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June 16, 2011

Senator Barry J. Hobbins  
Senator Justin Alford  
3 State House Station  
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Dear Senator Hobbins and Senator Alford:

I am writing in response to your letter of June 10, 2011, in which you inquired whether the provisional balloting system set forth in LD 1376, entitled "An Act to Preserve the Integrity of the Voter Registration and Election Process," would impose a mandate on municipalities pursuant to Article IX, section 21 of the Maine Constitution and thus require state funding of 90% of those costs or enactment by a two thirds vote of all members in each chamber. For the reasons explained below, it is the opinion of this Office that this legislation does not constitute a mandate within the meaning of the constitutional provision.

Article IX, section 21 provides in its entirety as follows:

For the purpose of more fairly apportioning the cost of government and providing local property tax relief, the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the votes of 2/3 of all members elected to each House. This section must be liberally construed.

In order to qualify as a "mandate" under this provision, an action of the Legislature must not only require units of local government to expand or modify their activities, but that expansion or modification must "necessitate additional expenditures" of local revenue. Even if legislative action fits this definition of a mandate, the state is not required to fund "costs incurred by local units of government to comply with a federal law or regulation ... except to the extent that the State imposes requirements or conditions that exceed the federal requirements." 30-A M.R.S. § 5685(3)(D). This provision of the implementing statute is often referred to as the "federal mandate exception."

## SUMMARY

While L.D. 1376 does require municipalities to modify and/or expand their activities with respect to voter registration, absentee ballots and provisional ballots, these modifications do not appear to necessitate additional expenditures of local revenues. Instead, it appears likely that the legislation will result in a net decrease in expenditures of local revenues for voter registration and balloting activities during the last few days before and including election day. Accordingly, we conclude that L.D. 1376 does not meet the second part of the mandate test. In addition, we conclude that, certainly with respect to statewide primary and general elections, and most likely with respect to all elections conducted under Title 21-A, the federal mandate exception in 30-A M.R.S. § 5685(3)(D) applies.

## ANALYSIS

**I. Expansion or Modification of Municipal Government Activities**

L.D. 1376 requires municipalities to modify their activities with respect to voter registration and issuance of absentee ballots in several ways. The bill eliminates in-person voter registration on election day and during the two business days before election day. L.D. 1376, §§ 3 & 4. It also prohibits the issuance of absentee ballots after the third business day before the election (*i.e.*, after the close of business on the Thursday before election day) unless the voter who wishes to vote absentee states that he or she (a) will be unexpectedly absent from the municipality during the entire time the polls are open on election day, (b) has a physical disability or incapacity or illness that makes them unable to leave home or a treatment facility on election day, or (c) is a resident of a coastal island ward or precinct and is unable to travel to the polls on election day. *Id.* § 23 (repealing and replacing 21-A M.R.S. § 753-B(2)).

The bill also modifies, and arguably expands, the activities of municipal election officials by adding a new provision in Title 21-A on provisional balloting. *See* L.D. 1376, § 21 (enacting 21-A M.R.S. § 673-A). It requires the issuance of a provisional ballot to any voter whose name does not appear on the incoming voting list but who appears at the polls on election day to vote and declares that he or she is already a registered voter in that jurisdiction. *Id.* § 673-A(1). The steps required when such a voter appears at the polling place and makes that declaration can be summarized as follows:

- the voter must complete an affidavit (on a form provided by the Secretary of State), stating under oath the reason(s) that the voter believes he or she is a registered voter in that jurisdiction. *Id.* § 673-A (1);
- the election official must then offer the voter a ballot with a provisional ballot envelope, and after the voter marks the ballot, it must be sealed in the envelope. *Id.* § 673-A (3);
- all provisional ballots must be logged in by the local officials and segregated from the other ballots in a tamper proof container. *Id.* § 673-A (4);

· by the close of the polls “if possible,” or *within three business days after election day*, the municipal clerk or registrar must review “all voter registration information on file with the municipality” (including without limitation the voter registration application and attached documentation, incoming voting lists from previous elections, and records in the central voter registration system) to determine whether the voter is eligible – i.e., whether the voter was previously registered to vote in that municipality and remains eligible to vote in that municipality. *Id.* § 673-A (6);

· if election officials confirm that the individual is a registered voter in that jurisdiction, then they must remove the ballot from the envelope and count it in the same manner as a regular ballot. *Id.* § 673-A (6)(A) & (B). If they cannot confirm the voter’s eligibility, they must mark the envelope as “rejected” and keep it sealed. *Id.* § 673-A(6)(C);

· the municipal clerk must record the final resolution of all provisional ballots in a log and provide that to the Secretary of State’s office. *Id.* § 673-A(7); and

· the clerk must also update the return of votes cast to reflect any provisional ballots that were cast after determining that the voter was eligible. *Id.* §673-A(7).

