LEAGUE OF WOMEN VOTERS® OF MAINE

TO: The Honorable Craig Hickman
The Honorable Laura Supica, Co-Chairs
Members of the Joint Standing Committee on Veterans and Legal Affairs

DATE: January 17, 2024

RE: LD 1991 - An Act Regarding Gubernatorial Primary Elections

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Good morning Senator Hickman and Representative Supica.

My name is Will Hayward. I am here today as the Advocacy Program Coordinator of the League of Women Voters of Maine. I am testifying Neither For Nor Against LD 1991.

The League of Women Voters of Maine is a nonpartisan political organization that has been working for over 100 years to encourage informed and active participation in government, to increase understanding of major public policy issues, and to influence public policy through education and advocacy. We never support or oppose any political party or candidate. We have been working on and supporting Ranked Choice Voting since 2008, and we have been among the lead organizations working to pass RCV for over fifteen years. We endorse the sponsor's goal of having a majority winner in Maine state elections for legislature and governor. We have supported a Constitutional Amendment to fully implement RCV in Maine. This is clearly the will of the people.

However, we have strong reservations about the approach proposed in this bill: a nonpartisan top-two primary with RCV. While this bill would accomplish the goal of a majority winner in the general election, it brings a lot of issues. I have attached our testimony to LD 114, considered during the 129th Legislature, which lays out our primary concerns. In addition to those enumerated in our prior testimony, we would add those imposed on the office of the Secretary of State in designing and implementing a novel election method.

In consultation with litigators and constitutional experts in Maine, we have developed an alternative approach to instituting RCV in Maine general elections that we would like the committee to consider — one that could be accomplished through statute, not requiring a Constitutional Amendment; one that respects and responds to the 2017 Solemn Occasion of the Maine Supreme Court; and one that also reflects a state court decision in Alaska, in a similar case to ours, that may give our court grounds to reconsider their prior non-binding opinion.

In 2017, the Maine Supreme Judicial Court issued an advisory opinion stating that the use of ranked choice voting likely contradicted provisions in the Maine constitution requiring that elections be decided by a "plurality" of the vote. The court reasoned that according to the Constitution, the "candidate who receives a plurality of the votes would be declared the winner" after the first round of tabulations in an election contest. The League of Women Voters' brief (page 4) argued that "[t]abulation under

ranked-choice voting is a complete process and may not be conceptually severed into a series of elections. A ranked choice ballot is a single vote that consists of a set of preferences." In ruling that the first-round tabulation counts "votes," the Maine SJC opinion implicitly rejected the LWV argument that the ballot is a set of preferences.

In November, 2020, Alaska voters approved legislation creating ranked choice voting for certain offices in that state. Opponents challenged the law arguing that the Alaska constitution's plurality requirement did not allow for the use of ranked choice voting. Opponents sought an opinion in line with the 2017 advisory opinion of the Maine SJC. After a full hearing and lengthy discussion of the issue, the Alaska Supreme Court found that their law did not violate the plurality language of the Alaska Constitution. The Alaska Supreme Court (page 49-50) criticized and directly rejected the reasoning of the Maine Supreme Judicial Court:

> 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's failure to pinpoint constitutional text, structure, or policies inconsistent with ranked-choice voting leaves us unconvinced by its analysis.

The Alaska court reasoned that in an RCV election, the "vote" is not known after the first round of tabulation, and that therefore the first round only shows a plurality of *preferences*, not votes. The vote is only revealed after all the tabulations have occurred, at which point there will be a plurality winner (who will also have a majority of the votes counted in that round).

Because our RCV statute refers to each ranking as a "vote," our statutory language may have contributed to the unfavorable opinion by our Court. We can respond respectfully to the court's opinion while pointing the way toward the Alaska Court's view by amending our RCV statute to be explicit that each ranking does not constitute a full vote.

If the Legislature were to enact such a law, together with language restoring the use of ranked choice voting to races affected by the 2017 opinion (i.e. general elections for governor and for the state legislature), RCV would go into effect for the next general election – unless opponents of RCV brought suit. If opponents did challenge the new law in court, we hope for a court ruling effectively negating the non-binding 2017 advisory opinion and allowing the use of RCV under the new statute.

