STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-20-227

DAVID A. JONES, et al.,

Petitioners-Appellees

v.

MATTHEW DUNLAP, in his official capacity as the Maine Secretary of State,

Defendants-Appellants

and

THE COMMITTEE FOR RANKED CHOICE VOTING, et al.,

Intervenors

Appeal from the Superior Court, Cumberland

BRIEF OF APPELLEES DAVID A. JONES, ET AL.

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STATEMENT OF FACTS

The People's Veto Petition. The 129th Maine Legislature enacted L.D. 1083—which provided that ranked-choice voting be expanded to cover the selection of Presidential electors for both primary and general elections—at a one-day special session in August 2019. Governor Janet Mills subsequently declared her intention to allow the Act to become law without her signature, effectively delaying implementation until after the March 2020 presidential primaries. *See* Governor Mills Statement on Ranked Choice Voting for Presidential Primary and General Elections in Maine (Sep. 6, 2019). Because the Governor did not return L.D. 1083 to the Legislature within three days of the convening of the Second Regular Session, the bill was chaptered as P.L. 2019, ch. 539 on January 12, 2020. As a non-emergency measure, L.D. 1083 was slated to take effect 90 days following adjournment of the legislative session**.**

The Maine Constitution reserves to the people the ultimate legislative authority by allowing the people to vote to veto legislation before it takes effect. *See* Me. Const. art. IV, pt. 3, § 17. On February 3, 2020, the Secretary of State approved an application for a people's veto referendum petition against the Act filed by Demitroula Kouzounas. R.1289;[1] *Payne v. Sec'y of State*, 2020 ME 110, ¶ 7, ___ A.3d ___.

[1] References to the record in this brief are based on the page numbers of the electronic file provided to the Clerk of this Court by counsel for the Secretary by the Attorney General on August 31, 2020. Because this brief is submitted pursuant to the accelerated mandatory deadlines of 21-A M.R.S. § 905(3), which require simultaneous briefing by both parties, the Appellees have not had the opportunity to review any Appendix filed pursuant to M.R. App. P. 8(a). Where appropriate, this brief also cites to the record of proceedings below. *See* M.R. App. P. 5.

The petition effort faced unprecedented challenges arising from government restrictions imposed by COVID-19. Public gatherings that would normally constitute the main opportunity to gather signatures came to an end in March. It took weeks for the petition effort to gain approval of circulators as essential service providers. Pet. ¶16. The Governor generally exempted notaries from conducting business face to face, but not for purposes of petition gathering. *See* Executive Order 37 FY 19/20, 2 (April 8, 2020). And petition proponents had to sue the City of Portland to gain access to election polling locations, and (although successful) were ultimately able only to gather signatures outside polling locations for half the day on the March "Super Tuesday" primary—a critical day for signature gathering, especially in light of the subsequent shutdown of public gatherings. *See* Randy Billings, *Maine Republicans win court order to petition at Portland polling locations*, Portland Press Herald (March 3, 2020).

Nonetheless, on June 15, 2020, Ms. Kouzounas and people's veto referendum proponents filed with the Secretary of State more than 72,000 signatures. R.1241. The submission of the petition automatically suspended the Act from taking effect. Me. Const. art. IV, pt. 3, § 17(2).

The Secretary's Initial Determination. The Secretary took the entirety of the 30-day review period allowed for him to decide whether to certify the petition. 21-A M.R.S. § 905(1). In his initial "written decision stating the reasons for the decision," *id.*, he identified several categories of signatures that were invalidated and concluded that "of the 9,482 petition forms filed with the Secretary of State, I find that 11,178

signatures are invalid and 61,334 signatures are valid. The number of signatures required for a valid petition is 63,067. As petitioners have failed to submit a sufficient number of valid signatures, I find the petition to be invalid." R.479-80.

Petitioners quickly determined that hundreds of signatures were improperly or mistakenly invalidated. For example, the Secretary wrongly invalidated more than 800 signatures because of handwritten notations from a town registrar suggesting that the petitions were submitted to municipal officials for review and certification after the June 10 deadline. R.350-51. But this was a clerical error that could have been remedied with a simple call to the registrar. *Id.*; R.3564-66. Moreover, the Secretary invalidated more than 1,000 signatures for "CIRC," shorthand for his determination that "the circulator collected signatures prior to becoming registered to vote in the state of Maine." R.479. But some of those circulators were long-time registered voters, and all affirmed their registered status when they submitted their signatures. R.350; R.357-59. And the Secretary's count of invalid signatures was also inflated by apparent tabulation errors, where the Secretary simply miscounted the number of valid signatures on individual petitions. R.352. The Petitioners also identified numerous other errors, large and small, with respect to the Secretary's determination. *See* R.350-54.

Petitioners Challenge the Secretary's Determination. Petitioners are three individuals who validly signed the people's veto petition in question, and thus have standing to challenge the Secretary's determination. *See* 21-A M.R.S. § 905(2); Sup. Ct. Order 2. Petitioners filed this action on July 27, 2020, within the 10-day statutory

deadline set forth in § 905(2). The following day, Petitioners filed a motion requesting that the Superior Court remand the case to the Secretary for the taking of additional evidence. With the consent of the Secretary and the Intervenors (the Committee for Ranked Choice Voting and some of its members), the Superior Court remanded the case back to the Secretary to consider additional evidence submitted by Petitioners and the Committee. Sup. Ct. Order (8/3/2020). The Petitioners and the Committee subsequently made evidentiary submissions to the Secretary. R.341-469; R.472-76.

The Secretary's Amended Determination. On April 12, the Secretary issued his amended "written decision," 21-A M.R.S. § 905(1), in this case. Despite sustaining a number of the petitioners' objections, *see* R.2-10, the Secretary concluded that the petition was 1,775 valid signatures short of the necessary number to appear on the ballot. R.10. The Secretary made several findings relevant to this appeal.

First, the Secretary rejected the arguments that circulators Michelle Casey-Riordan, Monica Paul, and Michael Patterson were registered voters in Maine and therefore their signatures should be counted. R.2-3. The Secretary held that because these circulators were not registered at their current address when they gathered signatures, "the signatures may not be counted as valid." *Id.* These determinations resulted in the invalidation of more than 1,000 signatures.

Second, the Secretary declined to validate 160 signatures from Freeport because he determined that the town's registrar administered the circulator's oath one day after she began checking the registered status of all of the signatories to the petition. *See* R.4.

But the town registrar made clear that she did not complete her certification until that error was corrected, the next day. R.78. And in several other cases the Secretary explicitly recognized that certification could begin before the oath was executed, so long as it was not completed before the oath was administered. R.4-5.

