STATE OF MAINE

BEFORE THE JUSTICES OF THE
SUPREME JUDICIAL COURT

DOCKET NO. OJ-26-1

IN THE MATTER OF
REQUEST FOR OPINION OF THE JUSTICES

BRIEF OF MARSHALL J. TINKLE

In Response to the Court's Procedural Order
Dated February 11, 2026

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INTRODUCTION

In response to the Procedural Order inviting various governmental bodies and officials "and any other interested person or entity" to file briefs in this matter, I respectfully submit the following Brief, as a longtime student of the Maine Constitution and as a Maine voter, in the hope of shedding some light on the question propounded by the 132nd Legislature on February 10, 2026, to wit, "Does the method of arriving at a plurality of votes cast through the use of ranked choice voting, as amended by L.D. 1666, in which a person's vote is not determined until the final round of tabulation and in which the candidate with the highest continuing ranking on the most ballots after the final round of tabulation is determined to have received a plurality of votes cast, conform with the provisions of the Constitution of Maine, Article IV, Part First, Section 5; Article IV, Part Second, Section 4 and Section 5; and Article V, Part First, Section 3" (the "Question").[1]

Based on my independent research, I respectfully submit that LD 1666 should be deemed constitutional.

ARGUMENT

LD 1666 was passed recently by both houses of the Legislature. All legislation is presumed constitutional. *See, e.g., Bouchard v. Department of Public*

[1] Although the Justices have invited comments on whether the Question presents a "solemn occasion," I will confine my remarks to the substance of the Question. For purposes of this brief, I assume that the Justices will agree that the Question does present a solemn occasion under article VI, section 3 of the Maine Constitution.

Safety, 2015 ME 50, ¶ 8, 115 A.3d 92, 96; *Common Cause v. State*, 455 A.2d 1, 18 (Me. 1983) (referendum measure).[2] This is a "presumption of great strength." *Portland Pipe Line Corp. v. Environmental Improvement Comm'n*, 307 A.2d 1, 10 (Me. 1973); *Baxter v. Waterville Sewerage District*, 146 Me. 211, 214, 79 A.2d 585, 587 (1951). Anyone challenging the constitutionality of legislation bears the "heavy burden" of overcoming the presumption by demonstrating a violation of the state constitution "by strong and convincing reasons." *Ford Motor Co. v. Darling's*, 2014 ME 7, ¶ 33, 86 A.3d 35, 47. All reasonable doubts must be resolved in favor of constitutionality. *Bouchard*, 2015 ME 50, ¶ 8; *Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 5, 997 A.2d 92. Put another way, the unconstitutionality of a law must be proved "beyond a reasonable doubt." *State v. Poulin*, 105 Me. 224, 228-29, 74 A. 119, 121 (1909), *quoting Soper v. Lawrence*, 98 Me. 268, 280, 56 A. 908, 911 (1903).

These principles stem from the separation of powers doctrine enshrined in Article III:

> The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department

[2] Though LD 1666 has not yet been signed into law, the presumption of constitutionality should still apply. As noted in the text above, the reason for the presumption is that the judicial department has a duty to presume that the coequal legislative department has acted constitutionally in passing a law. The presumption thus arises upon legislative enactment. Moreover, it can be assumed that LD 1666 will be signed into law *unless* the presumption is deemed rebutted.

> to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons.

Laughlin v. City of Portland, 111 Me. 486, 489, 90 A. 318, 319 (1914). Moreover, the burden on the challenger is even greater when it is alleged that the statute is unconstitutional on its face. Under a facial challenge, it must be established that *no set of circumstances exists* under which LD 1666 would be valid. *Dorr v. Woodard*, 2016 ME 79, ¶ 25, 140 A.3d 467, 473.

The question, then, is whether any party filing a brief in this matter has shown beyond a reasonable doubt that the only rational way of construing LD 1666 and the Maine Constitution is that they are unambiguously and ineluctably in conflict. The Question specifically asks whether LD 1666 conflicts with constitutional provisions that candidates for governor, U.S. Senate and U.S. House of Representatives be elected by a "plurality" of the votes. Because LD 1666 is not in clear and irreconcilable conflict with any of these provisions, however, it may not be declared unconstitutional.

