STATE OF MAINE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-17-1

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

ON REFERRAL OF THREE QUESTIONS
FROM THE SENATE

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

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STATEMENT OF INTEREST

Eight years ago, the League of Women Voters of Maine (the "League") initiated the process that culminated in enactment of Maine's ranked-choice voting law. In 2009, the League launched a three-year study into the potential benefits of ranked-choice voting. After substantial research and extensive deliberations, the League issued the results of its analysis[1] endorsing the concept of ranked-choice voting for Maine elections.

The League campaigned broadly to bring ranked-choice voting to Maine, working with other individuals and organizations to draft legislation, testify in public hearings, and place a citizen initiative on the ballot. In 2015 and 2016, the League deployed volunteers and paid staff to conduct an extensive public education program to introduce citizens across Maine to the concept of ranked-choice voting. The League's Advocacy Chair, Ann Luther, is one of Maine's foremost experts on ranked-choice voting, voting rights, ethics in government, term limits, and elections practices, and has served on the League's board and on numerous committees of the League of Women Voters (US) board. She, along with multiple League leaders, was actively involved in the leadership of the citizen initiative campaign. Another League board member was among the five statutory "designated voters" to sign the application with the Secretary of State to launch the citizen initiative.

[1] The study the League published is available at http://www.lwvme.org/files/lwvmeIRV.pdf.

As the state's leading election practices organization and the earliest and most active advocate for ranked-choice voting, the League has a direct interest in this Court's consideration of the Senate's questions and requests the opportunity to be heard at oral argument on April 13, 2017.

* * *

Maine Citizens for Clean Elections ("MCCE") is a nonpartisan organization that has advocated for open and accountable state elections for over two decades. MCCE spearheaded the effort to create the Maine Clean Election Act in 1996 and has been outspoken on nearly every major public policy matter relating to the conduct and financing of elections since its inception. MCCE endorsed the 2016 citizen initiative and has invested substantial resources to ensure the success of ranked-choice voting in Maine.

SUMMARY OF THE ARGUMENT

This Senate's referred questions do not present a solemn occasion on which this Court should render an advisory opinion. Finding that a solemn occasion exists here will set a troubling new precedent allowing this Court to be called upon to declare the constitutionality of enacted laws without the benefit of full litigation. In order to preserve the integrity of our adversarial system and avoid entangling this Court in partisan political battles, this Court should decline to answer the questions posed by the Senate.

If this Court does reach the merits, it should apply the strong presumption of constitutionality that is afforded to all laws. An Act To Establish Ranked-Choice Voting (the "Act") sets forth a new format for ballots and a new method of tabulation to determine which candidate received the most votes. The Constitution is silent on both of these matters. To the extent this Court sees tension between the Constitution and the Act, it should apply a flexible interpretation consistent with the purpose and intent of the Constitution and hold that ranked-choice is constitutional without placing detailed requirements on its implementation.

If, however, this Court applies a strict, formalistic interpretation of the constitutional provisions at issue, ranked-choice voting can be implemented using methods that are consistent with both the Act and the Constitution. This Court should, therefore, uphold the constitutionality of ranked-choice voting and preserve the right of the people to declare for themselves the method by which they will exercise their right to vote.

ISSUES PRESENTED

1. In the absence of any credible pending legislative action, does the Senate's uncertainty about the constitutionality of an enacted law constitute a solemn occasion?

   Answer: No. The questions posed do not present a solemn occasion.

2. Does a method of vote tabulation that most often results in a candidate receiving a majority of the votes cast conflict with Me. Const. art. IV, pt. 1, § 5; art. IV, pt. 2, § 3; and art. V, pt. 1, § 3, which provide that a candidate may be elected by a plurality of votes cast?

Answer: No. The Act's prescribed method of vote tabulation is consistent with the Constitution's permission of election by plurality.

3. Does the local publication of a tally of voter preferences, as envisioned by the Act, violate Me. Const. art. IV, pt. 1, § 5; art. IV, pt. 2, § 3; and art. V, pt. 1, § 3, which require that municipalities "sort, count and declare [the votes] in open meeting"?