## II. Necessitating Additional Expenditures from Local Revenues

While provisional balloting is clearly a new activity that local election officials may have to perform on election day, there are a number of reasons that requiring this activity does not appear likely to necessitate additional expenditures from local revenues.

First, fewer voters will be eligible to vote by provisional ballot than were eligible to register to vote (and then vote) on election day under the statutory provisions that would be repealed by L.D. 1376. Thus, the addition of provisional balloting should be more than offset by the elimination of election day registration.

The election day voter registration statute that would be repealed by L.D. 1376, § 3, allows any person who meets citizenship, age and residency qualifications to register to vote in that jurisdiction to appear in person at the municipal office and register to vote on any day up to and including election day.<sup>1</sup> In contrast, the new statutory provision allows provisional ballots to be issued only to those voters who take an oath stating that they are already registered to vote in that municipality. L.D. 1376, § 21 (enacting 21-A M.R.S. § 673-A(1)).<sup>2</sup> A person who was registered to vote in another municipality, or had never been registered to vote in Maine before, would not be allowed to cast a provisional ballot under the proposed new statute. Thus,

<sup>1</sup> See 21-A M.R.S. § 122(4) (election day voter registration); and 21-A M.R.S. § 111 (1)-(3) (qualifications to register to vote).

<sup>2</sup> Provisional balloting creates a failsafe mechanism designed to protect a voter’s ability to vote on election day when the voter was properly registered in that jurisdiction but, due to an administrative error, the voter’s name does not appear on the incoming list of registered voters for that election.

municipal officials will have fewer provisional ballots to issue and process than they have had voter registrations to process on election day up to now.<sup>3</sup>

Second, by narrowing the circumstances under which voters may obtain absentee ballots during the three business days prior to election day, L.D. 1376 will likely reduce the number of absentee ballots that local election officials have to issue and process on those days, thereby resulting in a further net reduction of staff time in many municipalities.<sup>4</sup>

Third, provisional ballots will be issued to voters on election day by the same election officials who are already at the polls to handle regular and challenged ballots. The steps required to administer the oath to a provisional voter, mark the affidavit form and envelope, create a log, etc. are very similar to what is required to handle a challenged ballot under existing law (21-A MRSA § 673).<sup>5</sup> There is nothing in L.D. 1376 to indicate that additional staff would be required to perform these tasks.

Fourth, while local election officials are required to resolve the voter's registration status in order to determine whether to count a provisional ballot in the election tally, which is a step not required for challenged ballots,<sup>6</sup> this legislation allows them *up to three business days after election day* in which to complete the task. *See* L.D. 1376, § 21 (enacting 21-A M.R.S. § 673-A(6)). The bill directs them to resolve the voter's status on election day only "if possible," which logically means if existing staff are available and have time to do so. Thus, the steps necessary to resolve provisional ballots may be performed by existing municipal staff during regular office hours after election day. If L.D. 1376 is enacted, those same municipal staff will no longer be processing voter registrations from election day.<sup>7</sup>

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<sup>3</sup> It is worth noting that election officials in the Secretary of State's office estimate that it should take less time per voter to issue a provisional ballot than to register a voter on election day.

<sup>4</sup> The Secretary of State's office also estimates that it should take no more time per voter for a local official to issue a provisional ballot than it takes to issue and process an absentee ballot with an individual voting in person at the clerk's office during the three business days prior to election day. *See* 21-A M.R.S. § 753-B(8) (procedure for absentee voting in presence of the clerk).