Opponents of ranked-choice voting claim that it conflicts with the Maine Constitution's references to election by a "plurality" of the votes.[3]

[3] The section on the election of representatives calls for the Governor to issue a summons "to such persons as shall appear to have been elected by a plurality of all votes returned…." Me. Const. art. IV, pt. 1, § 5. The corresponding provision for Senators likewise instructs the Governor to issue a summons "to such persons, as shall appear to be elected by a plurality of the votes in each senatorial district." *Id.*, art. IV, pt. 2, §§ 4, 5. Similarly, the Constitution provides for the Senate and House of Representatives to determine the votes cast for Governor "and in case of a choice by plurality of all of the votes returned they shall declare and publish the same." *Id.*, art. V, pt. 1, § 3.

This claim would be tenable only if the terms "plurality" and "votes" were assigned specialized meanings not found in the Constitution. These terms are undefined. To discern the meaning and intent of these terms, it is useful to look at their history. *See Opinion of Justices*, 673 A.2d 1291, 1297 (Me. 1996).

Each of the four provisions in question originally referred to a *majority* of the votes.[4] The question of what to do if no candidate achieved a majority vote was handled in different ways. For representatives, the selectmen and assessors had to call a new election, "and the same proceedings shall be had at every future meeting until an election shall have been effected." Me. Const. art. IV, pt. 1, § 5 (1819). For vacant Senate seats, the Representatives and those Senators who did get elected were to elect by joint ballot, "from the highest numbers of the persons voted for … equal to twice the number of Senators deficient," the "number of Senators required." *Id.*, art. IV, pt. 2, § 5. If no gubernatorial candidate received a majority, first the House would choose two of the candidates from the top four vote-getters and then the Senate would elect one of them. *Id.*, art. V, pt. 1, § 3.

[4] *See* Me. Const. art. IV, pt. 1, § 5 (1819) ("in case any person shall be elected by a majority of all the votes, the selectmen or assessors shall deliver the certified copies of such lists to the person so elected"); *id.*, art. IV, pt. 2, § 4 (Governor and Council shall issue summons to such persons "as shall appear to be elected by a majority of the votes in each district"); *id.*, art. IV, pt. 2, § 5 (Senate shall "determine who are elected by a majority of votes to be Senators in each district"); *id.*, art. V, pt. 1, § 3 ("in case of a choice [of Governor] by a majority of all the votes returned," Senate and House of Representatives "shall declare and publish the same").

It did not take long for dissatisfaction with this dispensation to take hold. In 1847, an amendment was submitted to modify each of these provisions by deleting "majority" and substituting "highest number." Res. 1847 c. 45 (amend. VII). The proposal somehow passed with respect to representatives but not for senators and governors. In 1864, when the latter part of section 5 of Article IV, Part First was repealed and replaced, the word "plurality" appeared for the first time. Res. 1864, c. 344 (amend. X). There is no reason to suppose that anyone perceived any substantive difference between that term and "highest number"; rather, they appear to be used synonymously.[5] In 1875, "plurality" was substituted for "majority" in Article IV, Part Second, pertaining to the election of Senators (Res. 1875, c. 98; Me. Const. amend. XV); and in 1880, the same substitution was made with respect to Governors (Res. 1880, c. 159; Me. Const. amend. XXIV).

Thus, in each instance, "plurality" was inserted into the Constitution in order to eliminate the majority-vote requirement. The focus was strictly on the *percentage of votes needed to win an election*, not on the type of voting *system*. Voting systems vary with respect to how votes are cast and how they are counted;[6] but regardless of which voting system is used, the separate question remains as to what percentage of votes is necessary to determine the winner. Though some

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[5] In the voting context, a plurality is "a number greater than another" or "an excess of votes over those cast for an opposing candidate," *see* www.Merriam-Webster.com/dictionary/plurality.