Answer: No. The Act's requirements regarding the format and tabulation of votes are consistent with the Constitution's procedural requirement for elections.

4. Does the requirement in the Act that a tie between candidates for Governor be decided by lot conflict with Me. Const. art. V, pt. 1, § 3?

Answer: The governor-tie provision is severable from the remainder of the Act.

ARGUMENT

I. The Questions Presented Do Not Give Rise to a Solemn Occasion on Which this Court Should Provide an Advisory Opinion.

This Court's authority to issue advisory opinions is limited to "solemn occasions." Me. Const. art. VI, § 3. To constitute a solemn occasion, the questions referred to this Court must be "of a serious and immediate nature," asked under circumstances that "present[] an unusual exigency." *Opinion of the Justices*, 2012 ME 49, ¶ 5, 40 A.3d 930 (quotation marks omitted). This Court "will not answer questions that are tentative, hypothetical and abstract," and "the matter must be of instant, not past nor future, concern." *Id.* ¶¶ 5-6 (quotation marks omitted). An unusual exigency "exists when the body making the inquiry, having some action in view, has serious doubts as to its power and authority to take such action under the

Constitution or under existing statutes." *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997) (quotation marks omitted).

The limitations on what constitutes a solemn occasion provide an important backstop that honors the adversarial process on which our legal system is founded. This Court has long acknowledged that limitations on advisory opinions are necessary because, where individual rights are at stake, "the question should be submitted in a judicial proceeding, where all persons interested may have an opportunity to appear and be heard in their behalf." *Opinion of the Justices*, 95 Me. 564, 51 A. 224, 225 (1901); *see also Opinion of the Justices*, 124 Me. 512, 128 A. 691, 691 (1925).

It is for this reason that no solemn occasion exists when there is no action required of the requesting body, and instead the questions seek this Court's opinion on the constitutionality of an enacted law. *Opinion of the Justices*, 153 Me. 216, 219-20, 136 A.2d 508, 510 (1957) (declining to find a solemn occasion because the law at issue was in effect, and noting that "should parties in interest institute a proceeding for the purpose [of determining the constitutionality of the act in question], the court, as such, might, after hearing, and mature consideration, determine if the legislation be valid and constitutional" (quotation marks omitted)); *see also Opinion of the Justices*, 355 A.2d 341, 390 (Me. 1976); *Opinion of the Justices*, 339 A.2d 483, 488-89 (Me. 1975).

Here, the Senate is not required to take any action to enact or implement the Act,[2] *see* Me. Const. art. IV, pt. 3, § 19, and seeks only an opinion as to the law's constitutionality. Just as this Court will not offer an advisory opinion on the constitutionality of a law enacted by the legislature and signed by the Governor, it should not provide such an opinion with respect to a law enacted by referendum. *See Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 910-11 (1948).

The questions before this Court, though of unquestionable significance, do not warrant expansion of what constitutes a solemn occasion. Particularly where the questions at issue could be raised through an adversarial proceeding,[3] this Court

[2] In its Order requesting an advisory opinion, the Senate states that it requires this Court's advice so that it may decide whether to propose constitutional amendments and allocate funds for implementation of ranked-choice voting. The Senate does not require this Court's advice regarding its power to propose any constitutional amendments it deems appropriate. *Opinion of the Justices*, 339 A.2d at 488 ("There is no doubt whatever as to the power of the House to pass any bill, within the limits of the Constitution, which it sees fit, in amendment or alteration of these sections. Our opinion, if given, would not in any way affect the power of the House to repeal these sections, or to amend them, or declare the meaning of them, if there is doubt about the meaning." (quotation marks omitted)). Moreover, the possibility that the Senate will consider proposing a constitutional amendment — which, as set forth below, is entirely unnecessary — is far too speculative to constitute a solemn occasion. Even where a proposed bill is before a legislative committee, this Court is hesitant to find that the question is imminent enough to constitute a solemn occasion. *Opinion of the Justices*, 355 A.2d at 389. As to the allocation of funds, this Court's opinion would have no effect because the constitutionality of ranked choice voting in federal elections for the Senate and the House of Representatives is not at issue. The legislature will be required to appropriate the funds necessary to implement statewide ranked-choice voting for federal elections regardless of the outcome of this case. This Court's advice, therefore, has no bearing on whether to allocate funds to implement ranked-choice voting, and the questions do not constitute a solemn occasion. *See Opinion of the Justices*, 709 A.2d at 1185-86; *Opinion of the Justices*, 95 Me. 564, 51 A. 224, 225 (1901).

