STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET NO. CUM-20-227

DAVID A. JONES, et al. Petitioner-Appellees v. MATTHEW DUNLAP, in his capacity as the MAINE SECRETARY OF STATE, Respondent-Appellant and THE COMMITTEE FOR RANKED CHOICE VOTING, et al. Intervenor-Appellants	**INTERVENOR-APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO STAY THE EFFECT OF THE MANDATE**

Appellees' Motion to Stay the Effect of the Mandate should be denied by this Court. Appellees are unlikely to succeed at obtaining review and prevailing on a federal constitutional challenge because (a) Appellees failed to present a constitutional question in a manner that developed a record establishing the character and magnitude of burden caused by the challenged circulator registration requirement; and (b) Appellees do not have federal constitutional standing to litigate the federal question before the U.S. Supreme Court, because their standing in this case is conveyed by 21-A M.R.S.A. 905(2), not a showing of a particularized injury in fact. Further still, Appellees request for stay of the effects of this Court's judgment is unsupported by precedent because early voting in Maine utilizing ballots instructing voters to use the ranked-choice system is already underway, and any modification to the manner of tabulation would disenfranchise an unknowable number of Maine voters whose ballots are already cast in reliance on the ballot's ranked-choice instructions.

ARGUMENT

I. Appellees' are Unlikely to Obtain United States Supreme Court Review and Unlikely to Prevail on Any Petitioned-For Constitutional Challenge.

Appellees are unlikely to succeed at obtaining review from the United States Supreme Court for two reasons. First, Appellees failed to plead or otherwise develop evidence in the record necessary to establish that circulator registration requirements imposed substantial burden on circulators' political speech, and a finding of severe burden will not be presumed. Second, even if a showing of severe burden on political speech were presumed by the Supreme Court, Appellees' claim still would fail because Appellees have no federal constitutional standing to seek review in federal court. Although Appellees' rooting interest as referendum signers was sufficient to litigate in state courts thanks to the modified standing requirements of 21-A M.R.S.A. 905, Appellees' vicarious claim of injuries allegedly suffered by referendum organizers or proponents circulating petitions fails the heightened constitutional standing requirements to seek relief from the federal courts.

The central component for any request for stay of the effect of the mandate "is the demonstration of a reasonable likelihood of success in obtaining review and prevailing on a federal constitutional challenge." *Knutson v. Dep't of Sec'y of State*, 2008 ME 129, ¶ 4. Appellees cannot demonstrate that they have any likelihood of success at either obtaining review on certiorari or ultimately prevailing on the First Amendment question.

A. The Record is Inadequate to Determine the 'Character and Magnitude' of Burden Imposed by the Challenged Law.

This Court correctly decided the First Amendment question raised by the Superior Court's *sua sponte* constitutional scrutiny of Maine's circulator registration requirement wholly consistent with the controlling federal precedent. Even then, Appellees' First Amendment question is unfit for review by the United States Supreme Court because Appellees have failed to develop the evidentiary record necessary for the high court to assess

"the character and magnitude of the asserted injury to the rights protected by the First … Amendment," *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

As this Court observed, the evidentiary record of burden is vital for any court to assess the constitutionality of a statute that "control[s] the mechanics of the electoral process," because no litmus-paper test exists to otherwise test the constitutionality of electoral mechanics statutes. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (citing, *inter alia*, *Anderson*, 460 U.S. 780 and *Storer v. Brown*, 415 U.S. 724 (1974)). *See also Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999) ("We have several times said 'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'") (quoting *Storer*, 415 U.S. 724)).

Appellees fail to point to any prior case demonstrating that a severe constitutional burden caused by a challenged electoral mechanics statute will be presumed by the court without a showing in the record of such burden. *Buckley*, for example, relied upon a fully developed evidentiary record drawn from "statistical and testimonial evidence" to determine that the challenged statute "limits the number of persons available to circulate and sign initiative petitions and, accordingly, restricts core political speech." 525 U.S. at 194. The other cases Appellees cite to support their argument that strict scrutiny should apply were similarly based upon a robust evidentiary record that does not exist here. For example, *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013) relied heavily upon the "uncontested averments of the plaintiffs" regarding the burden imposed by the statutory requirement. Similarly, *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1026-27 (10th Cir 2008) relied upon record evidence showing that plaintiffs could not find sufficient numbers

of circulators who met the statutory requirement. No such showing of burden is available in the record here.

