F.2d at 630; *Wright*, 302 U.S. at 598; *see also Humphrey v. Baker*, 665 F. Supp. 23, 30 (D.D.C. 1987), *aff'd*, 848 F.2d 211 (D.C. Cir. 1988) ("In the absence of some clearer directive, transmittal to the House of Representatives and to the Senate can be effected by delivery to the Office of the Speaker of the House and to the Office of the President of the Senate.").

* * *

For the reasons discussed above, the Court should answer Question 1 "Yes."

II. The Court should answer Questions 2 and 3 "No": While the Legislature can carry the Initiatives over to the First Special Session for a variety of legislative activity, it cannot adopt the Initiatives without change in the First Special Session.

In Questions 2 and 3, the Legislature asks whether, assuming the Initiatives were properly presented during the First Regular Session, it is precluded from "carrying the measure[s] over for consideration in the First Special Session" and, if not, permitted to "enact the measure[s] into law" during the First Special Session. Joint Order at 2. The

answer to both questions is "No." While the Legislature has the authority to consider the Initiatives in a subsequent session, such authority does not include the right to enact the Initiatives without change, which has instead passed to the people of Maine.

With respect to Question 2, this Court previously has concluded the Legislature may enact a competing measure to a citizens' initiative at a session subsequent to when the initiative was presented, and that the people may then choose between the measures or reject both. *Opinion of the Justices*, 680 A.2d 444, 447-48 (Me. 1996). The Court determined that nothing in its prior jurisprudence or in Section 18 limited "the authority of the Legislature to enact a substitute measure at a special session." *Id.* at 448. It follows that, in this instance, the Legislature may, consistent with its broad powers of legislation, *see Sawyer v. Gilmore*, 109 Me. 169, 180, 83 A. 673 (1912), study, debate, and take testimony on the Initiatives during the First Special Session, and may choose as a result of these actions to send competing measures to the ballot for consideration by the people of Maine, or to refrain from passing competing measures and instead allow the people to decide on the Initiatives as presented.

In Question 3, however, the Legislature goes a step further and asks whether its constitutional authority to "make and establish all laws and regulations for the defense and benefit of the people of this State" includes the power to enact the Initiatives without change during the First Special Session. Joint Order at 2 (quoting Me. Const. art. IV, pt. 3, § 1). This proposition is foreclosed by the Maine Constitution, which states that a measure, "*unless enacted without change* by the Legislature at the session at

which it is presented, *shall be submitted to the electors*." Me. Const., art. IV, pt. 3, § 18, cl. 2. Applying a plain-language reading to this provision, and construing the provision to facilitate the right of the people to directly participate in legislation, *see Avangrid*, 2020 ME 109, ¶¶ 14-15, 237 A.3d 882, the provision means what it says: a measure that was not enacted without change during the session at which it was presented must be submitted to the people, and may not instead be "carried over" for enactment by the Legislature without change in a subsequent session.

The power of the Legislature to legislate, while broad, is "restricted and limited by the Constitution." *Sawyer*, 109 Me. 169, 180, 83 A. 673 (1912). It is notable that the quotation in the text of Question 3 to the clause of the Constitution granting the Legislature "full power" to enact reasonable laws, the Legislature neglected to include the final portion of that clause, which explains that such laws may not be "repugnant to this Constitution." Me. Const. art. IV, pt. 3, § 1. The enactment of an initiative without change at a session subsequent to when it was presented—which would seize the power to enact or reject the initiative from the people and place it back in the hands of the Legislature—would directly contradict the detailed procedure laid out in Section 18. The authority of the Legislature in Article IV, Part Third, Section 1 of the Constitution cannot trump the specific procedure laid out by the people in Section 18 in order to preserve their right of direct initiative. *See Butler v. Killoran*, 1998 ME 147, ¶ 11, 714 A.2d 129 (a "statute dealing with a subject specifically prevails over another statute dealing with the same subject generally"); *see also Avangrid*, 2020 ME 109, ¶ 14,

237 A.3d 882 ("We construe constitutional provisions by using the same principles of construction that we apply in cases of statutory interpretation.").

While the Legislature may carry over the Initiatives in order to determine whether to pass competing measures, or otherwise to study them, it does not have the authority to enact the Initiatives without change in the First Special Session.

III. The Court need not answer Questions 4 and 5.

The Legislature has asked this Court to answer Questions 4 and 5 only if Question 3—which asks whether the Legislature can enact the Initiatives without change in the First Special Session—is answered in the affirmative. Joint Order at 2-3. As discussed above, the Court should answer Question 3 in the negative. Accordingly, the Court need not answer Questions 4 and 5.

In the event the Court seeks to address Question 4, the same point stands: the Legislature may not enact an initiative without change at a session subsequent to when the initiative was presented and thereby prevent the initiative from being submitted to the people to accept or reject. *See supra* at Section II.

With respect to Question 5, the Constitution means what it says. Pursuant to Section 18, a legislature presented with a citizens' initiative has three options: (1) enact the initiative without change at the session at which it was presented, (2) take no action with respect to the initiative at the session at which it is presented and let it pass to the voters for their acceptance or rejection, or (3) pass an altered version of the initiative at either the session as which it was presented or a subsequent session. Me. Const., art.

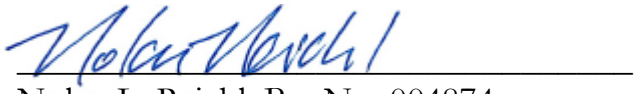
IV, pt. 3, § 18, cl. 2; *see also Opinion of the Justices*, 2004 ME 54, ¶ 5, 850 A.2d 1145 ("The Legislature has a constitutional duty to make a decision regarding [an initiative]. That is, it must enact the bill, propose a competing measure, or decide to take no action."). The Constitution does not allow for a fourth option whereby the Legislature may adopt an initiative without change in a session subsequent to the one at which it was presented.

Were the Legislature to attempt to adopt identical Initiatives without change in the First Special Session, the Initiatives would not be lawfully enacted, nor could they lawfully be placed on the ballot as "competing measures." The Constitution allows "competing measures" to be placed on the ballot so "the people can choose between the competing measures or reject both." Me. Const. art. 4, pt. 3, § 18, cl. 2. By a plain-language and common-sense reading of the Constitution, the placement of identical measures on the ballot does not give the voters a meaningful choice between two options. *See Choose*, Merriam-Webster, available at https://www.merriam-webster.com/dictionary/choose ("to have a preference for," "to make a section").

CONCLUSION

The Legislature lost the authority to adopt the Initiatives without change when it failed to enact them during the session at which they were presented—the First Regular Session. Accordingly, the Court should answer Question 1 in the affirmative, answer Questions 2 and 3 in the negative, and decline to answer Questions 4 and 5.

DATED: May 26, 2023



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