STATE OF MAINE

BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT

DOCKET NO. OJ-23-1

In the Matter of Request for Opinion of the Justices

BRIEF OF THE ATTORNEY GENERAL

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Introduction

After a controversy in 1971–72 in which the then-Governor delayed sending to referendum a direct initiative that could have harmed his party's prospects in an upcoming election, Maine voters ratified an amendment to the Constitution in 1975 constraining the Governor's power to take similar actions in the future. As amended, the Maine Constitution directs the Governor or, if the Governor does not act, the Secretary of State, to proclaim an election "within 10 days" after the adjournment without day of the legislative session "to which the measure was proposed"—unless the measure is first "enacted without change" by the Legislature. In overwhelmingly ratifying this constitutional amendment, the voters sought to protect the referendum process against elected officials seeking to manipulate or delay that process.

Governor Mills complied with this constitutional deadline by referring the four initiated measures at issue to the voters on April 7, 2023, 8 days after the adjournment of the legislative session to which they were transmitted by the Secretary. Though there is no doubt that the Legislature, in requesting an Opinion of the Justices, is acting out of a good-faith desire to substantively consider whether to enact these four initiated measures, the series of questions that it poses—and particularly Question 1—could nonetheless be answered in a manner that would open the door to manipulation or delay by future elected officials whose motives may be less pure.

Specifically, by suggesting that a measure is "presented"—a term that the Constitution uses as a synonym for "proposed"—only if certain internal legislative

processes such as bill printing are completed, a "No" answer to Question 1 could allow future officials to delay or even prevent initiated measures from going to referendum by asserting their control over those legislative processes. That is precisely the sort of manipulation that the 1975 amendment sought to prevent. Any interpretation of the direct initiative provisions of the Constitution must ensure that the people, not elected leaders, determine the legislative session to which a measure is "proposed" and, thus, "presented." Question 1 should therefore be answered "Yes."

If Question 1 is answered in the affirmative, the Maine Constitution can still be reasonably interpreted to allow the Legislature to "enact[] without change" the initiated measure at any point before the referendum election, as suggested by Questions 2 and 3. However, the Justices should adopt such an interpretation only if they conclude that enactment would allow for cancellation of the November referendum on the enacted measure. Otherwise, absurd results would follow. Voters would be asked either to vote on an exact duplicate of a law already in effect or would be asked to choose between two "competing" measures that are identical. In the former case, the vote would either be meaningless or would become a *de facto* people's veto referendum, without meeting the requirements for one. In the latter case, the measure could be defeated or delayed despite receiving a majority of total votes. Only if these absurd results—threatened by Questions 4 and 5 respectively—can be avoided should Questions 2 and 3 be answered to affirm the Legislature's authority to enact a measure after adjournment of the session in which it is presented.

And they can be avoided. In a different sentence than the one at issue in Question 1, the Constitution provides that a measure "shall not go to a referendum vote" if enacted without change. This sentence contains no reference to any particular "session" of the Legislature. This provision can be read as providing that enactment without change of a measure at any point prior to the referendum vote precludes an election, even if the Governor has already proclaimed one. Such an interpretation would provide maximal protection to the people's ability to seek enactment of the petitioned-for measure while still ensuring that elected officials cannot delay the election by manipulating legislative processes.

The Justices should thus answer Question 1 "Yes." Further, if they can answer Question 4 "Yes," then the Justices should answer Question 2 "No" and Question 3 "Yes."

Argument

I. The Legislature's Questions Present a Solemn Occasion

The Justices should conclude that the questions posed by the Legislature meet the criteria for a solemn occasion. *See Opinion of the Justices*, 2017 ME 100, ¶¶ 21–31, 162 A.3d 188, *as revised* (Sept. 19, 2017). The Legislature is considering whether to enact without change initiated measures in the current special session, which is not the session in which the measures were transmitted to the Legislature by the Secretary of State. The Maine Constitution provides no clear guidance as to whether the Legislature has the power to enact these measures or, if it does, what the effect of

enactment would be. As suggested by Questions 4 and 5, possible consequences of such enactment include forcing Maine voters to take a meaningless referendum vote on a law already in effect or to choose between two "competing" measures that are identical in every respect. Providing the Legislature with guidance as to whether it can act and, more importantly, how that action will affect what, if anything, Maine voters will be asked to decide in November 2023, is a question of "live gravity" that is "of instant, not past nor future, concern." *Id.* ¶ 23.

Other factors supporting a solemn occasion are present as well. Given the typically limited duration of the special session, the questions are ones of "unusual exigency." *See id.* ¶ 22. Moreover, the questions are neither hypothetical nor remote. At least two of the four measures remain under active consideration by the Legislature and could be enacted without change. *See id.* ¶ 25. The questions are specific and not overly complex, seeking application of a single section of the Constitution to a simple set of facts. *See id.* ¶¶ 26, 27. And the questions posed by the Legislature squarely relate to its own authority to legislate. *See id.* ¶ 24.

For all of these reasons, the Justices should find a solemn occasion.

II. The Justices Should Answer "Yes" To Question 1

Question 1 requests an opinion on the meaning of *presented* in the fourth sentence of § 18(2) of Article IV, Part Third, of the Maine Constitution: "The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented," must be sent to referendum. That sentence must be

read in the full context of § 18. In particular, it should be read in a manner that harmonizes it with § 18(3), which gives the Governor explicit instructions about when to send an initiative to voters, keyed to when the measure is "proposed"—not "presented"—to the Legislature. When that context is considered, it becomes clear that a measure is "proposed to the Legislature" under § 18(3) as soon as the Secretary of State, acting on behalf of the petitioners, transmits it to the Legislature, and that a measure is "presented" under § 18(2) when it is "proposed."