[3] Contrary to the assertion in the Senate Order, litigation of the constitutionality of the Act need not await the results of an election. A properly interested party has an opportunity to litigate the constitutionality of the Act before ranked-choice voting elections occur, as has occurred in other jurisdictions. *See Daggett v. Comm'n on Governmental Ethics & Election Practices*, 205 F.3d 445,

should not create a precedent for the use of advisory opinions to test the constitutionality of enacted laws. A request for an advisory opinion is not an opportunity to circumvent our adversarial system, and it is not an opportunity for the legislature to seek political cover to repeal a law enacted by the people. This Court should preserve the integrity of the solemn occasion and respect the importance of the rights implicated in these questions by declining to issue an advisory opinion on the constitutionality of ranked-choice voting.

II. Ranked-Choice Voting Is Constitutional

A. The Standard of Review

This Court reviews laws enacted by citizen initiative according to the same "heavy presumption of constitutionality" afforded to every statute. *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996). When it interprets the Maine Constitution, this Court accords the Constitution's provisions "a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983). Ranked-choice voting is constitutional unless this Court finds "that *no* logical construction can be given to the words of the [law] that will make it constitutional,"

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452 (1st Cir. 2000); *Dudum v. City and County of San Francisco*, No. C-10-00504-RS, 2010 WL 3619709, at *5 (N.D. Cal. Sept. 9, 2010); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009); *Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 861-65 (E.D. Wis. 2001); *see also Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979).

Me. Milk Producers, Inc. v. Comm'r of Agric., Food & Rural Res., 483 A.2d 1213, 1218 (Me. 1984) (emphasis added), and this Court must find that fact "established to such a degree of certainty as to leave no room for reasonable doubt." *Orono-Veazie Water Dist. v. Penobscot Cnty. Water Co.*, 348 A.2d 249, 253 (Me. 1975).

The presumption of constitutionality carries special importance here because the Act was adopted by citizen initiative. In reviewing the constitutionality of a citizen initiative, this Court's "primary consideration . . . must be that by the initiative amendment the people, as sovereign, have retaken unto themselves legislative power and that a particular undertaking by them to exercise that power shall be liberally construed to effectuate the purpose." *Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971).

Indeed, historical review of Maine law finds a consistent trend in favor of upholding the will of the citizen voter through liberal interpretation of statutory and constitutional requirements. In a series of decisions in the 1800s, this Court looked for function, rather than strict compliance to form, in order to ensure that the will of the people was protected. *Opinions of the Justices*, 70 Me. 560, 562 (1879) (stating that specific constitutional language governing 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, 570-82 (1880).

In *Opinions of Justices*, 70 Me. 570, this Court held that strict compliance with Constitutional requirements regarding the use of copies of election records was not necessary, and that technical requirements should not be applied to "defeat the will of the people, as expressed in the election." 70 Me. at 598. This Court went on to hold that "[t]he 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.*

Ranked-choice voting is the result of "government by the people." Consistent with its prior holdings, this Court should apply a heavy presumption of constitutionality and interpret the Constitution liberally in order to advance the will of the people by upholding the constitutionality of the Act.

B. The Act Does Not Conflict with the Constitution's Provisions Regarding Election by a Plurality of Votes.

Nothing in the Constitutional language providing for "election by a plurality of all votes returned" mandates that state officers be elected under a particular voting system or precludes ranked-choice voting. First, the language does not provide that election *cannot* occur by majority; it simply provides that election *may* occur by plurality. Second, the language does not mandate any particular method of vote tabulation and does not preclude a method — like ranked-choice voting — that most often results in election by a majority of votes. Finally, the legislative history

surrounding replacement of the term "majority" with "highest number" or "plurality" supports an interpretation of the Constitution that permits ranked-choice voting.