Third, the Secretary refused to credit the sworn testimony of the deputy clerk for the Town of Turner, Deana Pierce, who was responsible for certifying the registered status of Turner residents who signed petitions. R.4. Ms. Pierce testified by affidavit that she inadvertently listed the time and date of *certification* as the date on which the petitions were *received*. R.364-67. The Secretary rejected this testimony even though he never spoke to Ms. Pierce or obtained evidence contradicting her testimony, and stood by his initial decision to invalidate more than 800 signatures on this basis. R.4.

Finally, the Secretary rejected several arguments the Intervenors offered in an attempt to invalidate more signatures. For example, the Secretary found insufficient evidence that certain notaries who also sat on the Republican Party State Committee had a conflict of interest. R.6. He declined to invalidate more than 4,000 signatures that were notarized by an individual who may have run two errands of convenience to the post office and a copy shop. *Id.* And the Secretary rejected Intervenors' argument that municipal clerks could not notarize the petitions if they also discharged their obligation to certify the registered status of voters from their town who signed the Petition. R.6-7.

The parties then submitted briefing to the Superior Court. Notably, the Secretary's own brief identified the precise number the signatures that were invalidated based on the registered status of Ms. Casey-Riordan and Ms. Paul. *See* Respondent's Rule 80C Brief (Aug. 19, 2020) at 7 (describing "the Secretary's decision to invalidate 682 signatures on petitions circulated by Michelle Riordan, and 262 signatures on petitions circulated by Monica Paul").[2] And neither the Secretary nor the Committee argued that any of the disputed signatures collected by Ms. Casey-Riordan, Ms. Paul, or Mr. Patterson should be invalidated for other reasons—a striking omission, given that the Secretary had otherwise noted when signatures challenged by the parties were invalid for alternative reasons. *See* R.3 (noting that although the Secretary agreed that he had erroneously invalidated signatures circulated by Mark Longworth for CIRC, he had determined that "[t]he signatures were not those of registered voters, however, and should have been invalidated for REG"); R.5 (noting that "[o]f the 841 signatures at issue [from Turner], 32 are invalid for other reasons as well but were only discounted in the original determination for AMD").

On August 21, 2020, the Superior Court initiated a teleconference with the parties. During the conference, the court asked the parties several questions about whether the number of signatures invalidated for CIRC, combined with the signatures

[2] The Secretary later advised the Superior Court that this number was wrong, and that "[t]he number of signatures collected by Monica Paul that were invalidated in the Secretary's Amended Determination on remand . . . was actually 306, not 262[.]" Respondent's Supplemental Brief (Aug. 24, 2020).

rejected from Turner, would be sufficient to certify the petition if they were overturned. Following the teleconference, the Superior Court issued an order remanding the case to the Secretary for further fact-finding on the status of the Turner signatures, and directing the parties to file supplemental briefs addressing the significance of *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), in which the Supreme Court determined that a Colorado law requiring petition circulators to be registered voters violated the First Amendment. The Superior Court specifically asked the parties to address *Buckley*'s effect on the "1175 signatures disqualified as a result of a lack of circulator's voter registration." Sup. Ct. Conference Record (Aug. 21, 2020).

Following that second remand, the Secretary issued a Second Amended Determination in which he reversed his invalidation of 801 signatures from Turner.[3] The parties also submitted supplemental briefs as to the impact of *Buckley* and the First Amendment on the Secretary's determination. Again, neither the Secretary nor the Intervenors identified any alternative basis to invalidate signatures from Ms. Casey-Riordan or Ms. Paul other than CIRC.

The Superior Court's Decision. The Superior Court issued its decision on August 24, 2020, the last day allowed by statute. *See* 21-A M.R.S. § 905(2) ("The court shall issue its written decision containing its findings of fact and stating the reasons for

[3] The Second Amended Determination is not in the electronic agency record filed with the Superior Court and this Court, but is included as the last two pages of Exhibit 1 attached to the Secretary's Motion for Stay Pending Appeal filed with this Court on August 21, 2020.

its decision within 40 days of the date of the decision of the Secretary of State."). Its primary holding was that "that the Secretary improperly invalidated the signatures collected by Monica Paul and Michelle Riordan." Sup. Ct. Order 1-2. The Court therefore found "that the Petitioners collected enough signatures to place their petition on the November 2020 ballot and hereby reverses the Secretary's decision." *Id.* at 2.

The Superior Court's decision followed directly from its reading of *Buckley*. It noted that this Court had never squarely addressed the constitutionality of Maine's circulator registration requirement. *Id.* at 7-8. But it noted that *Buckley* had ruled that Colorado's identical requirement "is unjustified and infringes on the [F]irst [A]mendment rights of the circulators to conduct core political speech," and that "the state interest of fraud detection or administrative efficiency" could not justify the requirement. *Id.* at 8 (citing *Buckley*, 525 U.S. at 192, 197). The Superior Court noted that an unreported decision from a federal magistrate had upheld Maine's circulator-registration requirement shortly after *Buckley*. *Id.* at 8-9 (citing *Initiative & Referendum Institute (IRI) v. Secretary of State*, No. 98-cv-104, 1999 WL 33117172 (D. Maine Apr. 23, 1999) (Cohen, Mag. J.)). But the Superior Court held that *IRI* was "distinguishable from the case at hand," noting that *IRI* involved a challenge to the requirement that was disconnected from any pending petition, whereas "[h]ere, the State disqualified the petitions because the circulators collected signatures prior to registering to vote." Sup. Ct. Order at 9.

The Court further noted that it was limiting its decision only to the signatures of Casey-Riordan and Paul, both of whom were "registered to vote at the time the petitions were submitted to the Secretary of State." *Id.* at 9. The Superior Court reasoned that although the Maine Constitution and the implementing statutes required circulators be listed as registered voters in the towns where they reside, the Secretary's "temporal voter registration requirements"—i.e., that requirement that they be registered in the Town where they reside when they *collect*, rather than *submit*, petition signatures—"do not appear either in the Maine Constitution or in statute." *Id.* In light of the constitutional limitations outlined in *Buckley*, the Court determined that the registration of Casey-Riordan and Paul by the time they submitted the petitions was sufficient to "satisfy[]the State's interest to the extent voter registration makes it easier to locate circulators in the event an investigation is necessary." *Id.* But it held that requiring registration before circulation was not "justified by a compelling state interest and are narrowly tailored to serve that interest." *Id.* (citing *Wyman v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993)).