We have done considerable work on this idea, and we have tested it with litigators and constitutional experts in Maine. We are very optimistic that such an approach would be successful. If the committee is interested in pursuing this further, we are available to provide additional material for the work session.

Thank you for the opportunity to testify. I would be happy to answer any questions from the Committee.

LEAGUE OF WOMEN VOTERS® OF MAINE

TO: The Honorable Senator Louis J. Luchini,
The Honorable Representative John Schneck, Co-chairs
Members of the Joint Standing Committee on Veterans and Legal Affairs

DATE: February 6, 2019

RE: LD 114 - An Act to Establish Open Primaries for Certain Federal and State Offices.

Good morning Senator Luchini, Representative Schneck, and members of the Joint Standing Committee on Veterans and Legal Affairs. My name is Debra McDonough. I am a resident of Scarborough. I am here today as a volunteer member of the League of Women Voters' Advocacy Committee to testify neither for nor against LD 114 - An Act to Establish Open Primaries for Certain Federal and State Offices.

In 2018 we concluded a formal study of primary elections and adopted a position in support of "semi-open" primaries over various forms of closed or fully open primaries for candidate selection at all governmental levels, an approach that we will support when this committee hears LD 211 next week. The study did not reach a conclusion on nonpartisan primaries and so we testify neither for nor against LD 114 under consideration today. [1]

We would like to share our observations as you consider this bill.

• We are not aware of any jurisdictions currently using this approach. While top two primaries have been used in California, Washington, Nebraska and Louisiana, in each case the candidates for the general election are selected by plurality, rather than through ranked choice voting.

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[1] "The LWVME neither supports nor opposes nonpartisan primaries. The LWVME will continue to monitor experience with nonpartisan primaries and re-examine this issue when the results of more empirical studies are available." http://www.lwvme.org/primary_study.html

• While the data is not conclusive, open primaries may increase voter turnout by opening the primary election to unenrolled voters. Semi-open primaries, as proposed in LD 211, may have a similar effect.

• Any top-two open primary may result in a general election between two candidates from the same party. The use of ranked choice voting ensures that this would only occur when one party's candidates capture more than 2/3s of the primary votes. In a "safe" jurisdiction like this, pundits have pointed out that the competitive race occurs in the primary, which typically has lower voter participation. In these cases, it may be more appropriate to bring this choice to the general electorate, rather than leaving it in the hands of primary voters.

• It is difficult to assess the effect this approach might have on independent candidates. Independent candidates in Maine have won elections, and it seems possible that a strong independent candidate could finish in the top two and access the ballot for the general election. It is currently the case that independent candidates can access the general election ballot with support that is weaker than support for party candidates that have lost their primary. These weaker candidates inject a degree of unpredictability, also known as the spoiler effect, into the general election that would be reduced by requiring all candidates to participate equally in the primary.

• Limiting the general election to two candidates would reduce the richness of the policy debate in the higher profile general election and may contribute to more negative campaigning. We prefer extending ranked choice voting to the general election as a solution to this problem.

• This bill would require independent and other candidates to compete more vigorously earlier in the election cycle, with a ripple effect on the qualification timeline and on campaign financing for independent and small-party candidates. It may require more money earlier in the campaign cycle, possibly calling for adjustments in the Maine Clean Election Act.

• It is difficult to assess the effect this approach might have on established political parties. Parties could continue to recruit candidates and set party platforms. In the absence of a strong independent candidate, most general election races will continue to feature a Democrat and a Republican, but given Maine's history of support for independent candidates, we expect that this proposal will result in some general

election races where either the Maine Democrats or the Maine Republicans are excluded.

• While all voters, regardless of party affiliation, will rank the same set of candidates, partisan voters may rank the candidates from their own party at the top of their ballot such that many of these ballots would resemble ranked choice ballots from a party primary. Unenrolled voters may prefer to rank all candidates, rather than choosing one party in which to enroll, as they must do today (or by choosing the primary ballot for one party, as proposed in LD 211).

As you may be aware, the League of Women Voters of Maine has an established position in support of ranked choice voting that includes both primary and general elections. While this system has been implemented for federal elections, we find our current situation, in which the general election for Governor, State Senators and State Representatives continue to be conducted by plurality, to be unsatisfactory. While LD 114 would ensure that those elected to state office have majority support, we favor a constitutional amendment enabling the use of ranked choice voting in general election races for state office.