1. The Constitution Does Not Preclude Election by Majority.

By definition, a plurality of votes is that number of votes that is greater than any other number of votes.[4] The language providing for election by plurality *permits* election of a candidate that receives less than half of the total votes cast. However, this language clearly does not *preclude* election of a candidate who receives more than half of the total votes cast, either because the election involves only two candidates or because one candidate in a multi-party race happens to receive more than half of the vote.

Ranked-choice voting, which results in the election of the candidate who receives the most votes after tabulation is complete, is no more inconsistent with the Constitution than election of a candidate that receives more than half of the total votes after tabulation under our current system. Both systems result in the election of the candidate that receives the most votes, which is all the Constitution requires.

2. The Constitution Does Not Mandate a Particular Method of Voting or Vote Tabulation.

Nothing in the language providing for "election by a plurality of all votes returned" mandates a particular form of vote or a particular method of tabulation to

[4] Merriam Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/plurality

determine which candidate received the most votes. The Act does not mandate that the winning candidate receive a majority of the votes cast. Instead, ranked-choice voting is a method of tabulation that most often results in the candidate that receives the most votes receiving a majority of the total votes cast.[5] Nothing about that method of counting votes is inconsistent with the Constitution.

The argument that ranked-choice voting is inconsistent with the plurality language of the Constitution is based on the premise that each individual ranked-choice voting ballot contains a series of votes, namely a vote in each round of tabulation, such that a plurality winner can be determined after the first round of tabulation. But that premise represents a misunderstanding of ranked-choice voting and ranked-choice voting ballots. A ranked-choice voting ballot does not contain a series of votes. Instead, a ranked-choice ballot is a *single vote* that consists of a set of preferences. Those preferences are tabulated using a multi-round system to determine which candidate received the most votes. Until the tabulation process is complete, the votes have not been counted, and there is no way to know which candidate received the most votes. In the same way that under a single-vote system one cannot stop the count midway and know how many people voted for each

[5] In some instances, the winner of a ranked-choice election will receive less than half of the total ballots cast. This can occur as a result of exhausted ballots — ballots that are not counted for any continuing candidate because they do not rank any remaining candidate. 21-A M.R.S.A. § 723-A(1)(D).

candidate, there is no point during the rounds of tabulation at which one can stop and determine how many votes were cast for each candidate. It is not the case, therefore, that after the first round of ranked-choice voting tabulation, a candidate can be said to have received a plurality of the total votes cast.

This understanding of ranked-choice voting has been adopted by courts across the country when considering challenges to ranked-choice voting on equal protection and other grounds. For example, in considering a challenge to ranked-choice voting on equal protection grounds, the Ninth Circuit recognized that the calculations that occur with ranked-choice voting "are simply steps of a single tabulation, not separate rounds of voting." *Dudum v. Arntz*, 640 F.3d 1098, 1107 (9th Cir. 2011); *see also McSweeney v. City of Cambridge*, 665 N.E.2d 11, 14 (Mass. 1996) ("[I]t would be misleading to say that some ballots are counted two or more times. Although these ballots are examined two or more times, no ballot can help elect more than one candidate.").

The Constitution contains no language mandating any particular method of voting or tabulation. The Act is not a law that mandates that the winning candidate receive a majority of the votes cast, and ranked-choice voting is not a system whereby a plurality winner is determined and then ignored. Ranked-choice voting is simply a method of tabulation by which the candidate that receives the highest number of votes

will most often earn a majority of the votes cast. Thus, it is not a system that violates the Constitution.

3. Ranked-Choice Voting Is Consistent with the Legislative History Relating to the "Plurality of Votes" Language.

The legislative history relating to the "plurality of votes" language in the Constitution suggests an intention to give voters the most meaningful choices while at the same time providing for government stability and efficiency in elections.

