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Senate Order, Authorizing the President of the Senate To Represent the Interests of the Senate To Preserve the Integrity of the Election Process

WHEREAS, Article III, Section 1 of the Constitution of Maine expressly divides the sovereign power of the people of Maine among the Legislative, Executive and Judicial departments; and

WHEREAS, pursuant to Article IV, the Constitution of Maine allocates legislative power to the Maine Legislature, including the House of Representatives and the Senate; and

WHEREAS, Article IV of the Constitution of Maine allocates legislative power to the people of Maine pursuant to Article IV, Part Third, Sections 17 to 19; and

WHEREAS, Article V, Part Second, Sections 1 to 4 of the Constitution of Maine set forth and delimit the authority of the Secretary of State; and

WHEREAS, Article III, Section 1 of the Constitution of Maine expressly bars any person belonging to one department of the government of Maine from exercising the powers properly belonging to either of the other departments of the government of Maine; and

WHEREAS, the separation of the powers of the government of Maine is essential to the integrity of the government of Maine and the welfare, safety and preservation of the liberties of the people of Maine; and

WHEREAS, the legislative power of the State of Maine may be exercised only by the Legislature of Maine or the people of Maine in accordance with Article IV of the Constitution of Maine; and

WHEREAS, appropriations of public money may be made only through the exercise of legislative power as provided for and in accordance with Article IV of the Constitution of Maine; and

WHEREAS, when money is appropriated by the Legislature, the concurrence of both the Senate and the House of Representatives is required, which concurrence is subject to a veto by the Governor; and

WHEREAS, on November 16, 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 and counting, sorting and declaring votes for the offices of Governor, State Senator and State Representative, as well as for the offices of United States Senator and Representative to the United States House of Representatives, which applied to elections held on or after January 1, 2018; and

WHEREAS, the Act as approved by the voters did not appropriate or otherwise authorize the expenditure of money to implement ranked-choice voting; and

WHEREAS, the Office of Fiscal and Program Review estimated the cost of implementing ranked-choice voting at \$1,500,000; and

WHEREAS, in a sworn affidavit submitted to the Justices of the Supreme Judicial Court, the Secretary of State, through Deputy Secretary of State Julie Flynn, cited and relied upon the cost estimate in the fiscal note of the Office of Fiscal and Program Review; and

WHEREAS, in its brief to the Justices of the Supreme Judicial Court, the Office of the Attorney General also cited the cost estimate in the fiscal note of the Office of Fiscal and Program Review; and

WHEREAS, the Office of Fiscal and Program Review provided a fiscal note to L.D. 1646 of the 128th Legislature "An Act To Implement Ranked-choice Voting in 2021," referred to in this order as "L.D. 1646," as introduced of \$684,790 for the Secretary of State to develop, implement and administer ranked-choice voting in fiscal year 2017-18, and provided a fiscal note of \$96,768 for the Department of Public Safety as well as \$52,106 from the Highway Fund for fiscal year 2017-18; and

WHEREAS, in a public interview after certifying that the petitions for the exercise of a veto pursuant to Article IV, Part Third, Section 17 of the Constitution of Maine included sufficient signatures, Secretary of State Matthew Dunlap advised that the Legislature had not provided funding to implement ranked-choice voting and asked the Legislature to appropriate such funding in the amount of \$1,500,000 to implement ranked-choice voting; and

WHEREAS, in paragraph 54 of its complaint against the Secretary of State in *The Committee for Ranked-Choice Voting, et al. v. Matt Dunlap, as Maine Secretary of State*, Civil Action Docket No. CV-18-24, the plaintiffs alleged that the Secretary of State had "sufficient authority and financial means to timely implement the [Ranked-Choice Voting] Law for the 2018 elections" and, in answering this allegation by pleading dated March 16, 2018, the Secretary of State asserted that he had sufficient authority but denied all other allegations in that paragraph of the plaintiffs' complaint; and