The Court also specifically rejected the Secretary's argument that Petitioners had not raised a constitutional challenge to the registration requirement. *Id.* at 9-10. It noted that Petitioners had pled constitutional violations in their Petition, and that the Court specifically "raised the issue with the parties at its August 21 conference and the parties had time to brief it." *Id.*

Because the "number of signatures considered after clarification by the Secretary" was 988, *id.* at 8-9, the Court's holding was sufficient to reverse the Secretary's refusal to certify the people's veto petition. But the Court addressed other issues raised by the parties. With respect to Petitioner's challenge to the Secretary's rejection of 160 signatures from Freeport, the Court acknowledged and affirmed the Secretary's decision that a clerk could validly certify a petition for which the oath was completed after the certification process began. *See id.* at 14-15. But it held the Secretary's decision to invalidate a petition that was notarized the day after the certification process began—but before it was complete—was not arbitrary, capricious, or an abuse of discretion. *Id.* at 11-12. The Court also rejected all of Intervenors' other challenges, affirming the Secretary's refusal to disqualify thousands of petitions for alleged notary conflicts of interest. *Id.* at 14-16.

Further Proceedings. The Secretary and Intervenors filed notices of appeal on August 27, within the deadline required by 21-A M.R.S. § 905(3). Both parties subsequently filed motions to stay the Superior Court's order pending appeal. The Appellees opposed the stay, and the Court heard argument on that motion only on September 3, 2020.[4]

[4] On September 8, this Court issued a decision denying the Appellants' motion to stay as moot because Rule 62(e) applies to automatically stay the Superior Court's decision below. That decision did not relate in any way to the merits of this appeal, and it does not moot the case. As Appellants themselves argued, regardless of ballot design the Secretary can simply count only the first set of votes for President. Comm. Mot. to Stay. 8-9 ("[E]ven with a stay, Maine's Presidential election could move forward based on a plurality alone. A plurality vote can occur with ranked choice ballots, but ranked choice voting cannot occur without ranked choice ballots."). This would comply with the

STATEMENT OF THE ISSUES

I. Did the Superior Court correctly apply the Supreme Court's holding in *Buckley v. American Constitutional Law Foundation* in reversing the Secretary's requirement that petition circulators be registered to vote at their current address before they gather signatures?

II. Does 21-A M.R.S. § 905 permit the Appellants to raise a new factual challenge to signatures for the first time on appeal?

III. Was the Secretary's decision to reject the 160 signatures from Freeport arbitrary and capricious given his decision to accept as valid numerous other petitions where certification was initiated, but not completed, before the petition was notarized?

STANDARD OF REVIEW

The Legislature has imposed limitations on this Court's review on appeals of the Secretary's certification of initiative petitions. *See* 21-A M.R.S. § 905(3). Judicial review is governed by strict deadlines, and this Court's decision is limited to "questions of law." *Id.* Except as modified by § 905(3), review of the decision proceeds under Rule 80C, which typically means that this Court "review[s] directly the Secretary of State's decision

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Constitution's requirement that an act subject to the people's veto be suspended until the vote takes place. Me. Const. art. IV, pt. 3, § 17(2). And the petition would by law be placed on the ballot for the "next statewide or general election, whichever comes first." *Id.* And in no event can the ballot printing deadline—which the Secretary and Intervenors never raised until after the Superior Court decision—be construed to somehow vitiate the people's constitutional right to exercise the people's veto or the provisions for judicial review set forth in 21-A M.R.S. § 905(3).

for errors of law, findings not supported by the evidence, or an abuse of discretion." *Reed v. Sec'y of State*, 2020 ME 57, ¶ 12, ___ A.3d ___. But given the nature of this "expedited proceeding," this Court has accorded great weight to a Superior Court's "comprehensive analysis of the statutory interpretation required in th[e] matter." *Hammer v. Sec'y of State*, 2010 ME 109, ¶ 4, 8 A.3d 700 (citing *Sephton v. FBI*, 442 F.3d 27, 29-30 (1st Cir.2006)). "To interpret the Maine Constitution," the Law Court "construe[s] constitutional provisions by using the same principles of construction that [it] appl[ies] in cases of statutory interpretation" and "appl[ies] the plain language of the constitutional provision if the language is unambiguous," and "[i]f the provision is ambiguous, … determine[s] the meaning by examining the purpose and history surrounding the provision." *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 14, ___ A.3d ___ (quoting *Voorhees v. Sagadahoc County*, 2006 ME 79, ¶ 6, 900 A.2d 733).

SUMMARY OF ARGUMENT

The Superior Court correctly reversed the Secretary's invalidation of the signatures collected by Ms. Casey-Riordan and Ms. Paul. The Secretary's application of a requirement that circulators be registered to vote at the time they collect signatures cannot survive strict scrutiny, which is why similar requirements have been almost uniformly invalidated in the wake of *Buckley*. The Appellants have never argued that the Secretary's registration requirement can satisfy strict scrutiny, relying instead on a single outlier case that applied the wrong level of scrutiny and which the Superior Court recognized was distinguishable on its facts. The Secretary's argument that his

interpretation of the registration requirement is consistent with the Maine Constitution and statutes is incorrect, but also irrelevant; the First Amendment controls over contrary state law, which is why *Buckley* invalidated a state constitutional requirement. The Superior Court also properly rejected the Secretary's claim that the First Amendment question was forfeited below; the issue was timely raised, briefed by all parties, and passed upon by the Superior Court. This Court should affirm the Superior Court's decision reversing the Secretary's invalidation of the signatures collected by Ms. Casey-Riordan or Ms. Paul.

Appellants also argue, for the first time on appeal, that there are alternative reasons to invalidate some of the signatures collected by Ms. Casey-Riordan and Ms. Paul. This belated attempt to alter the basis for the Secretary's determination is barred by law. The Superior Court's decision relied upon the Secretary's express representations about the number of signatures at stake. And although the Secretary identified alternative reasons to exclude numerous other signatures below, he never raised any other challenge to the signatures collected by Ms. Casey-Riordan and Ms. Paul. Had he done so then, Appellees and the Superior Court could have addressed those reasons or responded with additional arguments. But it is too late now for the Secretary to revisit this factual question. To do so would violate the statute governing this Court's standard of review, contradict established principles of appellate procedure, and unfairly burden litigants and the lower courts with the responsibility of guessing the alternative reasons the Secretary might conjure from any one of tens of thousands of

pages of petitions submitted below. And even if it were possible to reopen the record below, fairness would require that Appellees be given the chance to raise additional arguments that would plainly offset the loss of the signatures that the Appellants are belatedly raising now.

Finally, even if the Appellees are permitted to raise their new signature challenges on appeal, the Court can affirm the decision below on alternative grounds because the Superior Court incorrectly affirmed the Secretary's decision to reject 160 signatures from Freeport. In that case, the town registrar began certifying the petitions before realizing that they were missing the circulator's notarized oath. The registrar called the circulator and arranged for them to come in and complete the oath before the registrar completed the process of certification. The Secretary accepted numerous other signatures that were certified in this same manner—but rejected the signatures from Freeport only because that process was not completed on the same day. But there is no "same day" requirement in the law, and the Secretary's treatment of otherwise identical petitions differently is the quintessential example of "arbitrary and capricious" action.