A. The Governor's Obligation to Proclaim the Election Is Triggered by the Secretary's Transmission of the Measure to the Legislature.

The Constitution describes the direct initiative process as requiring the people to "propose" the initiated measure to the Legislature. Section 18(1) explains the process by which the electors "may propose to the Legislature" the initiated measure. Me. Const. art. IV, pt. 3, § 18(1). That process requires the filing of a petition with the Secretary by certain deadlines keyed to the start of the first and second regular legislative sessions. *Id.* Section 18(2) describes a petition filed as described in § 18(1) as a measure "thus proposed," and later states that "[t]he measure thus proposed" must be submitted to referendum vote "unless enacted without change by the Legislature at the session at which it is presented." *Id.* § 18(2). This language makes clear that it is the petitioners who "propose[]" the measure to the Legislature, with the Secretary of State acting as an intermediary to confirm that the signature requirements of the Constitution are met.

The Constitution also contains precise instructions in § 18(3) for when the Governor must send the "proposed" measure to the voters. The instructions contain no form of the term *presented*. *See* Me. Const. art. IV, pt. 3, § 18(3). Rather, the Constitution links the Governor's obligation to proclaim a referendum election entirely to when the measure is "proposed to the Legislature":

> The Governor shall, by proclamation, order any measure **proposed to the Legislature as herein provided**, and not enacted by the Legislature without change, referred to the people at an election to be held in November of the year in which the petition is filed.

Id. (emphasis added).

That is not all that § 18(3) provides. It also includes a safeguard implemented after the Law Court's holding that it lacked the power to compel the Governor to proclaim a referendum election. *See Kelly v. Curtis*, 287 A.2d 426, 427 (Me. 1972); Con. Res. 1975, ch. 2. And that safeguard—requiring the Secretary to issue a proclamation by a date certain if the Governor fails to do so—is directly tied to when the measure is "proposed to the Legislature":

> If the Governor fails to order a measure **proposed to the Legislature** and not enacted without change to be submitted to the people at such an election by proclamation **within 10 days after the recess of the Legislature to which the measure was proposed**, the Secretary of State shall [issue the proclamation instead].

Me. Const. art. IV, pt. 3, § 18(3) (emphasis added). The Constitution defines "recess of the Legislature," as used in this subsection, to mean the "the adjournment without

day of a session of the Legislature." Me. Const. art. IV, pt. 3, § 20.

This provision confirms two things: first, that, again, the "proposing" is something done *to* the Legislature—*i.e.*, by the initiative petitioners through the Secretary of State—not something that happens internally within the Legislature; and, second, that the Governor's obligation to proclaim an election is triggered by the recessing of the legislative session that received that "proposal." In other words, this provision requires the Governor (and, if the Governor fails to do so, the Secretary of State) to determine the session to which initiative petitioners "proposed" their initiated measure, and issue the election proclamation within 10 days of when that particular legislative session adjourns without day.

The latest plausible date upon which initiative petitioners can be said to "propose" an initiated measure to the Legislature is the date upon which the Secretary of State transmits the petition to the Legislature. One need go no further than the plain language of the Constitution itself, which—twice—describes a petition filed with the Secretary as a measure "thus proposed." Me. Const. art. IV, pt. 3, § 18(2).

Such a reading of § 18(3) is also most consistent with the canon that the people's right to legislate must be liberally construed, *see Wagner v. Sec'y of State*, 663 A.2d 564, 566 (Me. 1995), as well as the specific purposes of § 18(3). As noted above, the provision requiring the Secretary of State to proclaim the election if the Governor fails to do so was a reaction to the Law Court's determination in *Kelly v. Curtis* that, despite the then-Governor's failure to timely proclaim an election for a direct

initiative, the judiciary was powerless to compel him to do so.[1] *See Report of the Judiciary Committee on the Initiative and Referendum Process* at 21, dated Dec. 2, 1974 ("1974 Referendum Report").[2] The purpose of § 18(3) is to ensure that such a scenario never happens again: that initiated measures submitted to the Legislature are referred to the voters—promptly—if the Legislature fails to enact them. *Id.*

The problem with any reading of § 18(3) that would link the Governor's obligation to proclaim an election to the occurrence of internal legislative processes (such as printing of legislative documents or holding of hearings) is that it would weaken this important safeguard ensuring prompt presentation of initiated measures to the voters. In this matter, there is no doubt that the Legislature is acting out of a

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[1] Some historical background on the controversy highlights the risk of a process that is open to manipulation. The initiative at issue in *Kelly*, promoted by Robert Monks, a prospective Republican candidate for U.S. Senate, sought to repeal the "big box" ballot option, which allowed Maine voters to check a single box to vote a straight party ticket. Monks believed that the "big box" would give a boost to down-ballot Democrats in the 1972 general election because the likely Democratic presidential nominee was former Maine Governor and then-current U.S. Senator, Edmund Muskie. *See generally* Matthew C. Moen et al., *Changing Members: The Maine Legislature in the Era of Term Limits* at 30 (2005) ("*Changing Members*").

At the time, the Constitution directed the Governor, if requested by petitioners, to proclaim a special election on the initiated measure to occur between four and six months of the date of the proclamation. *Kelly*, 287 A.2d at 427–28. But the Constitution did not say when the proclamation must issue. *Id.* So when the regular session of the Legislature adjourned in June 1971 having failed to enact the "big box" measure without change, the Governor, a Democrat, simply did not issue a proclamation. *Changing Members* at 30; *Kelly*, 287 A.2d at 427. After the Governor was sued in early 1972, he stated in interrogatory responses that he intended to time the proclamation so that the referendum could coincide with the 1972 presidential election. *Kelly*, 287 A.2d at 428. This lengthy delay would have ensured, contrary to Monks's intent, that any repeal of the "big box" option would not become effective until after the election. Following the Court's decision in *Kelly*, the Governor abandoned his plan and issued a proclamation setting the election for the June 1972 primary instead, where the measure was approved by 63 percent of voters. *Changing Members* at 30.