[6] *See* O'Neill, *Everything That Can be Counted Does Not Necessarily Count*, 2006 Mich. St. L. Rev. 327, 339.

kinds of votes require a "super-majority," the only options that have been considered in voting for elective offices are a simple majority or a plurality. In the period from 1847 through 1880, Mainers chose the plurality option for legislative and gubernatorial elections in order to eliminate the problems produced by the majority-vote requirement whenever more than two candidates were running and nobody received a majority: either a succession of do-over elections (in the case of representatives) or (for senators and governors) the anti-democratic solution of transferring the right of the people to choose their leaders to a small clique of politicians.[7] Allowing candidates to be elected by a plurality (or highest number) of the votes solved these problems by assuring (except in the unlikely event of a tie) that every popular election would produce a winner.

The use of the term "plurality" cannot be understood as intending to lock in forever the voting *system* then in use because, first of all, alternative voting systems were not on anyone's radar at the time of these amendments[8] and, secondly, alternative systems like ranked-choice voting do require successful candidates to receive a plurality – that is, the highest number of all the votes *as*

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[7] For example, the 1880 amendment allowing the Governor to be chosen by a plurality of the votes came close on the heels of the failed gubernatorial election of 1878, in which the Legislature, after nobody received a majority of the popular vote, elected the third-place finisher, with disastrous results. *See* Tinkle, *supra*, at 12.

[8] The ranked-choice voting system adopted by LD 1666 was invented by an MIT professor in the 1870s but was not implemented in the United States until the early twentieth century, when five states used it. *See Dudin v. Arntz*, 640 F.3d 1098, 1103 (9th Cir. 2011); S. Issacharoff, P. Karlin & R. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 1133, 1175 (3d ed. 2007); O'Neill, *supra*, at 334. It gained new momentum over the last twenty years. *See id.*

cast and determined under the rules of that system. LD 1666 is clear that at the end of the tabulation process "the continuing candidate with the highest continuing ranking on the most votes ballots in the final round of tabulation is determined to have received a ***plurality*** of the votes cast and is elected. LD 1666, §2 (amending 21-A M.R.S. § 1(35-A)) (emphasis added).[9] Because LD 1666 authorizes voters to express multiple preferences on a ranked basis, the method of determining which candidate has received a plurality of the votes returned will naturally be different from the present single-choice voting modality – often labeled the "first past the post" system in psephological circles.[10] But regardless of that difference, the goal is still to determine the plurality winner under a prescribed set of counting rules. When opponents of LD 1666 claim that the winner of a ranked-choice voting election will not necessarily have achieved a plurality of the votes, what they really mean is that the winner would not necessarily have gained a plurality *under the present first-past-the-post system*. However, nothing in the state constitution mandates the use of the first-past-the-post system or prohibits the use of any

[9] LD 1666 is more explicit that the winner receives a plurality of total votes than the previous effort to enact ranked choice voting. *Cf.* 21-A M.R.S. § 1(35-A) (2017) ("the candidate *with the most votes* in the final round is elected." (emphasis added).

[10] *See, e.g., Dudin*, 640 F.3d at 1103; Issacharoff, *supra,* at 1132; D. Farrell, *Electoral Systems: A Comparative Introduction* 19 (2001).

alternative voting system that satisfies basic equal protection and due process norms.[11]

Opponents of LD 1666 will likely argue that it requires a "majority" winner. That simply misconstrues the process of ranked choice voting as well as the plain language ("plurality of the votes cast") of the proposed statute. But even if that were one colorable interpretation of LD 1666, it is axiomatic that a piece of legislation should be construed to conform with the Constitution if at all possible. The forces arrayed against ranked-choice voting are asking the Justices to adopt the only construction that would be most likely to put the Act in conflict with the Constitution. That is the antithesis of what a court examining the constitutionality of legislation is required to do.