WHEREAS, the Secretary of State's denial of all other allegations in paragraph 54 of the plaintiffs' complaint means that, in a formal pleading filed with the Superior Court, the Secretary denied that he had the financial means to timely implement the ranked-choice voting law; and

WHEREAS, no bill seeking an appropriation to develop, implement and administer ranked-choice voting has been submitted to the Legislature since that time by the Secretary of State and no such bill has been approved for introduction to the Legislature; and

WHEREAS, the Secretary of State and the Deputy Secretary of State have testified that the Office of the Secretary of State will be expending public money to develop, implement and administer ranked-choice voting without an express appropriation by the Legislature; and

WHEREAS, the commitment and expenditure of public money without authorization by the Legislature violates the separation of powers and is prohibited by the Constitution of Maine, including but not limited to Article III and Article IV as well as the statutes of Maine; and

WHEREAS, the Act as approved by the voters did not provide for the implementation of ranked-choice voting; in particular the Act did not set forth which officials were charged with implementing ranked-choice voting or how it was to be implemented; and

WHEREAS, the Constitution of Maine has always placed primacy on the importance of the electoral process and the integrity of that process; and

WHEREAS, voting is a fundamental right and is at the heart of the democratic process of Maine;
and

WHEREAS, the Constitution of Maine and the statutes set forth in Title 21-A of the Maine Revised Statutes demonstrate that the Constitution of Maine and the Legislature have placed the public's trust in the integrity of the election process at the forefront of constitutional and legislative concern; and

WHEREAS, Article II, Section 1 of the Constitution of Maine recognizes Maine citizens voting in elections as constitutional officers designated as "electors" and Article II of the Constitution of Maine provides electors with limited immunity in the exercise of their right to vote; and

WHEREAS, Article IV, Part First, Section 5 of the Constitution of Maine requires that elections for Governor, State Senator and State Representative be conducted at the municipal level of government and that particular municipal officials receive, sort and count ballots and attest to the results of elections in an open and public manner; and

WHEREAS, when voting machines were considered as a means of accepting and counting votes, the Constitution of Maine was amended to add Article II, Section 5 for the purpose of authorizing the use of voting machines; and

WHEREAS, the procedures set forth in Article II and Article IV of the Constitution of Maine are intended to ensure integrity and openness in elections and to promote public confidence in the electoral process; and

WHEREAS, the procedures set forth in Article IV, Part First, Section 5 of the Constitution of Maine have served as the basis for the statutory process by which primary elections are held; and

WHEREAS, the only authority that the Legislature has provided to the Secretary of State is the authority to "adopt rules for the proper and efficient administration of elections determined by ranked-choice voting," including the development of procedures for "requesting and conducting recounts," the Maine Revised Statutes, Title 21-A, section 723-A, subsection 5-A, which authority was, as originally enacted, contingent on the Secretary of State making a full report to the Legislature on how ranked-choice voting should be implemented, which requirement has been suspended by the submission of a petition pursuant to Article IV, Part Third, Section 17 of the Constitution of Maine, the suspension of which will be decided in the June 12, 2018 election; and

WHEREAS, without the report required pursuant to Public Law 2017, chapter 316, section 13, the direction set forth in the Maine Revised Statutes, Title 21-A, section 723-A, subsection 5-A lacks sufficient standards to constitute a lawful delegation by the Legislature to the Secretary of State to develop and issue rules over the electoral process; and

WHEREAS, neither the Legislature nor the people of Maine acting pursuant to Article IV of the Constitution of Maine have authorized any executive officer to develop election procedures without first specifying to such executive officer measures binding on that officer that would ensure that the elections have the integrity and openness required by Article IV, Part First, Section 5 of the Constitution of Maine;
and

WHEREAS, except for recounts provided for in the Maine Revised Statutes, Title 21-A, section 737-A, neither the Legislature nor the people of Maine have authorized any persons, including law enforcement officers, to take custody of ballots that have been cast in municipalities and which, by law, have been commended to the possession, custody and control of particular and designated municipal officials; and