ARGUMENT

I. The Superior Court correctly held that the Secretary's requirement that circulators be registered voters before collecting any signatures cannot survive strict scrutiny.

The Superior Court correctly applied strict scrutiny to the Secretary's application of the circulator registration requirement, and reversed the invalidation of more than 900 signatures from circulators that all parties agree were registered at the time they

submitted their signatures. The Superior Court followed binding First Amendment precedent to adopt a limiting construction of Maine's registration requirements. The Secretary's refusal to recognize that the registration requirements must be interpreted in light of the First Amendment is baffling, and the Superior Court correctly rejected the Secretary's argument that the claim was forfeited by Petitioners below.

A. Strict scrutiny applies to circulator-registration requirements.

This Court has recognized that the circulation of petitions is "core political speech." *Maine Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶ 8, 795 A.2d 75 (quotation marks omitted). *See also Meyer v. Grant*, 486 U.S. at 414, 421-22 (1988) (holding that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'"). It follows that "[r]estrictions on the right to undertake an initiative are subject to exacting scrutiny, must be justified by a compelling state interest and be narrowly tailored to serve that interest." *Wyman*, 625 A.2d at 311.

The Superior Court properly identified strict scrutiny as the applicable standard. Sup. Ct. Order 9 (citing *Wyman*, 625 A.2d at 311). It also recognized *Buckley* as the key Supreme Court precedent. *Id.* at 8-9. *Buckley* held that Colorado's constitutional requirement that initiative-petition circulators be registered voters violated the First Amendment. 525 U.S. at 186-87. Colorado's registration requirement was unconstitutional because it directly "limited the number of voices who will convey the initiative proponents' message and, consequently, cut down the size of the audience

proponents can reach." *Id.* at 194-95 (cleaned up). The Supreme Court also noted the burden that would arise from preventing initiative proponents from qualifying the matter for the ballot, and thus limiting their "ability to make the matter the focus of statewide discussion." *Id.* at 195 (quoting *Meyer*, 486 U.S. at 423). Colorado's interests—including upholding the integrity of the initiative process—failed to justify the law under strict scrutiny. *Id.* at 195-97.

Since *Buckley*, the overwhelming weight of judicial precedent holds that "enforcement of … registration requirements against … circulators violate[s] … First Amendment rights." *See, e.g.*, *Nader v. Blackwell*, 545 F.3d 459, 476 (6th Cir. 2008). Indeed, Petitioners are unaware of any appellate decision in the last 20 years in which a court has upheld an initiative petition circulator registration requirement. *Cf. Lux v. Rodrigues*, 561 U.S. 1306, 1308 (2010) (Roberts, C.J., in chambers) (noting *Buckley* "differentiate[s] between registration requirements, which were before the Court, and residency requirements, which were not" and the courts of appeals have reached divergent results only "with respect to the validity of state residency requirements").

The Superior Court's decision thus represents a straightforward application of *Buckley*. It recognizes that the Secretary's requirement that circulators be registered to vote before collecting signatures could not satisfy strict scrutiny. Sup. Ct. Order 9. To the extent the requirement advances a state administrative interest by "mak[ing] it easier to locate circulators in the event an investigation is necessary," the Court found that interest was satisfied here because the circulators in question were registered at their

current addresses at the time they submitted the petition. *Id.* The Court thus had no occasion here to go any further (such as invalidating the registration requirement altogether).

B. The Superior Court correctly rejected Appellants' reliance on *IRI*.

The Appellants' reliance on the unreported federal magistrate's decision in *IRI* is unavailing. The Superior Court explained why *IRI* was distinguishable. *See* Sup. Court Order 8-9. *IRI* involved a prospective challenge to petition requirements by an organization whose members wished to engage in future, unspecified initiative campaigns. 1999 WL 33117172, at *6-*9. In that context, the magistrate judge concluded that the organizations could not show a "severe" burden because they had no evidence that the requirement imposed a "severe" burden *on them*, such as being "unable to hire sufficient numbers of circulators" or having "a particular initiative campaign [that] was hurt." *Id.* at *15. But that is not the case here; the Superior Court recognized that Secretary's requirement imposed a severe burden on this petition effort, striking hundreds of otherwise valid signatures. *See* Sup. Ct. Order at 9. There can be no burden more severe than striking a measure from the ballot based on the voter registration requirement.

As importantly, *IRI* was decided only four months after *Buckley*, and applied a "less stringent standard of review" to uphold the registration requirement. 1999 WL 33117172, at *15. In the intervening decades, "a consensus has emerged that petitioning restrictions like the one at issue here are subject to strict scrutiny analysis." *Libertarian*

Party of Virginia v. Judd, 718 F.3d 308, 316-17 (4th Cir. 2013); *see, e.g.*, *id.* at 316-19 (applying strict scrutiny to find unconstitutional Virginia's state residency requirement for petition circulators); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028-29 (10th Cir. 2008) (applying strict scrutiny to find unconstitutional Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader*, 545 F.3d at 475-76; *Nader v. Brewer*, 531 F.3d 1028, 1036, 1038 (9th Cir. 2008); *Lerman v. Bd. of Elections in City of New York*, 232 F.3d 135, 146-47 (2d Cir. 2000). And although this Court has not had occasion to consider the constitutionality of the voter registration requirement, it has previously applied strict scrutiny to circulator requirements. *See Hart v. Secretary of State*, 1998 ME 189, ¶ 13, 715 A.2d 165 (upholding residency requirement for circulators as a "compelling state interest" that "is narrowly tailored"); *see also Wyman*, 625 A.2d at 311.

Accordingly, "[s]trict scrutiny is the proper standard," *Libertarian Party of Virginia*, 718 F.3d at 317. Appellants have never provided a meaningful argument that they could actually satisfy strict scrutiny. Indeed, the Secretary's stay papers did not even *mention* strict scrutiny, and he resorted to citing a 1944 case—predating much of the current First Amendment jurisprudence—in a misguided attempt to try to shift the burden back to the Appellees. Sec'y Mot. to Stay 14 (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1944)).[5]

[5] Even ignoring its vintage, *Davies* cannot help the Appellants. It involved preemption, rather than a fundamental constitutional right, and held only that executive branch officials may presume that state measures are constitutional "until their invalidity is judicially declared." *Davies*, 321 U.S. at 153-54.

