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Judiciary Committee
Government Oversight Committee

Testimony of Senator Lisa Keim before the Joint Standing Committee on State and Local
Government

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Good morning Senator Baldacci, Representative Matlack and members of the Joint Standing Committee on State and Local Government. I am Lisa Keim, and I proud to represent the citizens of Senate District 18, which includes Northern Oxford County and two communities in Androscoggin County. I am here today to introduce a few bills before you today. Those bills are, LD 729, "An Act To Provide Transparency Regarding State Contracts During a State of Emergency;" LD 955, "An Act To Narrowly Tailor Emergency Powers of the Governor and Other Public Officials;" LD 1039, "An Act To Safeguard the People's Voice in a State of Emergency;" and LD 1237, "An Act To Allow the Governor To Declare a Limited State of Emergency for Federal Aid Purposes."

First, LD 729 would require the Governor to publish, and make publicly available within 72 hours, the complete terms and text of a contract that does not follow a competitive bidding process, or other procedures as required by statute, when the Governor, acting under emergency powers, enters into a contract that bypasses established process.

The goal of this bill is to maintain transparency in government, even in times of disruption and duress, when swift action may be necessary. The normal process of open proposals, allows for competition, and assures fair, effective and economical use of public funds. While emergency powers under 37-B allows for no bid contracts, to facilitate quick emergency response, it also removes the contractual process from public view and scrutiny. Though a copy of contract terms may eventually be requested and released, by requiring up front publication, this bill would make certain that the important details of public contracts will not go unexamined, lost in the myriad of emergency responses and executive decisions.

Second, LD 955 would limit emergency orders proclaimed by the Governor that bind, curtail or infringe the rights of private parties, requiring them to be narrowly tailored to serve a compelling health or safety purpose, and to be limited in duration and scope to reduce infringements on individual liberty.

Please note that I have attached to my testimony a significantly amended version of this bill, which would include a change in title. In an attempt to define the current impact of emergency powers, I believe as originally drafted the bill unintentionally *expanded* emergency powers. The

amended version removes any reference to constitutional rights and all reference to other public officials. The amended version more clearly reflects the intention of this legislation.

In addition, LD 955 gives a state court jurisdiction to hear a case that would challenge the legality of emergency orders, and require the court, to the extent feasible, to expedite consideration of the case. Inequality in the application or impact of emergency orders on analogous groups, situations and circumstances may constitute one ground, among others, for a court to invalidate an emergency order, or some of its applications, on the basis that it is not narrowly tailored to serve a compelling public health or safety purpose.

The Supreme Court has many times upheld that a law infringing on a fundamental constitutional right must be tailored narrowly, using least restrictive means, to achieve its purposes. Even in times of duress, our liberty should be held as an unalienable right.

One concern that some may have with this standard, is that in a time of emergency, the Governor doesn't have the luxury of thoughtful action. However, while the term 'narrowly tailored' requires that orders are not overbroad, it does not require that orders be perfect. This point was made by Chief Justice Roberts in upholding a restriction on campaign speech in *Williams-Yulee v. Florida Bar* (2015). In his opinion, Roberts wrote the restriction must be narrowly tailored, but "not perfectly tailored." With this qualification in mind, there is no reason the liberty of Maine people should not be safeguarded by the highest standard of strict scrutiny, and that our courts be swift in responding to grievances, so that timely modifications of emergency orders can be made, allowing the decision rendered to alleviate harm.

The third bill, LD 1039, similar to other bills presented today, would significantly change emergency powers regarding the termination of a state of emergency, and in so doing assert the rightful role of the legislature, restoring balance in government. LD 1039 would remove the Governor's authority to renew a state of emergency after 30 days, and allows, upon request by the Governor, a renewal of emergency declaration only if approved by a majority vote of the Legislature. This renewal process may be repeated indefinitely at 30-day intervals. If the state of emergency is terminated for any reason, the Governor may not declare another state of emergency for the same emergency or set of circumstances underlying the first state of emergency. The bill also authorizes the Legislature, by 2/3 vote, to terminate any specific emergency order given by the Governor, the same requirement as we have in law to override a veto. Seeking to address the practical issues of coordinating a legislative vote, this bill adds a notice of 3 days for the Legislature to convene to consider the Governor's request, and would allow, during a state of emergency, the Legislature to vote remotely by electronic or other means.