WHEREAS, except for recounts provided for in the Maine Revised Statutes, Title 21-A, section 737-A, neither the Legislature nor the people of Maine acting pursuant to Article IV of the Constitution of Maine have authorized any executive officer, including the Secretary of State, to order municipal officials to relinquish custody of ballots to any person or official or to allow municipal ballots to be removed from those municipal officials or to be delivered to any other person, including the Secretary of State; and

WHEREAS, in testimony before a committee of the Legislature, the Secretary of State and the Deputy Secretary of State asserted that the Office of the Secretary of State would seek to enlist the assistance of law enforcement officers, including members of the Maine State Police, wardens of the Department of Inland Fisheries and Wildlife and other law enforcement officers from departments, agencies or political subdivisions yet to be identified to remove ballots from the possession, custody and control of the designated municipal officials charged with maintaining such possession, custody and control; and

WHEREAS, neither the Legislature nor the people of Maine acting pursuant to Article IV of the Constitution of Maine have authorized the Office of the Secretary of State to exercise such authority either over the ballots cast in municipalities or the municipal officials charged by law with the possession, custody and control of such ballots; nor has the Legislature nor have the people of Maine pursuant to Article IV of the Constitution of Maine authorized any executive branch officials, including members of the Maine State Police, wardens of the Department of Inland Fisheries and Wildlife or any other law enforcement officers from departments, agencies or political subdivisions yet to be identified, to exercise such authority; and

WHEREAS, the assertion by the Office of the Secretary of State over municipal officials and law enforcement officers, without the express authority of the Legislature or the people of Maine pursuant to Article IV of the Constitution of Maine, exceeds the authority invested in the Secretary of State by the Constitution of Maine and the statutory laws of Maine; and

WHEREAS, the primary elections held under Maine statutory laws are elections within the meaning of Article IV, Part First, Section 5 of the Constitution of Maine; and

WHEREAS, as elections within the meaning of Article IV, Part First, Section 5 of the Constitution of Maine, Maine primaries must comply with the plurality requirement of the Constitution of Maine for the offices of Governor, State Senator and State Representative; and

WHEREAS, the measure of November 8, 2016 did not change the wording of the Maine Revised Statutes, Title 21-A, section 723, subsection 1 requiring that primary elections be determined by a plurality; and

WHEREAS, a proposal to amend the Maine Revised Statutes, Title 21-A, section 723, subsection 1 as set forth in section 5 of L.D. 1646 as introduced was removed in committee, struck from the bill and not enacted into law; and

WHEREAS, L.D. 1646 as enacted into law did not change the plurality requirement of the Maine Revised Statutes, Title 21-A, section 723, subsection 1 for elections held in Maine prior to 2021, and the plurality requirement of section 723, subsection 1 for primaries remains the law of Maine, fully in effect; and

WHEREAS, notwithstanding the Maine Revised Statutes, Title 21-A, section 723, subsection 1, the Secretary of State and the Deputy Secretary of State have testified before a committee of the Legislature that they intend to develop, implement and conduct the June 12, 2018 primary under ranked-choice voting; and

WHEREAS, by conducting the June 12, 2018 election using ranked-choice voting, the Office of the Secretary of State will be acting outside of the authority vested in that office by the legislative authority of Maine; now, therefore, be it

ORDERED, that the Senate authorizes the President of the Senate to represent the interests of the Senate and take all appropriate action, including the retention of outside counsel, on its behalf in any matter related to advocating for and defending the interests of the Senate, preserving the integrity of the separation of powers provided for in the Constitution of Maine, and preserving the integrity of the election process of Maine, and to raise all appropriate claims and defenses and to seek all appropriate manner of relief, including but not limited to seeking injunctive relief against any state official or private person seeking to exercise powers relegated to the legislative power of Maine not duly and properly extended to such official or officials or person or persons or any of them.