To be sure, the Secretary has pointed to statistics concerning voter registration that satisfied "the less stringent standard of review" in *IRI*. *See* Sec'y Mot. to Stay 13-14. But even if that standard were the correct one—and it is not—the Superior Court correctly observed that this case involved direct harm to an ongoing petition effort. Sup. Ct. Order at 9. *Indeed*, *IRI* itself recognized that it was not presented with evidence that "a particular initiative campaign was hurt." 1999 WL 33117172, at *15. And, as mentioned above, *Buckley* itself recognized that there are two distinct First Amendment harms that arise from registration requirements: both a reduction on the "number of voices who will convey" the initiative's message *and* "reducing the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limiting proponents' ability to make the matter the focus of statewide discussion." 525 U.S. at 194-95 (citing *Meyer*, 486 U.S. at 422-23 (cleaned up)). In *Meyer*, relied upon in *Buckley*, there was no reliance on factual testimony about the number of circulators who would be gained if they could be paid. *See* 486 U.S. at 423. And *Buckley* acknowledged that some individual circulators may choose not to register as a political statement, which is itself is protected by the First Amendment. *See Buckley*, 525 U.S. at 195-96. The Secretary's simple invocation of voter-registration statistics ignores these distinct First Amendment harms that are indisputably at issue in this case.

The Secretary's use of the voter registration statistics is also misleading. He relies on the relative percentage of Maine residents who are registered to vote in Maine. *See* Sec'y Mot. to Stay 13-14. But the signatures in question were invalidated by the Secretary

because, at the time the signatures were gathered, the circulators were not registered *at their current address*. *See* Amend. Determ. at 1-2. The statistics the Secretary relies on shed no light on the percentage of the state's voting age population that is registered at their current address. They simply reflect the percentage of the state that previously registered and remain on the rolls—which means they include some of the circulators that the Secretary nonetheless disqualified here. *See* R.11. Thus, the Secretary's statistics are irrelevant on their own terms, and in any event cannot satisfy strict scrutiny.

C. The Secretary's challenge to the Court's limiting construction of the Maine constitution and statutes is irrelevant and misplaced.

The Secretary expended considerable effort in his stay petition arguing that this case involves only a question of state-law interpretation, and that the Superior Court erred in holding that the applicable provisions do not require circulators to be registered at their current address before they gather signatures. Sec'y Mot. to Stay 1-2, 9-12. This plainly misconstrues the Superior Court's interpretive approach, and is ultimately irrelevant anyway given that *Buckley* and the First Amendment necessarily control over contrary provisions of state law.

To begin, the Secretary's repeated suggestions that this case does not involve the First Amendment is baffling. The Superior Court's analysis began with a discussion of *Buckley*, identified the proper First Amendment standard of strict scrutiny, and ultimately held that the Secretary's application of a "temporal voter registration requirement[]" could not satisfy that standard. Sup. Ct. Order 8-9. It is evident that the

Superior Court's interpretation of the relevant provisions not to impose a strict timing requirement was firmly made with the First Amendment's requirements in mind.

And rightly so. It is a "basic principle" of construction that courts are "bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements." *Bagley v. Raymond Sch. Dep't*, 1999 ME 60, ¶ 14, 728 A.2d 127 (quotation marks omitted). This principle applies with equal force to the interpretation of provisions of the Maine Constitution. *See Avangrid Networks, Inc.*, 2020 ME 109, ¶ 14, ___ A.3d ___; *see also In re Apportionment of House of Representatives*, 315 A.2d 211, 217 (Me. 1974) (seeking to "achieve a pragmatically effective and rational accommodation between the 'equal protection' demands of the federal Fourteenth Amendment and the basic spirit and letter of the Maine Constitution"). Indeed, other courts have taken similar approaches to limit their reading of registration requirements in light of *Buckley* and the First Amendment. *See, e.g.*, *KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens*, 199 Ariz. 30, 38, 13 P.3d 772, 780 (Ct. App. 2000) (concluding in light of *Buckley* that "the statutory scheme could not constitutionally include a local residency requirement for referendum petition circulators and we interpret in a way that avoids an unconstitutional result"); *Preserve Shorecliff Homeowners v. City of San Clemente*, 71 Cal.Rptr.3d 332, 342, 158 Cal.App.4th 1427, 1439 (Cal. App. 4 Dist. 2008) (same).

But even absent the required application of constitutional avoidance, the text of the Maine Constitution in fact does not include a requirement that circulators be

registered at their current address at the time of circulation. Instead, it requires only that circulators "must be a resident of this State" and that their "name must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor." Me. Const. art. IV, pt. 3, § 20.

The Legislature has enacted a statute further specifying these requirements, which allows "any Maine resident who is a registered voter" to circulate petitions. *See* 21-A M.R.S. § 903-A. That statute nowhere requires that circulators be registered *at their current address* when they circulate petitions. And although it requires circulators to submit an affidavit attesting that they meet various requirements, including as to their registration status, *see* § 903-A(4), that affidavit must include the "physical address at which the circulator resides… *at the time the petition is filed*," *id.* (emphasis added). The Superior Court's observation that the Secretary's "temporal voter registration requirement[] …. do[es] not appear either in the Maine Constitution or in statute" was well-founded. Sup. Ct. Order 9. Indeed, it directly applies this Court's warning to "be chary of reading another time limitation into [the Constitution] by implication." *Payne*, 2020 ME 110, ¶ 30, ___ A.3d ___ (quotation marks omitted).

The Secretary's reliance on *Reed v. Sec'y of State*, 2020 ME 57, ___ A.3d ___, is also unavailing. That case had nothing to do with the First Amendment and constitutional avoidance principles that apply here. It also turned on the Court's deference to the Secretary's "reasonable construction" of a statute that "falls within the agency's expertise." *Id.* ¶ 14. But the reading of constitutional provisions is not an area

within the Secretary's particular expertise and thus is subject to *de novo* review. *Maine Taxpayers Action Network*, 2002 ME 64, ¶ 8, 795 A.2d 75; *see also LeBlanc v. United Engineers & Constructors Inc.*, 584 A.2d 675, 677 (Me. 1991).

If anything, the absurdity canon relied upon in *Reed* cuts the opposite way here. Absurdity would arise from the Secretary's preferred interpretation because the Secretary's temporal registration requirement, when combined with Maine's relatively open same-day registration procedure, creates a trap for the unwary. Voters may register at their town office, at the Bureau of Motor Vehicles, or during voter-registration drives. 21-A M.R.S. §§ 121-22, 152. And voters can appear and register to vote in their current municipality of residence even on the day of an election. 21-A M.R.S. §§ 122(4), 121-A. Moreover, once registered, voters cannot be removed from the rolls "solely because the registered voter did not vote in previous elections." 21-A M.R.S. § 161(2-A). And even voters who change addresses cannot be removed from the voting list until they (1) register in a new municipality; (2) confirm in writing that they have abandoned their former address; or (3) fail to respond to a notice of change of address and fail to vote in the following two general elections. 21-A M.R.S. §§ 161(2-A)(A), 162(2-A)(2).

