AARON M FREY
ATTORNEY GENERAL

TEL (207) 626-8800
TTY USERS CALL MAINE RELAY 711

STATE OF MAINE
OFFICE OF THE ATTORNEY GENERAL
6 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0006

REGIONAL OFFICES
84 HARLOW ST 2ND FLOOR
BANGOR, MAINE 04401
TEL (207) 941-3070
FAX (207) 941-3075

125 PRESUMPSCOT ST , SUITE 26
PORTLAND, MAINE 04103
TEL (207) 822-0260
FAX (207) 822-0259

14 ACCESS HIGHWAY, STE 1
CARIBOU, MAINE 04736
TEL (207) 496-3792
FAX (207) 496-3291

Testimony Neither For Nor Against L.D. 2004, *An Act to Restore Access to Federal Laws Beneficial to the Wabanaki Nations*

Senator Carney, Representative Moonen, and distinguished members of the Joint Standing Committee on Judiciary, I am Aaron Frey, and I have the privilege of serving as Maine's Attorney General Thank you for allowing me this opportunity to provide comments neither for nor against L D 2004, *An Act to Restore Access to Federal Laws Beneficial to the Wabanaki Nations.* As an initial matter, I want to express my appreciation to the Speaker and the Wabanaki Nations' tribal officials and legal counsel for allowing my office to review early drafts of this bill and for involving us in discussions over the last few weeks

This bill seeks to alter the effects of provisions in the federal Maine Indian Claims Settlement Act (MICSA), Pub L No 96-420 (1980), which Congress enacted in 1980 as part of an agreement reached between the State and certain Tribes in Maine to settle pending tribal land claims litigation MICSA contains two provisions limiting the application of federal Indian law in Maine Section 6(h) addresses federal laws and regulations in effect at the time of MICSA's enactment

> Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State

Pub L No 96-420, § 6(h) Section 16(b) addresses federal laws passed after MICSA was enacted on October 10, 1980

> The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision

of such subsequently enacted Federal law is specifically made applicable within the State of Maine

Pub L No 96-420, § 16(b)

Under these provisions, many (and likely most) federal laws enacted for the benefit of Indians and Indian nations and tribes currently are applicable in Maine The federal laws that do not apply in Maine are those that would affect or preempt the application of Maine's laws Even those laws, though, can be made applicable in Maine if Congress expressly says so Congress did just that when it passed the Violence Against Women Act Reauthorization Act of 2022 and explicitly stated in the statute that the power to exercise special tribal criminal jurisdiction applies to participating Tribes in Maine

L D 2004 purports to undo these two MICSA provisions and make all federal statutes and regulations, whenever enacted, applicable in Maine regardless of whether they would affect or preempt the application of Maine's own laws It does this by, in effect, repealing the application of state law in tribal territory to the extent that those laws are affected or preempted by a regulation or statute of the United States so that those state laws no longer can impede application of federal law under sections 6(h) and 16(b) of MICSA Ultimately, it is for the Legislature (and possibly Congress) to decide, in the first instance, whether this is wise policy As Attorney General, I view my role in this matter as advising the Legislature on the legal effect and potential ramifications of this bill so that the Legislature can make informed decisions

As an initial matter, the bill may not be effective at achieving its stated intent The bill proposes changes to the Maine Implementing Act, 30 M R S §§ 6201-14, the state counterpart to MICSA Congress allowed amendments to MIA in certain circumstances With respect to the Passamaquoddy Tribe and the Penobscot Nation, amendments must relate to one of the following

> (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions,
> (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation, or
> (C) the allocation of jurisdiction between tribal courts and State courts

Pub Law 96-420, § 6(e)(1) Congress thus allowed amendments to adjust jurisdictional authority between these two tribes and the State but did not allow the State and tribes to affect the application of federal law or the obligations of federal authorities In fact, the language in section 6(e)(1) of MICSA was drafted in order to ensure that any amendments to MIA would not affect the roles of federal officials

With respect to the Houlton Band of Maliseet Indians, Congress did not consent to the State making any amendments to MIA but instead only authorized the State and the Band "to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust

for the benefit of the band or its members " Pub L No 96-420, § 6(e)(1) Thus, the amendments in MIA relating to the Houlton Band might not be authorized by Congress *But see* 30 M R S § 6209-C (reflecting amendments to MIA regarding the Houlton Band)