Before 1847, the Maine Constitution required that representatives, senators, and the governor be elected by a majority of votes at meetings called by town selectmen. Me. Const. art. IV, pt. 1, § 5; art. IV, pt. 2, §§ 3, 5; art. V, pt. 1, § 3 (1840). With respect to representatives, if the meeting did not result in a majority vote, the selectmen were required to call another meeting at which another vote — among all the same candidates unless a candidate voluntarily withdrew — would be held. Me. Const. art. IV, pt. 1, § 5 (1840). This process was required to continue, without limitation, until a candidate was elected by "a majority of all the votes." *Id.* With respect to senators, if no candidate received a majority, that seat was filled by a vote of the seated representatives and senators. Me. Const. art. IV, pt. 2, § 5 (1840). With respect to governor, if no candidate received a majority, the House and Senate elected a governor from among the candidates. Me Const. art. V, pt. 1, § 3 (1840).

In 1847, for reasons of "efficiency and economy" the provision regarding the election of representatives was amended to provide for election of the candidate with

the "highest number of votes." Marshall J. Tinkle, *The Maine State Constitution* 11 (1st ed. 2011). In an effort to take the governor's election out of the hands of the Legislature, the provision requiring the governor to be elected by majority was amended in 1880 after Governor Garcelon attempted to engineer a victory for himself by manipulating the legislators.[6] *Id.* at 12-13. These changes permitted election by plurality in order to avoid repetitive elections and ensure that the selection of elected officials remained an expression of the will of the people.

The amendments to the Constitution calling for election by the "highest number" or "plurality" of votes were instituted not to preclude particular voting methods, but to permit election by plurality in order to preserve the orderly, fair, and transparent transfer of power in an economical and efficient manner that reflects the will of the people. Ranked-choice voting elegantly accomplishes that goal. It is an efficient system by which the voters can be presented with a variety of choices and the will of a majority can be determined. It gives voters more meaningful choices by allowing candidates outside of the major parties to fully compete without being simply rejected as spoilers. It allows voters to support the candidate that most fully represents their values and interests without fearing that their votes will be wasted. And, it can reduce negative campaigning and increase focus on substantive issues.

[6] The provision governing election of Senators was amended to permit election by plurality in 1875, although it is not readily apparent what motivated that change. Tinkle, *supra*, at 81.

Rather than conflict with the Constitution, ranked-choice voting fully embodies the interests and intentions of the drafters.

C. The Act Does Not Conflict with the Constitution's "Sort, Count and Declare" Provisions.

The Constitution requires that local election officials "sort, count and declare [the votes] in open meeting." Me. Const. art. IV, pt. 1, § 5. Applying the liberal interpretation required by precedent, *Allen*, 459 A.2d at 1102, this Court can easily conclude that ranked-choice comports with the Constitution, while also preserving the will of the voters in enacting ranked-choice voting by declining to impose unduly specific procedural requirements on its implementation. However, ranked-choice voting is constitutional under even a narrow reading of the "sort, count and declare" provision, because there exist methods by which ranked-choice voting can be implemented that are consistent with even the most restrictive reading of this section. *See Me. Milk Producers*, 483 A.2d at 1218.

1. This Court Should Apply a Broad Reading Consistent with the Purpose of the "Sort, Court and Declare" Provision and the Will of the People in Enacting Ranked-Choice Voting.

The Constitution is largely silent on the specific procedural requirements that apply to the collection and counting of votes, and this Court has not previously interpreted the phrase "sort, count and declare." In the absence of any binding interpretation, this Court should accord these provisions "a liberal interpretation in order to carry out their broad purpose." *Allen*, 459 A.2d at 1102. A broad reading

will ensure that the purpose of the "sort, count and declare" provision is upheld without placing unnecessary restrictions on the specific mechanisms by which ranked-choice voting is implemented.

The Constitution provides that in elections for State Representatives, "the election officials of the various towns and cities shall preside impartially at [the polls], receive the votes of all the qualified electors, sort, count and declare them in open meeting; and a list of the persons voted for shall be formed, with the number of votes for each person against that person's name." Me. Const. art. IV, pt. 1, § 5. These procedures are incorporated into the constitutional provisions governing Senate and gubernatorial elections. Me. Const. art. IV, pt. 2, § 3; art. V, pt. 1, § 3.