[2] *Available at* http://lldc.mainelegislature.org/Open/Rpts/kf4881_z99m22_1974.pdf (last visited May 26, 2023).

good-faith desire to substantively consider the initiated measures. But the Justices, in construing the constitutional language, must ensure that the electors' right to directly legislate is also protected in scenarios like the one in *Kelly*, in which elected officials use the powers available to them to manipulate the initiative process. Any interpretation of "proposed to the Legislature" that allows elected officials, rather than the petitioners, to determine when a measure is "proposed" opens the door to potential manipulation of the referendum process.

For example, if the "propos[al]" of an initiated measure occurs by printing the measure as a legislative document, what happens if legislative leadership—perhaps deeply opposed to the initiated bill—delays or forbids printing of the bill? Surely legislative leadership could not delay indefinitely the Governor's obligation to proclaim the election. Even if the Governor ultimately proclaims an election for the same year in which the petition is filed, as required by § 18(3), a lengthy period of uncertainty as to whether the measure will appear on the ballot could interfere with ability of initiative proponents to effectively campaign for the measure.

Take another example. In this case, the Governor promptly called a special session of the Legislature upon adjournment of the regular session on March 30, 2023. But the Governor has no obligation to call a special session at all, let alone immediately following the adjournment of a regular session. Me. Const. art. V, pt. 1, § 13. And the Legislature itself can only call a special session if majorities of legislators from each party agree. Me. Const. art. IV, pt. 3, § 1. What if a future

Governor, backed by a bare majority of his or her co-partisans in the Legislature, and faced with the same scenario at issue here, declined to call a special session? Such a scenario should not allow the Governor to decline to proclaim the election until the adjournment of the *next* regular session of the Legislature, a full year later.

Under an interpretation of "proposed to the Legislature" that turns on whether internal legislative processes have occurred, the constitutional text, at best, provides no clear answers to these questions. The Justices should be mindful of the Law Court's admonition that "[n]either by action nor by inaction can the legislature interfere with the submission of measures as so provided by the constitution." *Farris ex rel. Dorsky v. Goss*, 60 A.2d 908, 911 (1948). To avoid opening the door to such possible manipulation, the Justices should interpret § 18(3) to require the Governor to proclaim an election following the adjournment of legislative session that receives the Secretary's transmission of the initiated measure and fails to enact it.

B. A Measure Is "Presented" When It Is "Proposed"

Question 1 asks whether the measures were "presented" under § 18(2), not whether they were "proposed to the Legislature" under § 18(3). But a harmonious construction of these two subsections requires concluding that an initiative is necessarily "presented" in the same session to which it is "proposed."

This construction follows from the fact that both provisions describe the same process. Both § 18(2) and § 18(3) mandate that a measure proposed by petitioners be referred to the voters unless the Legislature enacts the measure without change in a

specified session. Section 18(2) sets forth the mandate generally, providing for submission of the measure to electors unless the Legislature enacts it "at the session" in which it is presented. Section 18(3), responding to the *Kelly* decision, provides a specific timetable for carrying out § 18(2)'s mandate: 10 days after "the adjournment without day of [the] session of the Legislature" to which the measure was "proposed." Me. Const. art. IV, pt. 3, §§ 18(3), 20. Because § 18(3) merely supplies the mechanics for the general duty imposed by § 18(2) to submit measures to voters unless enacted without change in a particular session, the legislative "session" indirectly referenced in § 18(3), *see id.* § 20, must be the same "session" referenced in § 18(2).

That singular "session" can only be the one that receives the Secretary's transmission of the initiative. As shown in the previous section, there is no other viable interpretation of *proposed to the Legislature* as used in § 18(3). In contrast, while *presented*, read in a vacuum, could conceivably refer to completion of internal legislative processes such as bill printing, it can also reasonably be interpreted to refer to the Secretary's act of formally transmitting the measures to the Legislature on behalf of the petitioners. Because the latter interpretation is the only one that harmonizes § 18(2) with § 18(3), it should prevail over any interpretation that would allow "present[ment]" of an initiative to occur in a different legislative session than the one to which the initiative is "proposed."

Indeed, legislative history demonstrates that transmission of the measure by the Secretary is not just a plausible interpretation of when a measure is "presented," but

the interpretation the framers intended. The original § 18 provided for two ways for petitioners to "propose" a measure to the Legislature. They could do so in the current manner—by petition "filed in the office of the Secretary of State." Me. Const. art. IV, pt. 3, § 18(1). But they also had an option not available to current petitioners. Under the original § 18, initiators could propose an initiative by petition "*presented to* either branch of the legislature at least thirty days before the close of its session." Res. 1907, ch. 121 (emphasis added). Following that language was the current language providing that a measure "thus proposed" must be submitted to voters "unless enacted without change by the legislature at the session at which it is presented." *Id.*

Though a 1975 constitutional amendment removed the right of petitioners to "present" petitions directly to the Legislature, *see* Con. Res. 1975, ch. 2, the repealed language nonetheless illuminates what the framers meant by "present[ing]" a measure. The original § 18 expressly equated "present[ing]" a measure to "propos[ing]" a measure, referring to a measure "presented to" the Legislature as a measure "thus proposed." Res. 1907, ch. 121. And it makes clear that transmission to the Legislature is the key act: just as it is the petitioners who do the "proposing" under § 18(3), it is the petitioners who do the "presenting" under § 18(2). The "session at which [the measure] is presented" is thus the session at which *the petitioners* presented the measure, either via filing with Secretary of State or (prior to 1975) by transmitting the petition directly to the Legislature.