<sup>5</sup> When a voter's qualifications to vote are challenged by another voter (such as a poll watcher) or election clerk on election day, the challenger must fill out a form affidavit setting forth, *inter alia*, the grounds for the challenge and the source of information upon which the challenge is based. 21-A M.R.S. § 673(1). The ballot must then be marked with a unique number and recorded on a list by the local election official, and the incoming voting list must be annotated to indicate that the voter cast a challenged ballot. *Id.* § 673(2), (3) and (3-A).

<sup>6</sup> Challenged ballots are automatically included in the election night tally, and the eligibility of the voter who was challenged must be resolved only if the number of challenged ballots cast could make a difference to the outcome of that election. *See* 21-A M.R.S. § 696(1).

<sup>7</sup> Under existing law, a voter who registers to vote on election day is given an election certificate that authorizes the person to vote that day. 21-A M.R.S. § 122(4). The local registrar must then enter the data in the central voter registration system after election day. *Id.* § 152(2).

In sum, there is nothing in the statutory framework created by L.D. 1376 that suggests municipalities would need to hire additional staff or pay overtime to existing staff in order to conduct elections with provisional ballots. Instead, it seems more likely that the elimination of election day voter registration and in-person registration on the two business days prior to election day, coupled with the new restrictions on absentee voting during the three business days before election day, would reduce the overall demands on municipal staff and might therefore result in a net reduction of expenditures from local revenues to administer each election. For these reasons, we conclude that L.D. 1376 does not “necessitate additional expenditures from local revenues” and thus does not constitute a mandate.

### III. Federal Mandate Exception

Even if L.D. 1376 were deemed to impose new requirements on local units of government that necessitated additional expenditures, the State would have no obligation to fund 90% of those costs if the federal mandate exception applies. *See* 30-A M.R.S. § 5685(3)(D). To determine whether the federal mandate exception applies, we must assess: 1) whether the costs (if any) that may be incurred by local units of government are “to comply with a federal law or regulation,” and 2) whether L.D. 1376 “imposes requirements or conditions that exceed the federal requirements.” We have found no Maine court decisions or prior opinions of this office interpreting the federal mandate exception.

The federal Help America Vote Act of 2002 (“HAVA”) required states to adopt a system of provisional voting in all elections for federal office. The federal statute describes the circumstances under which a voter must be issued a provisional ballot as follows:

If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

42 U.S.C. § 15482(a). As explained in the legislative history, Congress’ intent in enacting this provision of HAVA was “not ... to extend the right to vote by provisional ballot to everyone who shows up at the polls and is not registered.” “The intent [was] to provide protection to those who in fact registered but do not appear on the register because of an administrative mistake or oversight.” 148 Cong. Rec. S10491-02 (Oct. 16, 2002) (remarks of Senator Bond).

Maine did not have to adopt provisional balloting in 2004 when other states were required to do so because its system of election day registration and challenged ballots provided an alternate means of accomplishing HAVA’s objectives. Election day registration accomplished the first objective by protecting a registered voter’s right to vote when his or her name is omitted from the incoming voting list in error, and the challenged ballot process addressed the second circumstance calling for a provisional ballot under HAVA – when an

election official asserts that the voter is not eligible to vote.<sup>8</sup> While the challenged ballot procedure continues to meet the second reason for provisional balloting under HAVA, the elimination of election day registration under L.D. 1376 would remove Maine's alternative means of complying with the first one.

The language of L.D. 1376, § 21 enacting 21-A M.R.S. § 673-A, closely tracks the provisions of HAVA on provisional ballots and, as indicated in the bill summary, was included to meet those federal requirements.

An argument can be made that the federal mandate exception in Title 30-A, section 5685(3)(D) should not apply when the Legislature changes state law in a manner that triggers federal law requirements not previously applicable. The premise of this argument is flawed, however. Provisional balloting is now and has been, since 2004, a requirement of federal law.<sup>9</sup> Local units of government in Maine did not have to incur any costs to comply with this part of HAVA at the time because they were already conducting election day registration, and thereby complying through different means. By enacting L.D. 1376, Maine would simply be changing the method by which the State and its local units of government comply with this federal law. Put another way, state law allowing election day registration may have excused local units of government from having to conduct provisional balloting for the past decade, but the repeal of that law does not change the reality that provisional balloting is a requirement of federal law.