Opponents also tend to construe the Constitution narrowly by arguing, in effect, that it forbids the adoption of any voting system that differs from that which held sway in the nineteenth century. The Justices should be very wary of this argument. First of all, it is not supported by the text, which far from specifying a particular voting system, broadly lays out a few basic steps in the ballot aggregation process designed to foster accuracy, transparency, and integrity so that the election results will reflect the will of the electors. There is no evidence that

[11] Every court that has considered constitutional challenges to ranked-choice-type voting has rejected them. *See, e.g., Dudin*, 640 F.3d at 1106-17; *Kohlhaas v. State*, 518 P.3d 1095 (Alaska 2022); *McSweeney v. City of Cambridge*, 422 Mass. 648, 665 N.E.2d 11 (1996) (similar "single transferable vote" system); *Minnesota Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683 (Minn. 2009).

ranked-choice voting will impede any of these goals. To the contrary, it is designed to *better* reflect the popular will in the election results. Whether it is the best method of achieving that end is not at issue here. The question is whether the Constitution should be interpreted as forbidding any attempt to improve the election system.

Like the federal constitution, our state constitution "should not be interpreted with the strictness of a municipal code, because that would be contrary to the original intent." 1 Rotunda & Nowak, *supra*, § 1.1 at 27. As Justice Story memorably exhorted:

> The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not an impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications, which, at the present, might seem salutary, might, in the end, prove the overthrow of the system itself. Hence, its powers are expressed in general terms, leaving to the legislature, from time to time, to adopt its own means to effectuate legitimate objects, and to mold and model the exercise of its powers, as its own wisdom, and the public interests, should require.

Martin v. Hunter's Lessee, 14 U.S. 304, 326, 4 L. Ed. 97 (1816); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 407, 4 L. Ed. 579 (1819) ("we

must never forget that it is a *constitution* we are expounding"); *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 312, 35 N.E.2d 222, 230 (1941) (in expressing challenge to change in vote counting procedure, "We must always be careful in approaching a constitutional question dealing with principles of government, not to be influenced by old and familiar habits, or permit custom to warp our judgment. We must not shudder every time a change is proposed."), *quoting Johnson v. New York*, 274 N.Y. 411, 430 9 N.E. 2d 30 (1937); *Commonwealth v. Blackington*, 41 Mass. 352, 356, 24 Pick. 352, 355-56 (1833) ("In construing this [state] constitution, it must never be forgotten, that it was not intended to contain a detailed system of practical rules, for the regulation of the government or people in after times…") (Shaw, C.J.).

The opponents of LD 1666 misinterpret the history of the "plurality" amendments. Everybody agrees that the purpose of these amendments was to rescind and replace the original majority-vote requirement. Under that requirement, any election in which no candidate received more than fifty percent of the votes was a failed election. No victor emerged, and the contested seat remained vacant. New elections had to be called: either (in the case of state representatives) an indefinite number of successive elections by the same electors who had been unable to reach a majoritarian result until such a result were

somehow obtained, or (for senators and governors) elections not by the people but by some combination of the House and Senate.

This is nothing like what happens under ranked-choice voting. In the new system, every election will produce a winner. Do-over elections will not occur. Within a single election, more than one step in the ballot tabulation process may occur; but that is fundamentally different from a system that would require multiple *new* elections, in all of the ways that matter. Ranked-choice voting avoids the various pitfalls of the majority-vote requirement: failed elections, the substantial delay and redoubled expense of supersessive elections, disruption of the electoral process, usurpation of the people's power to vote in their elective officers, and frustration of the popular will. Hence, the ranked-choice voting procedure is nothing like (and does not "reimpose") the old majority-vote requirement in any way. It is, rather, a more sophisticated (and admittedly more complex) method of determining which of more than two candidates has obtained the most electoral support – *i.e.*, a "plurality."

In *Opinion of the Justices*, 2017 ME 100, 162 A.3d 188, 211, the Justices appear to have misunderstood the status of ranked choice voting under the Maine Constitution; but three points are worth emphasizing. First, the Justices were opining solely on the constitutionality of 2017 legislation that used significantly different terminology than LD 1666. Second, the opinion merely set forth the

views of the particular justices sitting at the time, not a judgment of the Court. *See Opinion of Justices,* 281 A.2d 321 (Me. 1971). As such, the opinion has no binding authority. *Board of Overseers of Bar v. Lee,* 422 A.2d 998 (Me. 1980), *appeal dismissed,* 450 U.S. 1036 (1981); Tinkle, The Maine State Constitution 137-38.