The Law Court has recognized in dicta that presentation occurs when the

Secretary transmits a measure to the Legislature. In *Avangrid Networks, Inc. v. Secretary of State*, the Court described the Secretary's act of transmitting the direct initiative at issue to the Legislature in this way: "the Secretary *presented* the proposed initiative to the Legislature in a communication dated March 16, 2020." *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 6, 237 A.3d 882 (emphasis added). The Court followed that statement with a citation to article IV, part third, § 18(2), *see id.*, eliminating any doubt that it was using *presented* in its constitutional sense.

Finally, nothing in the text or structure of the Constitution suggests that the framers intended to entrust the critical task of "presenting" an initiated measure to the Legislature's bill-printing office. It is far more plausible that the framers intended to assign this task to the Secretary, a constitutional officer tasked with numerous other election-related duties.

C. The Constitution Contemplates Consideration of Initiated Measures in Regular Sessions.

In addition to the Constitution's plain text, constitutional structure, caselaw, legislative history, and past practice support a "Yes" answer to Question 1. Specifically, those sources strongly indicate that the Legislature is meant to consider initiated measures in regular sessions. These authorities further support a "Yes" answer to Question 1.

The framers' intent that measures be presented in regular session is apparent from the constitutional deadlines for petitioners to file petitions with the Secretary.

Under § 18(1), petitioners must file those petitions by the 50th day after convening of the "first regular session" (which convenes on the first Wednesday in December after the general election), or the 25th day after the convening of the "second regular session" (which convenes on the first Tuesday in January in the subsequent year). As a practical matter, these deadlines result in petitions being transmitted to the Legislature by February or March of any given year, months during which a regular session of the Legislature is invariably in session. These deadlines are plainly aimed at ensuring that the petitions are presented to the Legislature at one of its regular sessions.

Legislative history confirms the framers' intent. The original version of § 18 provided that the petition must be filed or presented "at least 30 days before the close of its session." Res. 1907, ch. 121. But in 1949 the deadline was amended to tie it specifically to a "regular" session of the Legislature, changing the deadline to "45 days after the date of the convening of the legislature in regular session." Res. 1949, ch. 61.

Then, in 1975, the Legislature tasked the Judiciary Committee with studying the direct initiative process and proposing reforms to the process. The Judiciary Committee's report considered and rejected amending the Constitution "to allow filing [of a direct initiative petition] at a special session as well." 1974 Referendum Report at 16–17. As a result, the package of amendments proposed by the Commission and ultimately ratified in modified form did not include any provision allowing for presentment of an initiative in special session. Con. Res. 1975, ch. 2.

This legislative history confirms the framers' intent that presentment occur in regular session of the Legislature.

Both a decision of the Law Court and an Opinion of the Justices also confirm that initiative petitions should be considered in regular sessions. In *Allen v. Quinn*, 459 A.2d 1098 (Me. 1983), the Court considered whether a direct initiative petition filed with the Secretary after the adjournment of the second regular session but before the gubernatorial election in the same year should be deemed filed when submitted to the Secretary or on the first day of the next regular session of the Legislature. *Id.* at 1100. The question mattered because a petition deemed filed after the gubernatorial election would be subject to a higher signature threshold, established by the number of votes cast in that election.

In concluding that the petition should be deemed filed when submitted to the Secretary, the Court specifically addressed presentment of an initiative to the Legislature. The plaintiff argued that the petition could not be deemed filed when submitted because petitioners had addressed it to the 111th Legislature, which did not convene until after the gubernatorial election. *Id.* at 1101. The Court rejected this argument:

> The answer to that argument lies in the fact that **only a regular session of the legislature can be required to consider a measure proposed by an initiative petition**. [The petitioner] had no choice; its petition had to be directed to the legislature that was next to be in regular session.

Id. (emphasis added). *Allen* thus confirms what is apparent from the constitutional text: that the framers intended for initiative petitions to be presented to and considered at regular sessions of the Legislature, not special sessions.

A 1971 Opinion of the Justices also indicates that the Constitution contemplates presentment in regular sessions. There the Justices were asked to interpret the sentence in § 18(2) providing that the "Legislature may order a special election on any measure that is subject to a vote of the people." In the course of giving this provision a narrow construction, the Justices observed that

> under our present system of biennial regular Legislature sessions, **and with initiative petitions being presentable only at a regular session**, it will usually happen that the next regular election after the recess of the Legislature would occur as long as fifteen to eighteen months after recess.

Opinion of the Justices, 275 A.2d 800, 804 n.2 (Me. 1971) (emphasis added). The Justices' use of the term "presentable"—a form of the very term from § 18(2) at issue here—is notable. Also notable is that the Justices used that term in the context of a discussion of §18(3), suggesting that the Justices saw no distinction between when an initiative was "presentable" and when it was "propos[able]."

Finally, legislative history shows that the lengthy delay that occurred in this case between transmittal of the initiatives by the Secretary and printing of the bills—54 days for two of the four measures and 28 and 35 days respectively for the other two—was an aberration. In the vast majority of cases, the Legislature has deemed the

measures "transmitted" and then printed them as legislative documents immediately or shortly after receiving the Secretary of State's letter. *See* Appendix. This past practice suggests that the Legislature has typically viewed itself as obligated to consider initiated bills promptly, and before the adjournment of the regular session.

In short, constitutional text and structure, legislative history and practice, and caselaw all point to a "Yes" answer to Question 1.

III. The Justices Should Answer Questions 2 through 5 to Avoid Absurd Results

The remaining questions ask, if the answer to Question 1 is "yes," whether the Legislature can still enact the measure and, if it can, what the consequences would be if it did so. Specifically, Questions 2 and 3 ask whether the Legislature has the authority to enact the measure without change in the wrong session, and, assuming enactment is possible, Questions 4 and 5 ask about the consequences of doing so. Questions 2 and 3, considered on their own, pose difficult questions with no clear answers. Because Questions 4 and 5 have possible answers that would produce consequences absurd and inimical to the people's right to directly initiate legislation, the imperative to avoid those results may dictate the answers to Questions 2 and 3. We therefore address Questions 4 and 5 first.