The result of this regime is that active voters who move within the state almost always maintain their registered status continuously, often updating their address and registration at their current municipality on election day. *See* U.S. Election Assistance Comm'n, 2016 Election Administration and Voting Survey: Report to 115th Cong 102 (showing that Maine has the fifth highest percentage of election day registration in the

country). Because the change of address has no practical limiting ability on a voter's eligibility to participate in an election, the Secretary's rule renders circulation as the *only* time a voter's status on a particular town's rolls could have any effect.

In all circumstances the Maine Constitution should not be construed so narrowly, and in cases involving the people's reserved right to initiate or veto legislation and the First Amendment, the Court must err on the side of the people's right to "exercise of their sovereign power to legislate," *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983), and circulators' established right to free speech. But again, even if the Secretary's reading were compelled by the Maine Constitution—notwithstanding its silence on the timing of circulator registration—it would still have to yield to the First Amendment, as the Colorado constitutional and statutory provisions did in *Buckley*.

D. The Superior Court correctly rejected the Secretary's forfeiture claim.

Finally, contrary to the Secretary's assertion, the First Amendment issue has been "properly presented" Sec'y Mot. to Stay 15. The Superior Court the Secretary's argument below, noting that Petitioners had in fact raised constitutional challenges in their Petition. *See* Sup. Ct. Order 9-10. Moreover, the issue indisputably was presented to and passed upon in the Superior Court—which is all that is required for preservation. *See McAfee v. Cole*, 637 A.2d 463, 467 (Me. 1994) (issue properly presented when "the trial court ha[d] full opportunity to dispose finally of the action" and "determine[d] the propriety of the relief requested" (internal quotation marks omitted)). And all parties

had a full opportunity to address the issue and submitted supplemental briefing during the proceedings below. *See Franklin Prop. Tr. v. Foresite, Inc.*, 438 A.2d 218, 221 (Me. 1981) (question adequately raised when "both parties addressed this issue in their memoranda in support of summary judgment and have filed supplemental briefs herein on this point"); *see also St. Francis De Sales Fed. Credit Union v. Sun Ins. Co. of New York*, 2002 ME 127, ¶ 22, 818 A.2d 995 ("An issue is raised and preserved if there was a 'sufficient basis in the record to alert the court and any opposing party to the existence of that issue.'" (quoting *Chasse v. Mazerolle*, 580 A.2d 155, 156 (Me. 1990))). And in any event, the Superior Court always has the power to ensure that its order does not run afoul of the United States Constitution or binding Supreme Court precedent by applying the doctrine of constitutional avoidance. The Secretary's claim of forfeiture thus has no merit.[6]

II. The Appellants' belated factual challenges are precluded on appeal and, even if allowed, could not support reversal.

The Appellants seek to revisit factual determinations about the number of valid

[6] The Secretary's contention that Rule 80C(i) required Petitioners to assert a separate First Amendment claim is inapplicable here. Rule 80C(i) deals only with joinder of "independent action[s]." But it does not cabin the court's ability to request supplemental briefing from the parties or to apply constitutional avoidance when interpreting state constitutional and statutory provisions. Moreover, provisions of Rule 80C are not applicable to the extent they are "modified by" section 905's judicial review provisions. Section 80C(i) creates a lengthy process for joining independent claims, complete with a suspension of "the time limits contained in this rule" and a hearing. This process is plainly incompatible with section 905, which provides for liberal intervention by interested parties and a full resolution of the matter "within 40 days of the decision of the Secretary." Likely reflecting this incompatibility, no court has ever held that Rule 80C(i)'s requirements apply to a section 905 proceeding.

signatures that the Superior Court made below. But the signature numbers used by the Superior Court came directly from the Secretary's *own filings* in this case, and the Legislature precludes the belated attempt to raise factual issues now. Even if this Court had jurisdiction to make new factual findings, it is unfair and burdensome on the parties and lower courts to allow the Secretary to litigate new grounds at this late stage of the case. And even if the record could be reopened, Appellants can plainly identify additional valid signatures that would offset those the Appellants claim should not have been counted below.

To begin, the number of signatures reinstated by the Superior Court came from the Secretary's *own* filings. *See* Sup. Court Order 3 n.1, 8, 11, 17. *See also* Sec'y Rule 80C brief (8/19/20), at 7 (defending the Secretary's "decision to invalidate 682 signatures on petitions circulated by Michelle Riordan, and 262 signatures on petitions circulated by Monica Paul"); Sec'y Supp. Br. (8/24/20) at 4 n.4 (noting that "[t]he number of signatures collected by Monica Paul that were invalidated in the Secretary's Amended Determination on remand, issued on August 12, 2020, was actually 306, not 262 as originally determined"). The Appellants are thus wrong to suggest that the Superior Court made any mistake. The lower court—like Appellants—simply and justifiably relied on the Secretary's own representations in the briefs presented to him.

Moreover, the Secretary had every opportunity below to argue alternative grounds for the invalidity of the signatures in question. Indeed, there are examples of him doing so. For example, the Secretary noted in his Amended Determination that

although he had erroneously invalidated signatures circulated by Mark Longworth for CIRC, he determined that "[t]he signatures were not those of registered voters, however, and should have been invalidated for REG." Amend. Determ. at 2 ¶ 2 (R.3). And in discussing signatures from Turner (which the Secretary later conceded were valid), the Secretary noted that "[o]f the 841 signatures at issue, 32 are invalid for other reasons as well but were only discounted in the original determination for AMD." *Id.* at 4 ¶ 6(b) (R.5). That is exactly the type of argument that the Appellants are now trying to raise for the first time on appeal. Those arguments *could* have been made before, but they were not.

This is not a mere foot-fault. The statute governing the timing and judicial review of the Secretary's determination on citizens' initiatives sharply limits the time and scope of review. The statute unambiguously requires that the Superior Court "*shall* issue its written decision containing its findings of fact and stating the reasons for its decision within 40 days of the date of the decision of the Secretary of State." 21-A M.R.S. § 905(2) (emphasis added). When used in Title 21-A, "the words 'shall' and 'must' are used in a mandatory sense to impose an obligation to act[.]" *McGee v. Sec'y of State*, 2006 ME 50, ¶ 15, 896 A.2d 933. Indeed, on this point the Legislature has shown "a particularly firm resolve," and as a result, "[t]he statutory deadline means what is says." *Id.* ¶¶ 15, 17. The deadlines and other limitations within section 905(2) are binding on

this Court and the parties.[7] *See also City of Lewiston v. Maine State Employees Ass'n*, 638 A.2d 739, 742 (1994) (noting that "[t]he Superior Court had no authority to grant a one-day extension pursuant to M.R. Civ. P. 6(b), nor did it have the authority over the Employers' appeal"); *Dobson v. Department of the Secretary of State*, 955 A.2d 266, 267 (Me. 2008) ("affirm[ing] the Superior Court's judgment affirming the Secretary of State's final agency action concluding that it lacked the authority to extend the statutory filing deadline"); *Cent. Maine Med. Ctr. v. Concannon*, No. CIV. A. AP-00-16, 2000 WL 33671789, at *2 (Me. Super. Sept. 26, 2000) (rejecting argument that "statutory deadlines are not mandatory but directory").

