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Senate Order, Requesting an Opinion of the Justices of the Supreme Judicial Court Regarding an Initiated Bill

WHEREAS, it appears to the Senate of the 128th Legislature that the following are important questions of law and that this is a solemn occasion; and

WHEREAS, the Constitution of Maine, Article VI, Section 3 provides for the Justices of the Supreme Judicial Court to render their opinion on such questions; and

WHEREAS, separate provisions of the Constitution of Maine, adopted at different times, provide that persons elected to the House of Representatives and as Governor shall be elected "by a plurality of all votes returned," Me. Const. art. IV, pt. 1, §5 and art. V, pt. 1, §3, and those elected to the Senate "by a plurality of the votes in each senatorial district," Me. Const. art. IV, pt. 2, §4; and

WHEREAS, Article IV, Part First, Section 5 of the Constitution of Maine provides that in elections for the House of Representatives, "the election officials of the various towns and cities shall ... 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. ... Fair copies of the lists of votes shall be attested by the municipal officers and the clerks of the cities and towns [who] shall cause the same to be delivered into the office of the Secretary of State forthwith ... [and] [t]he Governor shall examine the returned copies of such lists and ... shall issue a summons to such persons as shall appear to have been elected by a plurality of all votes returned, to attend and take their seats."; and

WHEREAS, Article IV, Part Second, Section 3 of the Constitution of Maine provides that meetings for the election of Senators "shall be notified, held and regulated and the votes received, sorted, counted, declared and recorded, in the same manner as those for Representatives. Fair copies of the lists of votes shall be attested by the clerks of the cities and towns or other duly authorized officials and sealed up in open meetings and ... delivered into the office of the Secretary of State forthwith."; and Article IV, Part Second, Section 4 further provides that "[t]he Governor shall ... examine the copies of such lists, and ... issue a summons to such persons, as shall appear to be elected by a plurality of the votes in each senatorial district, to attend that day and take their seats."; and

WHEREAS, Article V, Part First, Section 3 of the Constitution of Maine provides that "meetings for election of Governor shall be notified, held and regulated and votes shall be received, sorted, counted and declared and recorded, in the same manner as those for Senators and Representatives. Copies of lists of votes shall be sealed and returned to the secretary's office in the same manner and at the same time as those for Senators. The Secretary of State ... shall ... lay the lists returned to the secretary's office before the Senate and House of Representatives to be by them examined, ... and they shall determine the number of votes duly cast for the office of Governor, and in case of a choice by plurality of all of the votes returned they shall declare and publish the same."; and

WHEREAS, Article V, Part First, Section 3 of the Constitution of Maine further provides that "[i]f there shall be a tie between the 2 persons having the largest number of votes for Governor, the House of Representatives and the Senate meeting in joint session, and each member of said bodies having a single vote, shall elect one of said 2 persons having so received an equal number of votes and the person so elected by the Senate and House of Representatives shall be declared the Governor."; and

WHEREAS, on November 8, 2016, the voters of the state approved a measure referred to the people pursuant to Article IV, Part Third, Section 18 of the Constitution of Maine, entitled An Act To Establish Ranked-choice Voting, referred to in this order as "the Act," which creates new methods of casting ballots for candidates, counting votes and determining elections for the offices of Governor, State Senator and State Representative, as well as the offices of United States Senator and Representative to Congress, and applies to elections held on or after January 1, 2018; and

WHEREAS, section 2 of the Act defines "ranked-choice voting" as "the method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected"; and

WHEREAS, the Act provides that "[f]or offices elected by ranked-choice voting, the Secretary of State shall tabulate the votes according to the ranked-choice voting method described in [the Maine Revised Statutes, Title 21-A,] section 723-A" as enacted by section 5 of the Act; and

WHEREAS, the method of ranked-choice voting described in the Act does not allow the Secretary of State to aggregate the lists of votes compiled by city and town officials and submitted to the Secretary as required by the Constitution of Maine as set forth above, but instead necessitates that all ballots or images of ballots cast by voters within the entire electoral district be delivered to a central location in order for the Secretary of State to conduct multiple rounds of counting and redistributing voter preferences in each subsequent round of counting using specially designed computer software; and