A. The Constitution Should Not Be Interpreted to Allow a Vote on "Competing" Measures that Are Identical.

Question 5 asks whether—assuming the Legislature could validly enact an initiated measure in a session subsequent to the one in which the initiative was

"presented"—the enacted measure would become "a competing measure to an identical measure placed on the ballot by proclamation of the Governor on April 7, 2023." The Justices should answer this question "no." Moreover, if they conclude that the only possible answer is "yes," they should answer Question 2 or 3 to conclude that the Legislature cannot enact initiated measures outside the session in which they were presented, thus mooting Question 5.

Question 5 refers to the requirement in § 18(2) that a measure not "enacted without change by the Legislature at the session at which it is presented" must be referred to the voters "together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both." Me. Const. art. IV, pt. 3, § 18(2). Under this provision, any legislative enactment qualifying as an "amended form" or a "substitute" of the initiated measure does not go into effect but must instead be placed on the ballot together with the initiated measure. An Opinion of the Justices confirms that the Legislature may enact competing measures at any time prior to the election. *See Opinion of the Justices,* 680 A.2d 444, 448 (Me. 1996).

In *Farris ex rel. Dorsky v. Goss*, 60 A.2d 908 (1948), the Law Court defined a "substitute" measure as one that "deals broadly with the same general subject matter, particularly if it deals with it in a manner inconsistent with the initiated measure so that the two cannot stand together." *Id.* at 911. That decision held that a bill that was "in essential respects" inconsistent with an initiated bill was a "substitute" that must

be placed on the ballot as a competing measure, even though the Legislature did not intend it as a substitute measure. *Id.* at 912; *see McCaffrey v. Gartley,* 377 A.2d 1367, 1371 (Me. 1977).

The *Farris* test makes clear that an exact replica of the initiated measure, enacted in the wrong legislative session, cannot be considered a "substitute" for the initiated measure that must be presented to the voters as a competing measure. Such a bill would not be "inconsistent" with the initiated measure; to the contrary, as an exact duplicate it would be consistent in every respect.

Similarly, though the Law Court has never had occasion to interpret "amended form," the term *amended* plainly requires some alteration of the original initiated bill. An exact copy of the initiated measure would not meet this requirement.

Even if this textual analysis is unpersuasive, the Justices should avoid interpreting the Constitution to allow submission to voters of two identical measures as "competing" measures. The courts interpret the Constitution using the same principles that apply to statutory interpretation. *Payne v. Sec'y of State*, 2020 ME 110, ¶ 17, 237 A.3d 870. One such principle is that absurd or illogical results should be avoided. *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104. Treating an exact replica of an initiated bill as a competing measure would produce such results.

The mechanics of competing measures demonstrate why. The Constitution requires placement of both the initiated bill and any competing measure on the ballot in a manner "so that the people could choose between them or reject both."

McCaffrey, 377 A.2d at 1371. In other words, voters can pick one of the competing measures or none; they cannot vote for both. If one of the competing measures gets an outright majority of votes cast, then it is approved and becomes law. Me. Const. art. IV, pt. 3, § 18(2). If not, then two things can happen. If neither measure gets at least one-third of the total votes cast, both measures fail. *Id.* Otherwise, the measure receiving the plurality of votes is voted on again, by itself, in the next general election. *Id.*

If an exact replica of an initiated bill can be a competing measure, initiative supporters would have no reason to vote for one measure over the other. They would likely split their vote between the two. As a result, a measure supported by a majority of voters could fail to receive a majority of votes. The voters would have to re-vote on the same measure in the next general election or—even more absurdly—the measure could fail completely despite receiving a majority of votes.

Such an electoral outcome would make no sense. It would significantly undermine the rule that § 18 must be "liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *Wagner*, 663 A.2d at 566 (quoting *Allen*, 459 A.2d at 1102–03). Because any such result would violate the absurdity canon, the relevant constitutional provisions should be interpreted—one way or another—to avoid it.

B. The Constitution Should Not Be Interpreted to Allow a Referendum on an Already Enacted Measure

Question 4 asks a different question about the consequences of the Legislature enacting a measure in the wrong session, assuming it has authority to do so. It asks, in effect, whether enactment of the measure without change in the special session would cancel the November vote on the initiated measure already proclaimed by the Governor. To avoid another absurd result, either the answer to this question must be "yes," or the Legislature must lack the authority to enact the measures.

Answering Question 4 to require a validly enacted measure to go to voters would, at best, be a pointless and confusing exercise, and, at worst, flip the initiative process on its head. Such a vote would seem to be entirely meaningless: if voters approved the measure, it would repeal and replace its exact copy, already enacted by the Legislature; if the voters did not approve the measure, the identical Legislature-enacted measure would remain in effect. Either way, nothing would change. Voters would be justifiably confused and possibly incensed as to why they were being asked to vote on a meaningless ballot question.

The only way to give the referendum vote meaning would be to treat failure of the measure at referendum as a repeal of the Legislature-enacted measure. But this result would be even more absurd. The referendum process is meant to give petitioners two chances to enact the proposed measure: through the Legislature or, failing that, by referendum vote. If a "No" vote at referendum could repeal a measure

validly enacted without change by the Legislature, the referendum would be converted from an additional chance to enact the petitioned-for measure into an opportunity for opponents of the measure to veto it by popular vote. Such a construction should be rejected as "handicap[ping]" rather than "facilitat[ing]" the people's exercise of their power to legislate. *Wagner*, 663 A.2d at 566.