In this case, the Superior Court issued its decision on the last day permitted by statute—after twice remanding the case to the Secretary for the taking of additional evidence and several rounds of briefing by the parties. Further review in this Court is expressly limited to "questions of law," 21-A M.R.S. § 905(2)—not findings of fact. As a result, both this Court and the Superior Court lack jurisdiction to take new evidence or otherwise litigate factual issues that the Secretary or Intervenors failed to raise below.

Nor can the Appellants avoid this plain and unambiguous deadline by contending that the Secretary's determinations are shown "on the face of the petitions" themselves. Sec'y Mot. to Stay 16. This Court and the Superior Court review the

[7] The same mandatory deadlines preclude a remand, because any new findings from the Superior Court would necessarily be made later than "40 days of the date of the decision of the Secretary of State." 21-A M.R.S. § 905(2).

Secretary's determination—which is set forth in his written determination, amended twice after separate remand for further factual findings. Indeed, the statute *requires* the Secretary to make his determination in "a written decision stating the reasons for the decision[.]" 21-A M.R.S. § 905(1). Having failed to identify alternative challenges to these signatures in that "written decision"—which he modified twice after remands from the Superior Court—the Secretary cannot now simply invite the Court to engage in its own flyspecking of the voluminous record here or find new facts about the signatures and the Secretary's reasons for invalidating them. After all, the Secretary concedes that this case involved the submission of 9,482 petitions to the Secretary. Sec'y Mot. to Stay 16 n.10. Each of those petitions is two pages long. The Secretary is thus alleging that parties and courts have an independent obligation to review upwards of 19,000 pages of raw petitions in this case—and presumably any future ones—to decipher handwritten notations[8] and refute alternative reasons for the Secretary's actions even if the Secretary himself never raised them below. Indeed, the Secretary concedes that it took his office an entire day *after* the Superior Court's ruling—and therefore long after the deadlines of section 905 had expired—to calculate the alleged alternative reasons. *See* Sec'y Mot. to Stay at 16; Comm. Mot. to Stay at 6.

[8] Absent an opportunity for adversarial testing below, there is no reason to assume these notations are accurate; the Petitioners below identified numerous errors in the handwritten tallies that the Secretary was obligated to correct in his later determination. *See* R.5 ¶ 6(d) (assessing 39 petitions Intervenors identified as submitted after constitutional deadline); R.7 ¶ 10 (assessing errors in determination that voters were registered); R.7 ¶ 11 (assessing "tabulation errors" identified by Petitioners).

The ordinary rules of party presentation and the enforcement of the Legislature's deadlines and limitations on judicial review take on added importance here. The Maine Constitution requires that a valid people's veto petition—by either proclamation of the Governor or the Secretary—be "submitted to the people" at the "next statewide or general election, whichever comes first, not less than 60 days after such proclamation." Me. Const. art. IV, pt. 3, § 17(3). And in the meantime, the statute that is subject to the petition "shall not take effect until 30 days after" the vote on the people's veto is certified. *Id.* § 17(1). Section 905's statutory deadlines—and limitations on the scope of judicial review—advance the Constitution's requirements respecting "the people's exercise of their sovereign power to legislate," *Allen*, 459 A.2d at 1102-03, and "facilitate[s]" this "integral component of the constitutional scheme," *McGee*, 2006 ME 50, ¶¶ 25, 27, 896 A.2d 933.

The alternative is unworkable. If the Secretary or The Committee can make new arguments on the 41st day after the initial determination, what would prohibit the Appellees from bringing challenges on the 45th day? Or the 50th? At some point the petition needs to be finalized and either sent to the voters or reposed as invalid. Permitting belated factual challenges also leaves Petitioners having to guess which new arguments might pop up later. Litigation is not whack-a-mole; the parties must bring their arguments forward at the appropriate time, when all sides can present evidence or alternative arguments to rebut them.

Finally, even if the factual record could be revisited at this late hour, it still would

not support reversal of the decision below. If the factual record were to be reopened to allow the Secretary and Committee to make new arguments, fundamental fairness would at least require that Appellants also be permitted to renew their initial challenge to the disqualification of signatures by Michael Patterson. *See* R. 2-3. The signatures gathered by Patterson were invalidated for the same reasons as Michelle Casey's and Monica Paul's, *id.*, and the number of signatures he collected (in excess of 90) would more than offset the signatures the Committee seeks to belatedly challenge on appeal *See* Appellants' Opp. to Mot. to Stay, Ex. 1.[9] The same is true if the Court were to reverse the Secretary's decision with respect to the 160 signatures from Freeport. *See infra*, at 30-34. But this court need not, should not, and cannot go there; the time to raise factual challenges is over, and this Court's review is restricted to "questions of law." 21-A M.R.S. § 905(3).

III. The Secretary's rejection of 160 signatures from Freeport was arbitrary and capricious.

The Secretary invalided 160 signatures from Freeport because he determined that the town's registrar administered the circulator's oath one day after she began checking the registered status of all of the signatories to the petition. R.4; Sup Ct. Order 11-12. The Freeport registrar submitted a statement to the Secretary indicating that she

[9] The Superior Court declined to reach this issue because it was not necessary to the outcome of the petition and, in its view, "the other parties have assumed they were abandoned have had no reason to address petitions submitted by any other circulator." Sup. Ct. Order at 7. This underscores the unfairness of Appellants' arguments now that the Secretary can never be deemed to have abandoned an argument. Abandonment is a two-way street, and it must apply equally to both sides.

"started certifying the petitions" on March 4, realized the oath had not been filled out, and arranged for the circulator to return to the office on March 5. R.87. The registrar stated that she should have changed the certification date to March 5, and that she "never released the petitions until the circulator's oath had been signed and all the signatures had been verified." *Id.* Under these circumstances, and in light of the treatment the Secretary gave to other petitions in nearly identical postures, the invalidation of these petitions was arbitrary and capricious.[10]

The Secretary's basis for invalidating these signatures is 21-A M.R.S. § 902. That statute provides, in relevant part, that circulators:

> must sign the petition and verify by oath or affirmation before a notary public … that the circulator personally witnessed all of the signatures to the petition and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be and that each signature … was made by the authorized signer in the presence and at the direction of the voter. … **After the petition is signed and verified in this manner, the petition must be submitted to the registrar for certification** in accordance with the Constitution of Maine, Article IV, Part Third, Section 20. If the petitions submitted to the registrar are not signed and verified in accordance with this paragraph, the registrar may not certify the petitions and is required only to return the petitions.