The absence of evidence in the record regarding the alleged burden imposed on circulators' political speech rights weighs on Appellees' own shoulders. Appellees failed to plead facts in their petition claiming the circulator registration requirement imposed a substantial burden on the proponents' political speech rights. In turn, no factual record regarding the degree of constitutional burden was developed or even requested by Appellees. Further still, Appellees did not plead and, as discussed below, could not plead an independent First Amendment claim that would have facilitated development of an evidentiary record regarding the character and magnitude of burden imposed by the circulator registration requirement, and the State's regulatory interests in that law. Without such evidence, the U.S. Supreme Court can merely speculate about whether Maine registration requirement for referendum petition circulators imposes a severe or slight burden. The U.S. Supreme Court's record of avoiding such undeveloped constitutional disputes demonstrates Appellee's unlikely prospect of having their petition for certiorari heard. *See, e.g.*, *Cowgill v. California*, 396 U.S. 371, 372 (1970) (observing that "the stipulated statement of facts on which this case comes to us suggests that the issue was not, in the first instance, determined as a factual matter by the trial court" and, further, "there is no indication that appellant either presented evidence on this question at trial or urged any standard at trial for determining that issue"); *Adams v. Robertson*, 520 U.S. 83, 86–87, 92 (1997) (describing "the value to this Court of a fully developed factual and legal record upon which to base decisions," and explaining various reasons Court will not grant certiorari on federal questions including where a petitioner has failed to meet burden of "demonstrat[ing] that it presented the particular claim at issue here with 'fair precision and in due time'")

B. Appellees Have No Standing to Litigate the Alleged First Amendment Injury in Federal Court.

Even if the Supreme Court could presume without any record showing that Maine's registration requirement imposed a severe burden on referendum proponents' First Amendment rights, Appellees lack standing to have the First Amendment question considered by the Supreme Court in the first place because they suffered no individualized constitutional injury. Appellees characterize themselves as petition signers generally opposed to ranked-choice voting. But their alleged constitutional injury—their supported petition's failure to qualify for the ballot—is merely speculative and wholly derived from the actual injury allegedly suffered by referendum organizers and circulators who utilized the petition process to communicate *their* political message to voters.

Appellees' speculative injury was adequate for them to establish standing in Maine state courts to appeal the Secretary of State's invalidation of the petition pursuant to 21-A M.R.S.A. § 905(2), which allows any signer of an invalidated petition to appeal the determination without showing of any particularized injury. But, the United States Supreme Court has jurisdiction to review this Court's final judgment only where "the *validity* of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States," 28 U.S.C.A. § 1257 (emphasis added).[1] No federal court—including the United States Supreme Court—can hear a state law challenge on the merits without a justiciable cause of action, including parties with standing

[1] Notably, the "validity" of Maine's circulator registration requirement in the Maine Constitution, Article IV, Part 3, § 20 is not at issue in this action because the action before the Court prayed only for reversal of the Secretary of State's invalidation of the referendum petition. No independent First Amendment challenge seeking to strike down the registration requirement in Article IV, Part 3, § 20 was presented. And, even if a stand-alone facial challenge of the provision was pleaded, Appellees would have lacked standing to litigate that independent claim for the same reasons Appellees fail to satisfy the federal court's standing requirements for review of the constitutional question.

to litigate the claim. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019).