IV. If Absurd Results Can Be Avoided, Questions 2 and 3 Should Be Answered to Authorize Enactment of a Measure Without Change in the Special Session.

Questions 2 and 3 ask whether the Legislature had the authority to carry over the initiated measures to the special session and, if so, whether it can enact them in that session without change. If the Justices agree with the argument in Part I that the four initiated measures were "presented" in the First Regular Session, and further agree with the argument in Part II that under no circumstances may the Constitution be interpreted to require a referendum vote on either two identical "competing" measures or a single measure that is already law, there are two plausible answers to Questions 2 and 3 collectively. First, the Constitution could be interpreted to forbid the Legislature from enacting an initiated measure without change in the special session. Second, the Constitution could be interpreted to allow the Governor's proclamation of an election to be negated by the enactment without change of a measure in the special session. Although the former interpretation would be a permissible reading of the constitutional text, the latter interpretation would more expansively protect the people's right to legislate under § 18.

The more restrictive interpretation of the Constitution—that the Legislature misses its chance to enact the measure without change if it fails to do so in the session in which the measure was "presented"—results from a plausible facial reading of § 18(2). The constitutional language refers to "*the* session"—a singular session—in which the measure may be enacted without change to avoid a referral to voters. That language could be read to imply that the converse is also true: that a failure to enact the measure in "the" applicable session terminates the Legislature's ability to do so, at least until after the election. Thus, the Constitution could be read to render any enactment without change of the measure in a special session occurring between the regular session and the election as having no effect.

But while this restrictive interpretation may be supported by the constitutional text, the more forgiving interpretation also has textual support. Specifically, the language of § 18(2) referenced in Question 4 potentially allows a broader understanding of the Legislature's authority:

> If the measure initiated is enacted by the Legislature without change, it shall not go to a referendum vote unless in pursuance of a demand made in accordance with the preceding section [i.e., a people's veto petition].

Me. Const. art. IV, pt. 3, § 2. This language can be read to support the Legislature's authority to enact a measure without change beyond the session in which the measure is presented. Specifically, because it does not contain any reference to enacting a measure without change in a particular "session," it could be read as a kind of

"override" provision, negating the referendum requirement if at any point the measure is enacted without change. Under this reading, the Governor's election proclamations, though validly and properly issued at the time, would be negated by this provision in the event of subsequent enactment without change of the measure.

To be sure, such a broad reading of this language is in tension with the language in § 18(2) providing that a measure "shall" go to the voters "unless" it is enacted without change in a particular session. Me. Const. art. IV, pt. 3, § 18(2). Moreover, the language cited by Question 4 could also be read as simply clarifying that initiated measures can be subjected to a people's veto referendum.

Nevertheless, assuming the Justices can avoid the absurd results described in Part III above, they should adopt the broader reading of § 18(2) as allowing for enactment without change of the measure at any time before the referendum election. As already noted, § 18 must be liberally construed to facilitate the people's right to legislate. A reading of § 18(2) that maximizes the timeframe in which Legislature can enact initiated measures without change best furthers the people's right to legislate by allowing petitioners to continue to pursue enactment by the Legislature even as they prepare for the referendum election. Moreover, by reading the "shall not go to a referendum vote" language to nullify the Governor's proclamations, the Justices would avoid the absurd referenda warned of in Part III. The Attorney General has not identified any significant countervailing policy concerns if the Legislature's

window to enact a measure without change is expanded.[3]

When this broad reading is combined with the strict reading of "presented" and "proposed" set forth in Part I, the result is a cohesive interpretation of § 18 that provides maximal protection to the initiators of legislation. Specifically, the petitioners would be assured of a timely proclamation of election by the Governor, with no ability by elected officials to manipulate the timing of the proclamation or the referendum election. At the same time, the petitioners could continue to urge the Legislature to enact the measure, potentially avoiding the need for a costly and uncertain election campaign. All the while, the petitioners would remain assured that their right to a popular vote is guaranteed if their efforts to persuade the Legislature are unsuccessful.

Conclusion

The Attorney General urges the Justices to answer Question 1 "Yes," Question 2 "No," Question 3 "Yes," and Question 4 "Yes." If the Justices would answer Question 4 "No," then they should instead answer Question 2 "Yes" or Question 3 "No" to moot Questions 4 and 5.

[3] The one possible drawback of such an interpretation is that it could, in unusual circumstances, result in the removal of a question from the ballot after ballots have been printed and can no longer be changed. In such circumstances, the Secretary of State would presumably follow the same procedures used when a candidate dies or withdraws after the ballots are set—i.e., post signs indicating the change.