The "sort, count and declare" provision provides only general guidelines for election procedure.[7] In fact, the Constitution specifically authorizes the Legislature to "prescribe the manner in which the votes shall be received, counted, and the results of the election declared." Me. Const. art. IX, § 12. The fact that the Constitution does not provide for any specific method of sorting, counting, or declaring demonstrates that the crux, and clear purpose, of the passage is the requirement that elections occur *in an open meeting* administered by impartial officials. The purpose

[7] The specific procedures for sorting, counting, and declaring are set forth in Title 21-A. The fact that certain of the procedures for ranked-choice voting, as provided for in the Act, modify significantly the procedures in Title 21-A or differ from long-standing practice does not render those procedures unconstitutional.

of the Constitution's mandate that election officials "sort, count and declare [the votes] in open meeting" is to ensure the transparency of elections, not to dictate the particulars of election procedure. Nothing about ranked-choice voting conflicts with the provision's central requirement that elections are conducted transparently in open meetings.

Further, the Constitution does not state that the procedural aspects of the "sort, count and declare" provision set forth the sole and only tasks associated with the election of officials. For example, the "sort, count and declare" provision does not provide a method of voting (e.g. written ballot or show of hands) or a method of counting votes (e.g. hand-count or optical scanner). Laws that provide such details do not conflict with the Constitution.

Under a ranked-choice system, a town's election officials will receive each qualified elector's vote; the officials will sort and count the total number of ballots; and the officials will declare the votes authentic and properly cast. So long as these actions are conducted in an open meeting, this process satisfies the election officials' Constitutional responsibilities. The fact that the Secretary of State will then tabulate the result of the election — in the same way that under the current system the Secretary of State tabulates the result by aggregating the votes from around the state and determining which candidate received the most votes — does not undermine the constitutionality of the procedure.

Interpreting the procedural aspects of the "sort, count and declare" provision liberally, *see Allen*, 459 A.2d at 1102, and applying the heavy presumption that the statute is constitutional, *League of Women Voters*, 683 A.2d at 771, there is nothing to suggest that ranked-choice voting conflicts with the Constitution. This Court should, therefore, avoid a strict interpretation of the "sort, count and declare" provision that would impose unnecessarily specific requirements on the implementation of ranked-choice voting.

2. Ranked-Choice Voting Is Consistent with Even a Strict Interpretation of the "Sort, Count and Declare" Provision.

If this Court applies a strict interpretation of the "sort, count and declare" provision and reads it to confer specific procedural requirements for elections, this Court must still hold that ranked-choice is constitutional because there exist methods by which ranked-choice voting can be implemented that are consistent with even that strict interpretation. *See Me. Milk Producers*, 483 A.2d at 1218 ("Any party attacking the constitutionality of a state statute . . . must prove that *no* logical construction can be given to the words of the [law] that will make it constitutional." (emphasis added)).

In municipalities that use optical scanners to count votes, the process will be essentially identical to the current system. Local election officials will gather the ballots, feed them into the scanners, and data reflecting the votes cast will be sent to the Secretary of State for tabulation and a determination of which candidate received the most votes. In municipalities that hand-count, one option would be to provide

scanners in a central or regional location. The fact that the insertion of ballots into scanners would occur outside the physical boundaries of the municipality is not inconsistent with the Constitution. The Constitution provides that sorting, counting, and declaring will be conducted "*by* the election officials of the various towns and cities," but does not state that the sorting, counting, and declaring must occur *in* those towns and cities. Me. Const. art. IV, pt. 1, § 5.[8]

Alternatively, election officials in a hand-count municipality can create one of a number of representations of the votes in a ranked-choice election. For example, the officials could create a list like the one below:

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

This list, when combined with lists from around the state, contains all of the information needed to tabulate the winner of this three-candidate ranked-choice election. As an example, if the list above contained the complete state results, the

[8] Currently, a number of towns count votes outside the physical bounds of the municipality. The list of polling places maintained on the Secretary of State's website shows that a number of towns and townships currently use polling places in a neighboring town, and thus do not conduct their sorting, counting, and declaring in the municipalities from which the voters hail. http://www.maine.gov/sos/cec/elec/data/votingplaces1116.pdf.

winner of the election would be determined as follows: because Candidate C received the fewest first-choice rankings, Candidate C is eliminated. The fifteen ballots that had Candidate C as the first choice and Candidate A as the second choice are reallocated to Candidate A, and the same for the four ballots with Candidate B as the second choice. Candidate A is the winner, receiving 56 votes.