Having lived through a prolonged state of emergency, we can more clearly imagine other emergency scenarios under which 37-B would apply. The bills presented today give us, as lawmakers, an opportunity to examine and improve the process. LD 1039 would require the legislature take a more active role during an emergency, instead of the currently assumed posture of irrelevant detachment. While this bill gives the Governor an immediate 30-day window to address urgent and critical emergency issues, it forces our body, the voice of the people to deliberate and consider the crisis at hand and be engaged.

When our emergency power laws were established, no legislator could have foreseen the lengthy public health battle we have undertaken. In laws written by our predecessors, assuming an emergency situation to be a temporary circumstance, the people's voice was inadvertently deemed nonessential. Nothing could be further from the intention of our forefathers when establishing our form of government, which is entirely based on the self-evident fact that all men are created equal, and that, as capable individuals, it is our right to create the laws, we then agree to live by. An emergency does not render Maine people senseless, or incapable of adequate understanding and appropriate action.

The fourth and final bill I present today, LD 1237, allows the Governor to declare a state of emergency for the sole purpose of requesting the President of the United States to declare a major disaster for part or all of Maine to make available federal aid.

In current law, Title 37-B, section 742, there is a limited state of emergency, called an Energy Emergency Proclamation, that allows for a state of emergency without conferring broad emergency powers to the Governor. LD 1237 would add another type of emergency declaration similarly limited in scope; a proclamation that states the emergency need for federal aid. In LD 1237, if the Governor declares this type of emergency, the Governor is prohibited, pursuant to the declaration, from using any emergency powers granted to the Governor under a state of emergency declared because of a disaster or civil emergency pursuant to the Maine Revised Statutes, Title 37-B, section 742, subsection 1.

In closing, let me restate the imperative of the bills being presented today. The biggest issue with our current emergency powers law is that it silences an entire co-equal branch of government on a baseline assumption that Maine legislators, the voice of the people, have nothing of value to add in a state of emergency. That is a horrendously detrimental assumption, and undermines the very foundation of our form of government.

In times of prolonged battle in any emergency situation, the thoughtful deliberation of diverse perspectives, from all walks of life and from every corner of our state, is essential. No matter the efficacy of top-down mandates, without the people's alliance, no battle against an enemy, seen or unseen, can be victorious.

It our job, as legislators to uphold our form of government, and refuse to abdicate our constitutional roles in acquiescence to the chief executive and a group of unelected advisors. It is not the right of any governor to limit and define the methods we employ to rightfully represent the Maine people. I implore you to consider what future emergencies may look like. If we do not create law that safeguards the people's voice, independent of the executive branch, we do a grave disservice to future Mainers.

Thank you for your indulgence with this lengthy testimony, and consideration of the important changes being proposed. I am happy to answer any questions you may have.

LD 955

An Act To Narrowly Tailor Emergency Powers of the Governor

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 37-B MRSA §742, sub-§1-A is enacted to read:

1-A. Limitation on emergency powers. The exercise of any emergency power the Governor may have under the laws of this State that binds or regulates the public is limited as provided in this subsection.

A. As used in this subsection, unless the context otherwise indicates, the following terms have the following meanings.

(1) "Emergency order" means an order, decree, regulation or other mandate proclaimed or promulgated by the Governor.

B. Notwithstanding any law to the contrary, an emergency order that binds, curtails or infringes the rights of private parties must be narrowly tailored to serve a compelling health or safety purpose. Each emergency order must be limited in duration, applicability and scope in order to reduce any infringement of the rights of private parties or constitutional rights.

C. A court of this State has jurisdiction to hear a case challenging the legality of an emergency order, including compliance with the limitations imposed on emergency orders pursuant to this subsection. A court shall expedite consideration of a challenge brought pursuant to this paragraph to the extent practicable. Inequality in the applicability of the impact of emergency orders on analogous groups, situations and circumstances may constitute one ground among others for a court to invalidate or enjoin an emergency order, or some of its applications, on the basis that it is not narrowly tailored to serve a compelling public health or safety purpose.

SUMMARY

This bill requires the emergency powers exercised by the Governor that bind, curtail or infringe the rights of private parties to be narrowly tailored to serve a compelling health or safety purpose and to be limited in duration, applicability and scope to reduce any infringement of individual liberty or constitutional rights.

This bill also gives a state court jurisdiction to hear a case challenging the legality of the exercise of emergency powers and requires the court to expedite consideration of the case to the extent practicable. Inequality in the applicability of impact of emergency orders on analogous groups, situations and circumstances may constitute one ground among others for a court to invalidate or enjoin an emergency order, or some of its applications, on the basis that it is not narrowly tailored to serve a compelling public health or safety purpose.