. Respectfully submitted,

May 26, 2023

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APPENDIX

Time Elapsed Between Secretary of State Letter Transmitting Initiated Bills and Bill Printing (1983–2023)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
111th	1st Reg	743	1	Repeal the Law Providing Open Season on Moose	2/14/1983	2/14/1983	0	2/14/1983	0	1 Legis. Rec. 159 (1983)
112th	1st Reg	615	1	Require Voter Approval of the Disposal of Low-Level Radioactive Waste	2/19/1985	2/20/1985	1	2/19/1985	0	1 Legis. Rec. 173 (1985)
112th	2nd Reg	2092	2	Prohibit the Promotion and Wholesale Promotion of Pornographic Material in the State of Maine	2/28/1986	2/28/1986	0	2/27/1986	-1	1 Legis. Rec. 426-27 (1986)
112th	2nd Reg	2093	3	Prohibit Mandatory Local Measured Service and Preserve Affordable Traditional Flat Rate Local Telephone Service at as Low a Cost as Possible	2/28/1986	2/28/1986	0	2/27/1986	-1	1 Legis. Rec. 427 (1986)
113th	1st Reg	20	1	Regarding the Generation of Electric Power and High-Level Radioactive Waste	1/13/1987	1/15/1987	2	1/13/1987	0	1 Legis. Rec. 65 (1987)
114th	1st Reg	255	1	Regarding Testing of Cruise Missiles in Maine	2/15/1989	2/16/1989	1	2/15/1989	0	1 Legis. Rec. 176 (1989)
114th	1st Reg	256	2	Limit Spending and Contributions in Campaigns for Governor	2/15/1989	2/16/1989	1	2/15/1989	0	1 Legis. Rec. 176 (1989)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
114th	2nd Reg	2371	3	Amend the Sunday Sales Law	2/23/1990	2/27/1990	4	2/23/1990	0	IV Legis. Rec. 295 (1990)
115th	1st Reg	719	1	Deauthorize the Widening of the ME Turnpike…	2/15/1991	2/20/1991	5	2/19/1991	4	1 Legis. Rec. H-233 (1st Reg Sess. 1991)
116th	1st Reg	751	1	Impose Term Limits on Legislators…	2/12/1993	3/2/1993	18	2/12/1993	0	1 Legis. Rec. H-214-15 (1st Reg. Sess. 1993)
117th	1st Reg	310	1	Limit Protected Classes Under Maine Law	1/26/1995	1/31/1995	5	1/26/1995	0	1 Legis. Rec. H-106 (1st Reg. Sess. 1995)
117th	1st Reg	716	2	Repeal the Motor Vehicle Emission Inspection Pro	2/27/1995	3/2/1995	3	2/27/1995	0	1 Legis. Rec. H-179 (1st Reg. Sess. 1995)
117th	1st Reg	717	3	Establish the Maine Outdoor Heritage Fund	2/27/1995	3/2/1995	3	2/27/1995	0	1 Legis. Rec. H-179-80 (1st Reg. Sess. 1995)
117th	2nd Reg	1819	4	Promote Forest Rehab. And Eliminate Clearcutting	2/22/1996	3/5/1996	12	2/22/1996	0	VI Legis Rec. H-1652–53 (2nd Reg. Sess. 1996)
117th	2nd Reg	1823	5	Reform Campaign Finance	2/22/1996	3/5/1996	12	2/22/1996	0	VI Legis Rec. H-1653 (2nd Reg. Sess 1996)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
117th	2nd Reg	1827	6	Seek Congressional Term Limits	2/27/1996	3/6/1996	8	2/27/1996	0	VI Legis Rec. H-1662 (2nd Reg. Sess 1996)
118th	1st Reg	1017	1	Protect Traditional Marriage and Prohibit Same Sex Marriages	2/7/1997	2/11/1997	4	2/7/1997	0	1 Legis. Rec. H-118 (1st Reg. Sess. 1997)
119th	1st Reg	1593	1	Ban Partial Birth Abortion	2/22/1999	3/2/1999	8	2/22/1999	0	1 Legis. Rec. H-244 (1st Reg. Sess. 1999)
119th	1st Reg	2109	2	Permit the Medical Use of Marijuana	3/18/1999	3/30/1999	12	3/18/1999	0	1 Legis. Rec. H-449-50 (1st Reg. Sess. 1999)
119th	2nd Reg	2348	3	Death with Dignity	11/23/1999	1/5/2000	43	11/23/1999	0	2 Legis. Rec. H-1713 (2nd Reg. Sess. 2000)
119th	2nd Reg	2349	4	Allow Video Lottery Terminals	11/16/1999	1/5/2000	50	11/16/1999	0	2 Legis. Rec. H-1713-14 (2nd Reg. Sess. 2000)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
119th	2nd Reg	2594	5	Regarding Forest Practices	2/28/2000	2/29/2000	1	2/28/2000	0	2 Legis. Rec. H-1863 (2nd Reg. Session 2000)
119th	2nd Reg	2602	6	Repeal sales tax on snack food	3/1/2000	3/3/2000	2	3/1/2000	0	2 Legis. Rec. H-1877 (2nd Reg. Session 2000)
121st	1st Reg	1370	1	Enact the Maine Tribal Gaming Act	2/26/2003	3/18/2003	20	2/26/2003	0	1 Legis. Rec. H-245 (1st Reg. Sess. (2003)
121st	1st Reg	1371	2	Allow Slot Machines at Commercial Horse Racing Tracks	2/26/2003	3/18/2003	20	2/26/2003	0	1 Legis. Rec. H-245-46 (1st Reg. Sess. (2003)
121st	1st Reg	1372	3	Enact the School Finance and Tax Reform Act of 2003	2/19/2003	3/18/2003	27	2/19/2003	0	1 Legis. Rec. H-246 (1st Reg. Sess. (2003)
121st	2nd Special	1893	4	Impose Limits on Real and Personal Property Taxes	2/9/2004	3/1/2004	21	2/26/2004	17	2 Legis. Rec. H-1278 (2nd Spec. Sess. 2004)
121st	2nd Special	1938	5	Prohibiting Certain Bear Hunting Practices	3/4/2004	3/18/2004	14	3/17/2004	13	2 Legis. Rec. H-1373 (2nd Spec. Sess. 2004)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
122nd	2nd Reg	2075	1	Create the Taxpayer Bill of Rights	Communication was not printed in the Record on reference of IB	3/16/2006	?	3/15/2006	?	2 Legis. Rec. H-1287 (2nd Reg. Sess. 2006)
123rd	1st Reg	805	1	Tribal Commercial Track and Slot Machines in Washington County	2/6/2007	2/16/2007	10	2/15/2007	9	1 Legis. Rec. H-150-51 (1st Reg. Sess. 2007)
123rd	1st Reg	1856	2	Allow a Tax Credit for College Loan Repayments	3/13/2007	4/12/2007	30	4/11/2007	29	1 Legis. Rec. H-366 (1st Reg. Sess. 2007)
123rd	2nd Reg	2261	3	An Act To Allow a Casino in Oxford County	3/10/2008	3/17/2008	7	3/14/2008	4	2 Legis. Rec. H-1209 (2nd Reg. Sess. 2008)
124th	1st Reg	974	1	Decrease the Automobile Excise Tax and Promote Energy Efficiency	3/4/2009	3/10/2009	6	3/4/2009	0	1 Legis. Rec. H-151 (1st Reg. Sess. 2009)
124th	1st Reg	975	2	Establish the Maine Medical Marijuana Act	3/4/2009	3/10/2009	6	3/4/2009	0	1 Legis. Rec. H-152 (1st Reg. Sess. 2009)
124th	1st Reg	976	3	Provide Tax Relief	3/4/2009	3/10/2009	6	3/4/2009	0	1 Legis. Rec. H-152 (1st Reg. Sess. 2009)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
124th	1st Reg	977	4	Repeal the School District Consolidation Laws	3/4/2009	3/10/2009	6	3/4/2009	0	1 Legis. Rec. H-152-53 (1st Reg. Sess. 2008)
124th	2nd Reg	1808	5	Allow a Casino in Oxford County	2/25/2010	3/4/2010	7	2/25/2010	0	2 Legis. Rec. H-1110 (2nd Reg. Sess. 2010)
125th	1st Reg	985	1	Act Regarding Establishing a Slot Machine Facility	2/17/2011	3/8/2011	19	3/7/2011	18	1 Legis. Rec. H-150 (1st Reg. Sess. 2011)
125th	1st Reg	1203	2	Washington County Tribal Racino	3/7/2011	3/21/2011	14	3/17/2011	10	1 Legis. Rec. H-200 (1st Reg. Sess. 2011)
125th	2nd Reg	1860	3	Allow Marriage Licenses for Same Sex Couples and Protect Religious Freedom	3/6/2012	3/12/2012	6	3/8/2012	2	Legis. Rec. H-1235 (2nd Reg. Sess. 2012)
126th	2nd Reg	1845	1	Prohibit Use of Dogs, Bait or Traps when Hunting Bear	3/18/2014	3/25/2014	7	3/18/2014	0	Legis. Rec. H-1667-68 (2nd Reg. Sess. 2014)
127th	1st Reg	806	1	Strengthen MCEA	3/2/2015	3/10/2015	8	3/6/2015	4	Legis. Rec. H-148–49 (1st Reg. Sess. 2015)
127th	2nd Reg	1557	2	Est. Ranked-choice voting	1/7/2016	1/14/2016	7	1/12/2016	5	Legis. Rec. H-1214 (2nd Reg. Sess. 2016)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
127th	2nd Reg	1662	5	Require Background Checks for Gun Sales	3/15/2016	3/17/2016	2	3/15/2016	0	Legis. Rec. H-1397 (2nd Reg. Sess. 2016)
127th	2nd Reg	1661	4	Raise the Min Wage	3/15/2016	3/17/2016	2	3/15/2016	0	Legis. Rec. H-1390-91 (2nd Reg. Sess. 2016)
127th	2nd Reg	1660	3	Establish the Fund to Advance K-12 Education	3/15/2016	3/17/2016	2	3/15/2016	0	Legis. Rec. H-1390 (2nd Reg. Sess. 2016)
127th	2nd Reg	1701	6	Legalize Marijuana	4/27/2016	4/29/2016	2	4/27/2016	0	Legis. Rec. H-1731 (2nd Reg. Sess. 2016)
128th	1st Reg	719	1	Allow Slots or Casino in York Co	2/6/2017	2/28/2017	22	2/24/2017	18	Legis. Rec. H-146 (1st Reg. Sess. 2017)
128th	1st Reg	1039	2	Enhance Access to Aff. Health Care	3/7/2017	3/14/2017	7	3/13/2017	6	Legis. Rec. H-207 (1st Reg. Sess. 2017)
128th	2nd Reg	1864	3	Establish Universal Home Care for Seniors…	3/5/2018	3/13/2018	8	3/12/2018	7	Legis. Rec. H-1371 (2nd Reg. Sess. 2018)
129th	2nd Reg	2164	1	Reject NECEC Transmission Project	3/16/2020	3/17/2020	1	3/17/2020	1	Legis. Rec. H-1343–44 (2nd Reg. Sess. 2020)