The list above is functionally identical to the list produced under our current system indicating how many votes each candidate received, and its creation satisfies a strict interpretation of the "sort, count and declare" provision.[9] A list of this type also ensures strict compliance with the Constitution's requirement that "a list of the persons voted for shall be formed, with the number of votes for each person against that person's name."[10] Me. Const. art. IV, pt. 1, § 5.

This Court should apply a liberal interpretation of the "sort, count and declare" provision and hold that ranked-choice voting comports with the provision's purpose of ensuring transparent elections without impeding the implementation of ranked-

[9] This list becomes more complicated as more candidates are added to the race. Complexity of sorting, counting, and declaring is, however, irrelevant to determining whether ranked-choice voting is constitutional. The test is not whether the Act can be *easily* or *conveniently* implemented in a manner consistent with the Constitution, but whether it can be implemented *in any way* that is consistent with the Constitution. *See Me. Milk Producers*, 483 A.2d at 1218.

[10] This Court should, however, accord the list provision a liberal interpretation that permits flexibility not only as to the content of the list, but also as to who is responsible for creating it. Here, the voicing of this portion of the provision is significant. The clause containing the "sort, count and declare" provision is in the active voice, with a clear mandate that "the election officials of the various towns and cities shall" perform the various tasks included in that clause. The list provision appears in a separate clause that switches to the passive voice, and states that "a list of the persons voted for shall be formed," with no direction as to who shall form it.

choice voting by imposing unnecessarily specific procedural requirements. *See Allen*, 459 A.2d at 1102. However, under even the strictest interpretation of the "sort, count and declare" provision, there exist methods by which ranked-choice voting could be implemented consistent with that strict interpretation, and this Court must, therefore, hold that it is constitutional. *See Me. Milk Producers*, 483 A.2d at 1218.

D. The Governor-Tie Provision is Severable from the Act.

In the event that this Court finds that a solemn occasion exists with respect to the question of the constitutionality of the governor-tie provision[11] and finds that provision inconsistent with the Constitution, this Court's opinion should make clear that the governor-tie provision does not render the entire Act unconstitutional because it may be severed from the remainder of the Act. A single section's unconstitutionality does not render an entire law unconstitutional unless "the invalid provision is such an integral part of the statute that the Legislature would only have enacted the statute as a whole." *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986).

[11] Perhaps more so than either of the other questions, the governor-tie provision does not present a solemn occasion because it is hypothetical. Maine's gubernatorial election has never resulted in a tie, 2 *The CQ Press Guide to U.S. Elections* 1618-20 (6th ed. 2010), and the odds of it ever happening are infinitesimal, *see* Casey B. Mulligan & Charles G. Hunter, Nat'l Bureau of Econ. Research, *The Empirical Frequency of a Pivotal Vote* 2-3 (2001) (finding that there were no ties in 16,577 federal elections studied between 1898 and 1992, and only two ties among 40,036 state elections studied between 1968 and 1989; at that rate, Maine should have a tie vote for governor every 114,286 years). With such a statistically insignificant chance that the Act's provision regarding ties in gubernatorial races will ever impact an election, the question regarding its constitutionality is far from instant and is too tentative and hypothetical to be of "unusual exigency."

The governor-tie provision is not integral or necessary to the implementation of ranked-choice voting. If the governor-tie provision were struck from the Act, elections for governor would occur by ranked-choice voting, and, in the event of tie, the tiebreaker in Me. Const. art. V, pt. 1, § 3, would be used to resolve it. The governor-tie provision does not impact the determination of how many votes each candidate for governor received, and it has no impact whatsoever on the election of state and federal senators and representatives. Every other aspect of the Act can be given effect in the absence of the governor-tie provision.