WHEREAS, the Attorney General issued an opinion on March 4, 2016, to the effect that the system of ranked-choice voting established in the Act conflicts with provisions of Article IV, Part First, Section 5; Article IV, Part Second, Sections 3 and 4; and Article V, Part First, Section 3 of the Constitution of Maine, which declare that ballots are to be counted by municipal officials and that the winner of each electoral race is the candidate who received a plurality of the votes cast and counted at the municipal level, and further that the ranked-choice method of resolving a tie vote in a race for Governor conflicts with Article V, Part First, Section 3; and

WHEREAS, the Act appears to conflict with the Constitution of Maine inasmuch as it would not recognize a person obtaining a plurality of the votes counted and declared by city and town officials as having prevailed in the election; would fundamentally change the role of city and town officials in sorting, counting, declaring and recording votes and would transfer those duties to the Secretary of State; and would eliminate the role of the House of Representatives and the Senate in resolving tie votes for the office of Governor; and

WHEREAS, the Act's provision for resolving tie votes for Governor by lot conflicts with duties that the Constitution of Maine imposes on Representatives and Senators under such circumstances

pursuant to Article V, Part First, Section 3 and, therefore, would require them to violate their oath of office pursuant to Article IX, Section 1 of the Constitution of Maine; and

WHEREAS, if the Act were applied to elections in 2018 without resolution of the constitutional questions presented here, a candidate for Representative, Senate or Governor who gained a plurality of the votes counted by city and town officials but failed to prevail in the subsequent round or rounds counted centrally by the Secretary of State pursuant to the Act could challenge that candidate's declared loss as violative of the plurality vote requirement in the Constitution of Maine for the position sought by that candidate, and thereby place the validity of the election into question and delay the seating of a Representative, Senator or Governor; and

WHEREAS, failing to address important and unresolved questions of law about the constitutionality of ranked-choice voting before the end of the current legislative session would create uncertainty over the outcome of any future election contests involving more than 2 candidates; and

WHEREAS, the Senate requests guidance from the Justices as to the constitutionality of the Act so that it may determine, during the current legislative session, whether it is necessary to propose constitutional amendments for submission to the voters for approval in November 2017, in order to implement ranked-choice voting for elections held on or after January 1, 2018, as the Act requires; and

WHEREAS, the 128th Legislature also must determine during the current legislative session whether to authorize and appropriate in excess of \$1,500,000 in the biennial budget for the period beginning July 1, 2017 to implement the Act, including funds at a minimum for new voting equipment and computer software, staff positions, ballot printing and transportation and storage of ballots for counting in a central location; and

WHEREAS, it is vital that the Senate be informed during the current legislative session as to the opinions of the Justices on the questions propounded in this order; now, therefore, be it

ORDERED, that, in accordance with the provisions of the Constitution of Maine, the Senate respectfully requests the Justices of the Supreme Judicial Court to give the Senate their opinion on the following questions of law:

Question 1. Does the Act's requirement that the Secretary of State count the votes centrally in multiple rounds conflict with the provisions of the Constitution of Maine that require that the city and town officials sort, count, declare and record the votes in elections for Representative, Senator and Governor as provided in the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Section 3 and Article V, Part First, Section 3?

Question 2. Does the method of ranked-choice voting established by the Act in elections for Representative, Senator and Governor violate the provisions of the Constitution of Maine, Article IV, Part First, Section 5, Article IV, Part Second, Sections 3 and 4 and Article V, Part First, Section 3, respectively, which declare that the person elected shall be the candidate who receives a plurality of all the votes counted and declared by city and town officials as recorded on lists returned to the Secretary of State?

Question 3. Does the requirement in the Act that a tie between candidates for Governor in the final round of counting be decided by lot conflict with the provisions of the Constitution of Maine, Article

V, Part First, Section 3 relating to resolution of a tie vote for Governor by the House of Representatives and Senate?