Id. The Secretary's rejection of the Freeport signatures hinges entirely on the word "after" in this statute. He contends that "[i]t was a violation of section 902 for the clerk to certify signatures on petitions before the circulator's oath was completed." R.4. But

[10] Because this argument seeks to affirm the judgment below on alternative grounds, no cross-appeal was necessary. *See* M.R. App. P. 2C(a)(1) (requiring a cross-appeal only "[i]f the appellee seeks any change in the judgment that is on appeal" and that an "appellee may, without filing a cross-appeal, argue that alternative grounds support the judgment that is on appeal").

this decision cannot be squared with the evidentiary record, his instructions to his own reviewers, his treatment of other petitions, or the Constitution itself.

To begin, there is no reason to invalidate the signatures under section 902 because the Freeport registrar did not complete her certification until the oath was administered. By her own statement—which was credited by the Secretary—she began the process of certification on March 4 but "never released the petitions until the circulator's oath had been signed and all the signatures had been certified." R.87. For this reason, she acknowledges that she "should have changed the certification date to 3/5/2020" because she "never released the petitions until the circulator's oath had been signed and all the signatures had been verified." *Id.*

Had the Freeport registrar actually corrected the certification date to match the date of the oath, the Secretary would have accepted these signatures. His own instructions to reviewers in his office make that point clear: "if these dates are the same, do not discount for PRIOR." R.511. When, as here, the registrar's failure to write the correct certification date is a clerical oversight, the signatures should be counted. *See In re Opinion of the Justices*, 116 Me. 557, 103 A. 761, 773 (1917) (clerk's mistake does not invalidate otherwise qualifying signatures); *In re Opinion of the Justices*, 114 Me. 557, 95 A. 869, 876 (1915) (same).

The Secretary's written guidance recognizes that section 902 is not intended to impose a strict order of operations, but instead to ensure that the final certification encompasses validly collected signatures. Indeed, the Secretary *rejected* the Intervenors'

calls to invalidate a number of other signatures for which certification at least in part preceded the administration of the oath. *See* Sup. Ct. Order at 14; R.4. The only distinction between those cases and that of Freeport is that the registrar did not return to the office to provide the notarized signature until the next morning. *See* R.4 (noting that in the other cases, "the registrar administered the oath on the same day as the certification—just not in the right sequence").

These cases cannot be materially distinguished from that of Freeport. Like the registrars in Boothbay and Dexter, the Freeport registrar began certifying the petitions before the oath was completed, but upon discovering her mistake made arrangements for the registrar to return and take the oath before she released the certified petitions.[11] And yet the Secretary decided to count all of the other petitions, but reject Freeport's. "Nothing could be more arbitrary or capricious" than "two identical cases [being] decided differently." *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011); *see also California Communities Against Toxics v. Envtl. Prot. Agency,* 928 F.3d 1041, 1057 (D.C. Cir. 2019) ("Agency action is also arbitrary and capricious if it offered insufficient reasons for treating similar situations differently.").[12] Nothing in the text of the statute or the Secretary's explanation justifies invalidating signatures if the oath is administered at 4:59

[11] This is not a case where the oath was added after the petitions left the custody of the registrar, thus introducing the possibility of post-certification addition of, or changes to, names or signatures.

[12] The Superior Court's deference to the agency's interpretation, *see* Sup. Ct. Order 14-15, does not solve this problem. The Secretary's interpretation here is based on a distinction that is unmoored from the statutory text or the purpose of the requirements of the oath and certification.

p.m. on the day certification begins, but not if it is administered at 9:01 a.m. the next morning.

The Secretary's rejection of the Freeport signatures also unjustifiably punishes the voters who wish to make their voices heard through the people's veto process. The Freeport registrar is the individual who chose to begin the certification process before the circulator in question appeared to complete her oath. The statute, however, requires registrars encountering an incomplete verification to "return the petitions" to the circulator. 21-A M.R.S. § 902. That is effectively what happened here—as in the other towns where petitions were deemed valid, the registrar did not complete the certification until the oath was verified. The Secretary's refusal to recognize that and validate these signatures punishes the Appellants for the mistakes of a registrar. And Petitioners' remedy is limited to relief against the Secretary, not the registrars. *See* 21-A M.R.S. § 905(2). Fundamental fairness requires that the Secretary in this case "facilitate, rather than handicap, the people's exercise of their sovereign power to legislate." *Allen*, 459 A.2d at 1102-03.[13]

[13] Even if section 902 were read to require invalidation of any signatures where the registrar began certifying petitions before the oath was administered, it would violate the Maine Constitution. The Constitution requires two elements for petitions submitted to the Secretary: verification and certification. Me. Const. art. IV, pt. 3, § 20. These constitutional requirements advance separate goals. Verification ensures the "trustworthiness and veracity of the circulator." *Maine Taxpayers Action Network*, 2002 ME 64, ¶ 13, 795 A.2d 75. Certification is necessary to comply with the Constitution's requirement that petitioners appear on the appropriate "voting list . . . as qualified to vote for Governor." Me. Const. art. IV, pt. 3, § 20. If these two conditions are satisfied, a petition is constitutionally valid. The power of the Legislature to further impose statutory obstacles on the petition process is limited; the Legislature may only design implementing legislation "pursuant to the Constitution." Me. Const. art. IV, pt. 3, § 17. The people's "absolute right" to enact or veto legislation

IV. The Superior Court correctly rejected Intervenors' other arguments.

Because 21-A M.R.S. § 905(3) requires the filing of simultaneous briefs, Appellees have not had a chance to review all of the arguments that may be advanced by Appellants. To the extent they challenge any other aspect of the decision below, Appellants incorporate their arguments below and encourage this Court to affirm for the reasons given by the Superior Court in its decision. *See* Sup. Ct. Order 14-17.

CONCLUSION

For these reasons, the judgment of the Superior Court should be affirmed.

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Dated: September 8, 2020

"cannot be abridged directly or indirectly by any action of the Legislature." *McGee*, 2006 ME 50, ¶ 21, 896 A.2d 933.

CERTIFICATE OF SERVICE

The undersigned hereby certifies, pursuant to M.R. App. P. 10(b), that copies of the foregoing were served upon the parties to this action below.

Dated: September 8, 2020

Patrick Strawbridge, Bar No. 10024