Third, and perhaps most significantly, the Alaska Supreme Court considered that opinion at length and, in a unanimous decision, explained why it was unpersuasive. *Kohlhaas v. State,* 518 P.3d 1095, 1119-24 (Alaska 2022). Like Maine's, Alaska's constitution does not require candidates for governor to receive a "majority" of the votes but, rather, states that the candidate wins by receiving "the greatest number of votes," a phrase the court construed as identical to "plurality." *Id.* at 1118. But ranked choice voting does not require winning by a majority. *Id.* at 1119. The court noted that in a recent *Maine* election using ranked choice voting, the winner received a plurality, not a majority, of the total votes cast. *Id.*

The court carefully explicated the mechanics of ranked choice voting, concluding that "a successful candidate can win the election with less than half of the total votes cast even though the candidate receives more than half of the votes counted in the final round of tabulation." *Id.* at 1120. Moreover, such voting does not contravene the purpose of the constitutional provision: "eliminating the risk of an election with no winner." *Id.* This voting system eliminates the risk of multiple

elections. In fact, an "election result is not 'final' under ranked-choice voting while election officials are still tallying voters' preferences; they must be tallied completely to determine which candidates have won, and the count is not complete until each vote has been given full effect." *Id.* at 1122. Once the tabulation is final, the winner is the candidate who has received, not a majority, but a plurality of the votes cast. *Id.*

Disagreeing with the 2017 *Opinion of Justices,* the Alaska court elaborated:

> But the Maine Supreme Judicial Court did not explain why its constitution required the election to be called after "one round of counting." If the vote count is not final after the first round of tabulation, then the candidate in first place after the first round is not necessarily the candidate "receiving the greatest number of votes." Instead that candidate is simply the candidate in the lead before the votes have been fully counted.
>
> With ranked-choice voting, the vote count is not final after the first round of tabulation. Maine's law provided that if there were more than two candidates left "the last-place candidate [wa]s defeated and a new round [of tabulation] beg[an]," repeating until two candidates remained and the candidate with the most votes was declared the winner… According to both states' ranked-choice voting laws, the vote count is not complete until the final round of tabulation. Yet the Maine Supreme Judicial Court treated the result obtained after the first round of counting as if it were final, without pointing to any text in its constitution that requires votes to be counted in that way or that limits the way a vote can be cast or expressed. The court discussed at length the history of the Maine constitution's plurality provision and the state's history of failed elections but did not explain how ranked-choice voting is any more likely to result in a failed election than single-choice voting. The court's failure to pinpoint constitutional text, structure, or policies inconsistent with ranked-choice voting leaves us unconvinced by its analysis.

Id. at 1121. The court concluded that a statutory scheme functionally equivalent to LD 1666 was constitutional under provisions functionally identical to the sections of the Maine Constitution at issue here. *Kohlhaas* offers the most persuasive analysis of whether ranked choice voting satisfies constitutional "plurality" provisions.

Hence, to the extent the Justices' reasoning in the 2017 *Opinion* has a bearing on the pending Question, it should not be followed. The Justices should not be reluctant to depart from a nonbinding opinion that was issued in quite different circumstances – addressing a piece of legislation by referendum that was not as carefully drafted as LD 1666, at a time when few people understood how ranked choice voting actually works. The Justices, whether acting as the Law Court or in an advisory capacity, have a well-deserved reputation for rarely getting it wrong and for being willing to correct those rare mistakes at the earliest opportunity. The pending Question presents such an opportunity with respect to ranked choice voting.

CONCLUSION

For these reasons, LD 1666 does not conflict with the state constitution's "plurality" provisions.

Respectfully submitted,

Dated: March 6, 2026

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