Legis.	Session	LD	IB	Title	Date of Letter from SoS to House Clerk certifying results	Date LD Printed	Days Elapsed	Date "Transmitted" as printed on title page of LD	Days elapsed (from SoS letter)	Legislative Record Citation
130th	1st Reg	1295	1	Require Leg. Approval of Certain Transmission Lines…	3/11/2021	3/30/2021	19	3/11/2021	0	Legis. Rec. H-159–60 (1st Reg. Sess. 2021)
131st	1st Spec	1610	1	Prohibit Campaign Spending by Foreign Govts…	2/16/2023	4/11/2023	54	4/10/2023	53	NA
131st	1st Spec	1611	2	Create the Pine Tree Power Co.	2/16/2023	4/11/2023	54	4/10/2023	53	NA
131st	1st Spec	1677	3	Regarding Automotive Right to Repair	3/21/2023	4/18/2023	28	4/13/2023	23	NA
131st	1st Spec	1772	4	Require Voter Approval of Certain Borrowing by Govt Controlled Entities…	3/21/2023	4/25/2023	35	4/21/2023	31	NA

CERTIFICATE OF SERVICE

As of the time of filing, no parties are listed on the Court's webpage as having appeared in this matter. I, Jonathan R. Bolton, hereby certify that I have provided electronic copies of the above Brief of the Attorney General to the following individuals:

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