With respect to the Mi'kmaq Nation, a separate federal act governs the relationship between the Nation and the State the Aroostook Band of Micmac Indians Settlement Act (ABMSA), Pub L No 102-171 (1991) Congress authorized the State and the Nation to "execute agreements regarding the jurisdiction of the State of Maine over lands owned by, or held in trust for the benefit of, the [Nation] or any member of the [Nation] " Pub L No 102-171, § 6(d) [1]

Should L D 2004 not be effective at affecting the application of federal law within the State, the portions of the bill repealing State law would likely still be effective which could create gaps in authority In addition, even if we were effective at making federal laws applicable, the State could not compel the federal government to act in accordance with these amendments, which likewise could create gaps in authority

Advising the Legislature on potential ramifications is particularly challenging because we do not know how many federal laws would become applicable in Maine or the extent to which they would affect or preempt the application of Maine's laws In 2019, the State of Maine Task Force on Changes to the Maine Indian Claims Settlement Implementing Act asked Suffolk University Law School's Human Rights and Indigenous Peoples Clinic to research federal laws enacted after October 10, 1980 for the benefit of Indians and Indian nations The Clinic identified 151 such laws [2] The Clinic did not research federal laws enacted before October 10, 1980, so we do not know how many such laws might exist, in addition to the 151 enacted after that date Moreover, the Clinic did not do an analysis of how many of the 151 identified laws would affect or preempt the application of Maine laws In short, if L D 2004 were enacted, we do not know the extent of the impact on the State and its laws

It is likely that at least some federal laws that would become applicable by virtue of L D 2004 would have significant impacts and cause regulatory confusion For example, in the environmental context, the Clean Water Act (CWA) has provisions authorizing the Environmental Protection Agency to treat Indian tribes as states (TAS) for purposes of adopting water quality standards Currently, because of MICSA, the TAS provisions do not apply here LD 2004 would likely change that, and Tribes in Maine would presumably become eligible for TAS status This could have significant impacts beyond tribal territories Once Tribes set water quality standards within their own territories, those standards would become enforceable under the CWA within those areas and potentially beyond tribal territory For example, dischargers upstream from new tribal water quality standards approved by EPA under the CWA would need to ensure compliance with those standards Given the ability of aquatic life to move upstream, it is also conceivable that downstream dischargers could be affected by new and approved tribal water quality standards upstream Such entities operating outside of tribal territories, which could include municipal as well as industrial dischargers, may incur significant costs to achieve compliance with these standards or may not be capable of achieving them at all It is also important to note that, unlike

[1] In addition, the State and the Nation may amend the Micmac Settlement Act, 30 M R S §§ 7201-07, for the same purpose Pub L No 102-171, § 6(d)

[2] *See* https //legislature maine gov/doc/3616

Tribes in many other parts of the country, tribal territory in Maine is widely fragmented, with tribal territorial parcels dispersed throughout the State Water quality standards promulgated for such scattered parcels could thus have a wider and more magnified extra-territorial impact than is the case for tribes elsewhere with more concentrated territories

This environmental example involving water quality standards highlights additional complications presented by this bill Because Maine already has EPA-approved jurisdiction and authority under the CWA to set water quality standards statewide, including in all tribal areas, LD 2004 could result in both the State and Tribes qualifying for TAS having authority under the CWA to set water quality standards in the same areas This would likely result in regulatory confusion, disputes, and additional litigation under the CWA

If the Legislature is concerned about the uncertainty surrounding the application of some unknown number of federal laws, other approaches could be considered For example, in the past, Tribes have identified certain federal laws that they want to make applicable in Maine If the bill were limited to specific federal laws, my office could review those laws and better inform the Legislature of the impact, if any, were they to be made applicable in Maine Further, such an approach could head off any additional potential litigation regarding whether the Tribes and the State have authority to make all federal laws applicable here, despite the provisions of MICSA

I also want to note the potential for other kinds of litigation if this bill were to pass One additional area of potential litigation is whether the Tribes and the State have the authority to make federal law applicable despite the express provisions of MICSA There may also be litigation over whether a particular state law is inapplicable because it is "affected or preempted by the operation of or the application of any statute or regulation of the United States " For example, when only one provision of a state law is affected or preempted by a federal statute or regulation, it is not clear whether the entire law would be rendered inapplicable or only the specific provision Amendments to clarify the operation of this aspect of the bill might be helpful Finally, federal regulations and statutes are adopted against a framework that presumes that States have minimal regulatory and legislative authority over Indian country—a framework that does not apply in Maine *See* Pub L No 96-40 § 6(a) (applying state law to tribal lands in Maine), 30 M R S § 6204 (same) The interplay between overlapping state and federal law is another potential source of conflict and litigation

I hope these comments are helpful and aid in your consideration of this bill