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GOVERNOR

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

March 7, 2023

Hon. Anne Carney, Chair
Hon. Matt Moonen, Chair
Joint Standing Committee on Judiciary
Room 438, State House
Augusta, Maine 04330

Re: L.D. 78, *RESOLUTION, Proposing an Amendment to Article X of the Constitution of Maine Regarding the Publication of Maine Treaty Obligations*, and L.D. 578, *RESOLUTION, Proposing an Amendment to the Constitution of Maine Regarding the Publication of Maine Treaty Obligations*

Dear Sen. Carney and Rep. Moonen:

Please accept this testimony on behalf of the Office of the Governor in opposition to LD 78, *RESOLUTION, Proposing an Amendment to Article X of the Constitution of Maine Regarding the Publication of Maine Treaty Obligations*, and LD 578, *RESOLUTION, Proposing an Amendment to the Constitution of Maine Regarding the Publication of Maine Treaty Obligations*.

In 1876, the Maine Constitution was recodified in an effort to make the instrument more accessible and concise, and to improve its organization. As part of that process, the Constitution was amended to direct that several sections, including Article X, Section 5, no longer be included in printed copies.¹ Article X, Section 5 contains the Articles of Separation, which set forth the respective obligations of the two states when Maine split from Massachusetts in 1820.² Among

¹ Me. Const. art. X, § 7.

² In addition to Section 5, the 1876 amendment directed that Sections 1 and 2 also not be included in printed copies of the Constitution. Section 1 set out when the first Maine Legislature would meet, when initial elections would be held, and how Senate and House seats would be apportioned. Section 2 established that the initial term of Maine's elected and appointed officers would be from the last Wednesday in May, 1820, to the first Wednesday in January, 1822.



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other things, the Articles of Separation stipulate that Maine assumes the duties of Massachusetts under treaties with the Passamaquoddy Tribe and Penobscot Nation. The 1876 amendment expressly stated that the reorganization did not “impair the validity” of Section 5, which remained part of the Constitution with “the same effect as if contained in said printed copies.”³

LDs 78 and 578 would initiate the process of amending the Constitution to require that Article X, Section 5, again be included in printed copies. Our concern with this legislation is that it appears to be based on the false premise that Article X, Section 5, was dropped from printed copies of the Constitution as part of an effort to conceal or evade Maine’s legal obligations under the treaties. That theory was thoroughly examined and discredited in this Report commissioned by the Maine Indian Tribal State Commission (MITSC) in 2022. The MITSC Report provides a detailed explanation of how the 1876 amendment was the result of a constitutional recodification process that was concerned only with making the document more readable. There is no evidence of ulterior motives related to treaty obligations.

In 2017, the 128th Legislature considered a Resolve (LD 428) that was substantively identical to LDs 78 and 578. The Legislature amended the bill to direct the Secretary of State, the Maine State Library, and the Law and Legislative Reference Library to make the Articles of Separation more prominently available. That was an appropriate result. The Articles of Separation should be easily accessible, and today they are.

Amending the Constitution as these Resolves propose, however, would be a mistake for two reasons. First, it appears to be a misguided attempt to right a historic wrong that never occurred – there is no factual basis for the proposition that the Articles of Separation were removed from printed copies of the Constitution as part of an effort to evade treaty obligations. Supporting this legislation would perpetuate that baseless theory.

Second, although the proposed constitutional amendment would have no legal effect, not everyone will understand that. It is foreseeable that some will wrongly believe that once again including the Articles of Separation in printed copies of the Constitution revitalizes 18th and 19th century treaty obligations. That is incorrect. Whether the Articles of Separation are included in printed copies of the Constitution is immaterial to their legal effect – they remain part of the Constitution today just as they always have been. But more importantly, the rights and responsibilities of the State and the Wabanaki Nations are not defined by treaties, but instead the state and federal statutes that codify the Maine Indian Land Claims Settlement of 1980. As part of that settlement, Congress, with the tribes’ consent, granted Maine a “general discharge and release” of any and all treaty obligations. 25 U.S.C. § 1731. Any legislation that could be interpreted as invoking ancient treaties as the legal basis for modern obligations would be confusing and potentially destabilizing.

Governor Mills looks forward to working with the Tribes and the Legislature to solve specific, identifiable problems, as she has done to establish the strictest water quality standards in the country to protect sustenance fishing, empower Tribal courts to prosecute domestic violence

³ *Id.*



offenses, provide tax relief to Tribal members, protect drinking water at Pleasant Point, give the Tribes exclusive mobile sports wagering opportunities, establish a formal collaboration process with state agencies on issues of Tribal concern, and ban the use of Native American mascots in Maine schools, among other things. Because this legislation would not solve any real world problem, but would instead create new confusion, the Office of the Governor urges that you vote ought-not-to-pass on LDs 78 and 578. Thank you for your consideration.

Sincerely,



Gerald D. Reid
Chief Legal Counsel



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