Accordingly, the first part of the federal mandate exception in section 5685(3)(D) applies. The only remaining question is whether the last clause of section 5685(3)(D) – “except to the extent that the State imposes requirements or conditions that exceed the federal requirements” – limits its applicability here because HAVA specifically addresses only federal elections.

Elections for federal office in Maine occur every two years, in conjunction with primary and general elections for all statewide and county offices. All elective offices are printed on the same ballot, and the steps involved in administering federal and statewide elections under Title 21-A are the same. *See, e.g.*, 21-A.M.R.S. § 601(3) (describing the order of federal, state and county offices on the ballot). Elections that do not coincide with those for federal office do occur, but only occasionally. State referendum elections (*e.g.*, on citizen initiatives, people's veto referenda, bond issues or constitutional amendments) are occasionally held in an odd-numbered year, and special elections to fill a vacancy in the House or Senate may be held at various times.

To the extent L.D. 1376 imposes a provisional ballot system applicable to these elections it could be argued that it “exceed[s] the federal requirements” and thus does not fit within the

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<sup>8</sup> Statements in the legislative record confirmed this understanding of Maine's compliance with HAVA. Senator Susan Collins specifically asked during the Congressional debate on HAVA if Maine's system of election day registration and challenged ballots would meet the federal requirements, and she was assured by the bill's sponsors that it would. *See* 148 Cong. Rec. S10494-02 (Oct. 16, 2002).

<sup>9</sup> HAVA obligated each state to comply with the requirements of provisional voting beginning on January 1, 2004. 42 U.S.C. § 15482(d).

scope of the federal mandate exception under 30-A M.R.S. § 5685(3)(D).<sup>10</sup> We do not believe a court would construe the statute to reach such a conclusion, however, for several reasons.

First, in substance, the requirements for provisional balloting that local units of government would have to comply with under L.D. 1376, § 21 do not "exceed" the federal requirements outlined in 42 U.S.C. § 15482. As noted above, the language of L.D. 1376, § 21 tracks HAVA quite closely. Second, the requirements for voter registration in Maine, and all other aspects of election administration, are the same whether a voter is appearing at the polls to cast a ballot for federal or state elective office, for local offices, or for a statewide referendum. Thus, any change to Title 21-A enacted to comply with federal law automatically governs the administration of all elections conducted under Title 21-A. Finally, in interpreting the federal mandate exception, a court might well consider the net effect of all the provisions in L.D. 1376 as applied to non-federal elections. L.D. 1376 narrows the scope of in-person absentee voting and eliminates voter registration on election day and for the two previous business days in off-year statewide referendum elections and special elections to fill House and Senate vacancies, as well as purely local elections conducted under Title 21-A. The reduction in these election administration duties should more than offset the addition of provisional balloting, thereby resulting in no net increase in the obligations of local units of government.

#### CONCLUSION

For the reasons outlined above, we conclude that L.D. 1376 does not constitute a state mandate within the meaning of Article IX, section 21 of the Maine Constitution and Title 30-A, section 5685. Accordingly, a mandate preamble and vote of two thirds of all the members elected to the House and Senate was not required to enact it, and no state funds to cover local costs need be appropriated, allocated or otherwise designated in accordance with those constitutional and statutory provisions.

I hope this is responsive to your question. If you need any clarification regarding this matter, please let me know.

Sincerely,

  
WILLIAM J. SCHNEIDER  
ATTORNEY GENERAL

<sup>10</sup> The same argument could be made with respect to purely local elections that are not held in conjunction with state and federal elections. "Except as otherwise provided" by Title 30-A or by municipal charter, the "method of voting and the conduct of a municipal election are governed by Title 21-A." 21-A M.R.S. § 2501. The system of provisional balloting added to Title 21-A by L.D. 1376 would thus apply to local elections until and unless an exception is created in Title 30-A or by municipal charter.

cc: Governor Paul R. LePage  
Senate President Kevin Raye  
Senator Jonathan Courtney  
Senator Debra Plowman  
House Speaker Bob Nutting  
Representative Phil Curtis  
Representative Andre Cushing  
Representative Emily Cain  
Representative Terry Hayes  
Hon. Charles E. Summers, Secretary of State  
Grant T. Pennoyer, Director, Office of Fiscal and Program Review