It's well-established law that "[t]o reach the merits of a case, an Article III court must have jurisdiction," *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. at 1950. Moreover, "One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so." *Id.* (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013). Challenges to an appellant's federal standing remain ripe through any review by the United States Supreme Court because standing to litigate in the federal courts cannot be waived or forfeited. *Id.*

Further still, standing to raise a constitutional question in federal court presents unique hurdles for any party seeking redress. Establishing federal constitutional standing requires that the plaintiff "must have suffered an injury in fact—an invasion of a legal protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (quotations and citations omitted). A particularized injury is one that "must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. Speculative or vicarious injuries are similarly inadequate to meet federal constitutional standing requirements. *See United States v. McHugh,* 769 F.2d 860, 864 (1st Cir. 1985) ("Vicarious assertion of another's constitutional rights is insufficient.")

Buckley provides an instructive example on the types of interests and injuries that establish adequate constitutional standing necessary to challenge statutes governing petition circulators in federal court. *Buckley* recognized the constitutional injury at issue was that "the [circulator] restrictions in question significantly inhibit communication with voters about proposed political change." 525 U.S. at 192. Standing in the *Buckley* matter was

addressed at the District Court level, where the court observed that the *Buckley* plaintiffs included individuals who had actually initiated referendum petition drives but struggled to recruit circulators and individuals who wanted to circulate petitions in Colorado but could not because of the challenged law. *Am. Constitutional Law Found., Inc. v. Meyer*, 870 F. Supp. 995, 997 (D. Colo. 1994). The *Buckley* plaintiffs demonstrated an actual, particularized injury in fact caused by the challenged statutes, because "[a]ll of the plaintiffs have shown sufficient commitment to continuing efforts to address the Colorado electorate through petitions for the Initiative and referendum." *Id.* In turn, the *Buckley* plaintiffs established the elements of *Lujan* federal standing required to litigate their constitutional claim through the Supreme Court's review.

Appellees' request for United States Supreme Court on a federal question is unlikely to succeed on review because Appellees cannot satisfy the minimum bar for federal constitutional standing. None of the named petitioners to the action have suffered any particularized injury to their personal and individual political speech rights caused by the circulator registration requirement. Petitioners characterize themselves in their petition only as referendum petition signers who "strongly oppose[ ] the use of ranked-choice voting in Maine, and in particular the Legislature's decision to extend it to presidential elections." R.26-27. Petitioners' averred interest in the action as petition signers is distinguished in the petition from that of nonparty Demitroula Kouzounas who organized the referendum process or referendum proponents who circulated petitions, such as Michele Riordan and Monica Paul whose petitions were disqualified. *Cf.* R.29. Appellees' averred interest in the federal question is merely the petition's ultimate validation. Appellees cannot claim that they suffered the same injury allegedly suffered by referendum organizers or circulators where "restrictions in question significantly inhibit communication with voters about proposed political change," *Buckley*, 525 U.S. at 192. The political speech of referendum organizers

and circulators is purportedly under fire, not the speech of general supporters, such as Appellees. And federal court precedent for establishing minimum constitutional standing does not include a vicarious injury to others' constitutional rights. *See United States v. McHugh,* 769 F.2d at 864.

Appellees stood on the sidelines of the political debate, a location where Maine's circulator registration requirement did *not* affect or inhibit *their* political speech "in a personal and individual way." *Lujan*, 504 U.S. at 560, n.1. Accordingly, Appellees lack the requisite particularized and actual injury in fact necessary to present a justiciable constitutional question for review by the United States Supreme Court on certiorari.

II. The Basis For Granting A Limited Stay of the Mandate That Applied in *Knutson* Does Not Apply Here.

The timing and circumstances of Appellees' motion to stay the effect of the mandate is distinguishable from *Knutson v. Dep't of Sec'y of State*, 2008 ME 129, where the Court granted a limited one-week stay of the mandate despite appellees' unlikelihood of success on review because that stay occurred in mid-August, while the disputed ballot was still being finalized. Appellees here, however, seek a stay of the mandate that would issue in early October, while ballots are already printed and early voting is already underway.