Further, it is clear that the governor-tie provision was not integral to the people's decision to enact ranked-choice voting because the ballot question as presented to the voters did not mention the governor-tie provision.[12] It cannot be said, therefore, that the governor-tie provision was so essential to voters' decision to enact ranked-choice voting that they would not have done so without it, and the governor-tie provision may be severed from the Act if this Court finds that it is unconstitutional. *See Bayside Enters.*, 513 A.2d at 1360.

[12] The text of the ballot question read: "Do you want to allow voters to rank their choices of candidates in elections for U.S. Senate, Congress, Governor, State Senate, and State Representative, and to have ballots counted at the state level in multiple rounds in which last-place candidates are eliminated until a candidate wins by a majority?" The text of the ballot summary read: "This initiated bill provides ranked-choice voting for the offices of United States Senator, United States Representative to Congress, Governor, State Senator and State Representative for elections held on or after January 1, 2018. Ranked-choice voting is a method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected."

III. Ranked Choice Voting is Consistent with Maine's Tradition Favoring the Full and Complete Expression of the Voters' Will.

The Act expresses the will of Maine citizens to fully and completely express their voice in determining who holds elected office in this state. Ranked-choice voting continues Maine's tradition as a leader in ensuring broad-based suffrage with limited disenfranchisement.

For example, in 1973 Maine became the first state in the country to legalize same-day voter registration. It is now one of sixteen states that permit same-day registration in some form.[13] Maine citizens reaffirmed their support for same-day voting in 2011, voting by a large margin to veto the legislature's repeal of same-day voting. Additionally, Maine is one of only two states in the country that does not, in some way, disenfranchise individuals convicted of a felony.[14] Maine also adopted voter registration at Bureau of Motor Vehicles offices five years before the federal "Motor Voter" legislation required states to do so. Maine was the first state to establish full public funding for legislative and gubernatorial elections. Finally, Maine permits voters who do not appear on a voting list and do not possess identification necessary for same-day registration to cast a "challenged ballot." These

[13] National Conference of State Legislatures, Same Day Voter Registration, available at http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx

[14] National Conference of State Legislatures, Felon Voting Rates Information, http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx

efforts to encourage voter participation and enhance access to the polls have resulted in Maine consistently having one of the highest levels of voter turnout in the nation.

Ranked-choice voting is another way that Maine voters have consciously decided to give the people more flexibility and more voice in Maine elections.[15] The option to rank candidates allows voters to express their preferences in a more complete and nuanced manner. The progression in Maine to ranked-choice voting is consistent with Maine's role as a trendsetter in electoral policy. Because there are no constitutional barriers to the implementation of ranked-choice voting, this Court should not interfere with the people's decision to carry on this tradition.

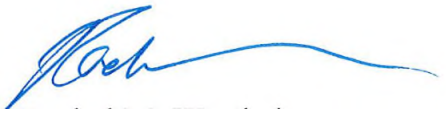
CONCLUSION

Ranked-choice voting, having been enacted by the voters, is the law of the State. The Senate has no "action in view" with respect to the Act, and no solemn occasion exists necessitating that this Court provide an advisory opinion regarding the Act's constitutionality.

Should this Court find that a solemn occasion exists, however, it should apply the presumption of constitutionality and find that the Act is consistent with the text and purpose of the Constitution. This Court can easily arrive at that conclusion

[15] Portland adopted ranked-choice voting for municipal elections in 2010 and conducted mayoral elections utilizing ranked-choice voting in 2011 and 2015. With this first-hand experience, the residents of Portland voted overwhelmingly in favor of statewide ranked-choice voting (the Act won in Portland by 43 percent).

because nothing in the Constitution prohibits the particular method of voting or tabulation provided for in the Act.



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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Procedural Order of this Court, dated February 7, 2017, I have, on March 3, 2017, filed the original and two copies of this Brief of Interested Parties League of Women Voters of Maine and Maine Citizens for Clean Elections with the Clerk of the Supreme Judicial Court and simultaneously emailed it in the form of a single text-based pdf file to: lawcourt.clerk@courts.maine.gov.

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