In *Knutson*, this Court determined that the party seeking review from the U.S. Supreme Court was unlikely to succeed at obtaining Supreme Court review or prevailing on the merits of that review. Nonetheless, the Court granted a limited, one-week stay of the mandate because the timing in mid-August allowed for the limited stay to be granted without harming the upcoming election. 2008 ME 129, ¶ 14. Ballots in that mid-August case were not yet finalized, and the Court agreed to grant a stay only through such time that finalization of the ballots was necessary. *Id.*

Here, Appellees —despite an unlikelihood of success on Supreme Court review—ask the court to grant them a stay of the effect of the mandate that would change the way already finalized ballots are tabulated. *See* Mot. at 2. Unlike *Knutson*, which sought the stay of the mandate in mid-August while ballot finalization was still underway, the circumstances here are dramatically different. In this case, final versions of the November election ballot were printed and mailed to overseas Maine voters nearly two weeks ago. Ballots have already been mailed to municipal clerks across Maine. Early voting in Maine begins immediately after municipal clerks receive the ballots, which means an unknowable number of ballots will be cast while Appellees seek Supreme Court review.

Moreover, unlike in *Knutson*, a stay of the effect of the mandate in this case without a grant of additional injunctive relief would have no effect on the election already underway because ballots are already printed, mailed and, in some cases, already cast. To that end, Appellees ask this Court to enter an order requiring Maine voters to cast their vote on a ballot explaining the ranked-choice tabulation method, but then require the ballots to be tabulated in a manner wholly inconsistent with the ballot's instructions. *See* Mot. at 2. This relief Appellees seek is *extraordinary* and unsupported by *Knutson* or any other precedent from prior cases in Maine or any other state. The Court must "tread carefully where preliminary relief would disrupt a state voting system on the eve of an election." *Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018) (citing, *inter alia*, *Reynolds v. Simms*, 377 U.S 533 (1964) and *Purcell v. Gonzalez,* 549 U.S. 1, 4–6 (2006)).[2] Such extraordinary relief should be denied to preserve the integrity of Maine's election.

[2] The Intervenor-Appellants asserted in their August 28, 2020 motion for stay that this Court, had it decided the case in Appellees' favor on or before September 23, 2020, would have had the opportunity to order that all ballots cast would be counted by plurality vote, because no ballots would have been cast at that time. Appellees' request for that form relief here, after early voting has already begun in reliance on the ranked-choice ballot instructions, is no longer a viable or equitable option.

III. Changing the Method of Ballot Tabulation While Ballots Are Being Cast Causes Irreparable Harm to Maine Voters.

Absentee voting in Maine has already begun, and any injunction requiring tabulation of ballots in a manner inconsistent with the ballot's ranked-choice voting instructions would disenfranchise an unknowable number of voters. The Court should reject any request for such relief at this stage of the general election.

Appellees justify their extraordinary request for injunctive relief on the basis that they are entitled to vicariously defend the political speech rights of referendum proponents and petition circulators who were inhibited by Maine's circulator registration requirement. But Appellees' request for injunctive relief is laced with a presumption that the political speech rights of referendum proponents who are not parties to this adjudicated action somehow *outweigh* the First Amendment rights of Maine voters who have already cast their ballots in reliance on the Maine ballots instructions

It is long-established that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Disregarding voters strategic use of the ranked-choice voting instruction means that their ranked-choice vote effectively would be weighted different than those subsequent voters who cast a ballot knowing that plurality tabulation would apply. "Weighting the votes of citizens differently, by any method or means … hardly seems justifiable," *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). Any injunctive order that would count ballots of voters who cast early votes differently from those cast after learning that the ballot rules had somehow changed, cannot withstand constitutional scrutiny.

At bottom, Appellees' interest cannot and does not outweigh the right of unknowable numbers of Maine voters who have already cast their votes with faith their vote will be counted as each voter intended.

CONCLUSION

Intervenor-Appellants the Committee for Ranked-Choice Voting et. al, for the aforementioned reasons, respectfully requests that the Court deny Appellees' Motion to Stay the Effect of the Mandate.

Dated at Portland, Maine, this 28th day of September, 2020.

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CERTIFICATE OF SERVICE

I, James G. Monteleone, hereby certify that on September 8, 2020, a copy of the Appellant-Intervenors' opposition was served via electronic and first-class mail upon counsel of record as follows:

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