STATE OF MAINE
CUMBERLAND, ss

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,
Defendant-Appellants,

and

THE COMMITTEE FOR RANKED CHOICE VOTING, et al.
Intervenors-Appellants.

MOTION TO STAY THE MANDATE, FOR AN INJUNCTION PENDING RELIEF FROM THE UNITED STATES SUPREME COURT, AND FOR EXPEDITED CONSIDERATION

INTRODUCTION

Petitioners-Appellees David A. Jones *et al.* seek a stay of the Law Court's mandate in this case pursuant to Maine Rule of Appellate Procedure 14(a)(3)(A) and an injunction of the Secretary's Determination pending Petitioner-Appellees' petition for certiorari to the United States Supreme Court. Additionally, Petitioner-Appellees move for expedited consideration of this motion pursuant to Rules 7(b)(4), and 10, and request that this Court shorten the time for any response to two business days. The Appellants have indicated that they oppose the motion to stay and for an injunction,[1] but do not object a shortened time to respond of three business days, if the Court

[1] Counsel for the Secretary specifically advised before this motion was filed that "the Secretary of State does not agree to stay his decision, whether or not he has authority to do so, and he certainly has no authority to enjoin the implementation of P.L. 2019, Chapter 539 in the upcoming general election."

wishes to see a response.

Petitioners have a strong likelihood of success on appeal because this Court's decision conflicts with well-established precedent applying strict scrutiny to circulator registration requirements. Additionally, Petitioners will be irreparably injured absent a stay because the Secretary's Determination displaces the Maine Constitution's automatic suspension of any law that is subject to a people's veto petition challenge. Finally, the public interest and balance of harms weigh decisively in Petitioner's favor because (as Appellants have conceded) the election can proceed with the current ballots and there remains adequate time to inform the electorate of the method of tabulation that shall be used.

This Court's prior decision to grant a stay in *Knutson v. Dep't of Sec'y of State*, 2008 ME 124, 954 A.2d 1054, makes this an easy case. There, in a similar posture, this Court recognized the "paramount importance" of the First Amendment and therefore "stay[ed] the issuance of the mandate for one week" to allow the petitioner to determine whether the Supreme Court will intervene to stay the mandate. *Id.* 2008 ME 124, ¶ 14, 954 A.2d 1054. Petitioners here make a far stronger showing of success on the merits and irreparable harm.

ARGUMENT

Petitioners satisfy both the standard for obtaining a stay pending certiorari and an injunction of the Secretary's Determination pending that appeal. The traditional standards for injunctive relief apply to both requests. *See Knutson*, 2008 ME 124, ¶ 4,

954 A.2d 1054. As discussed below, Petitioners have demonstrated that they (1) "will suffer irreparable injury if the stay is not granted; (2) such injury outweighs any harm which granting the stay would inflict on the other party; (3) it has a likelihood of success on the merits (at most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the stay." *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶ 14, 121 A.3d 792, 797.

I. Petitioners have a strong likelihood of success on the merits

The Court erred in holding that the circulator registration requirement contained in the Maine Constitution is not subject to strict scrutiny. This is the first time in decades—since the unpublished *IRI* opinion—that any court has upheld a circulator registration requirement. Moreover, it is the first time since that opinion that a court has upheld any circulator requirement without determining that it was narrowly tailored to serve a compelling government interest. This stands in stark contrast to the "consensus" that has emerged among federal circuit courts that strict scrutiny applies to circulator requirements. *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 v. Blackwell*, 545 F.3d 459, 475-76 (6th Cir. 2008); *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).

The Law Court's decision stands in even starker contrast with the consensus that circulator registration requirements in particular are almost *per se* invalid under *Buckley*. *See, e.g.*, *Nader*, 545 F.3d at 476 ("[E]nforcement of ... registration requirements against ... circulators violate[s] ... First Amendment rights."); *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").

This Court correctly recognized that "[t]he circulation of petitions is 'core political speech" and that "regulations affecting core political speech must ordinarily be narrowly tailored to carry out a compelling state purpose." Op. 11 (internal quotation marks omitted). But the Court refused to apply strict scrutiny by inventing an exception to *Buckley*'s exacting standard for what is calls "cases involving the regulation of ballot access," which supposedly "includ[es] cases involving the regulation of petition circulation." *Id.* The whole point of *Buckley* was to carve out such regulations from the normal *Anderson-Burdick* framework and apply greater scrutiny because "petition circulation is core political speech." *Buckley*, 525 U.S. at 186. *See also id.* at 642-45. Indeed, this is how federal circuit courts have *uniformly* interpreted *Buckley*. *See supra.* All petition circulation regulations can be couched as ballot-access

regulations. Thus, the Court's new "ballot-access regulation" exception to *Buckley* reads *Buckley* out of existence and subjects petition regulations to precisely the less stringent regime *Buckley* rejected.

Additionally, even assuming *Anderson-Burdick* balancing is appropriate here, the Court accorded more weight than was due to the State's "only" "germane" "justification for the registration requirement—the determination of the circulator's Maine residency at the time the circulator collects signatures." Op. 21. In holding that the registration requirement "is vital to the expedited review process," *id.* at 22, the Court ignored *Buckley*'s identification of another means to verify residency: an affidavit. *Buckley* held that a registration requirement was not necessary to further the State's "strong interest in policing lawbreakers among petition circulators" because this interest "is served by the requirement ... that each circulator submit an affidavit setting out, among several particulars, the address at which he or she resides, including the street name and number, the city or town, [and] the county." 525 U.S. at 196 (quotation marks omitted). Like Colorado's affidavit requirement in *Buckley*, Maine also requires circulators to submit an affidavit attesting that they meet various requirements, including as to their registration status, and the affidavit must include the "physical address at which the circulator resides... at the time the petition is filed." 21-A M.R.S. § 903-A(4). Accordingly, as in *Buckley* "the added registration requirement is not warranted. That requirement cuts down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. at 197.

Petitioners have thus presented a strong likelihood of success on the merits. Given the First Amendment interests at stake, this alone should be sufficient for a stay. In *Knutson*, this Court granted a stay even though the petitioner "failed to demonstrate a reasonable likelihood of success on appeal" "because safeguarding the protections of the First Amendment is of paramount importance." *Knutson*, 2008 ME 124, ¶ 4, 954 A.2d 1054.

II. Petitioners will be irreparably harmed absent a stay and injunctive relief.

Petitioners will also suffer irreparable harm absent the requested relief. Absent an injunction of the Secretary's Determination, the ranked choice voting law will go into effect despite the Maine Constitution's requirement that it be suspended upon submission of a valid petition. Me. Const. art. IV, pt. 3, § 17(2). This provision protects the people's right to "exercise of their sovereign power to legislate," *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983). Petitioners' fundamental right to engage in the initiative process and exercise their superior power to legislate would be rendered a nullity if the Constitution's automatic suspension provision was not given effect. *Cf. id.* (provisions should be construed to "facilitate, rather than handicap, the people's exercise of their sovereign power to legislate"). By allowing the ranked choice voting law to take effect, the action of the legislature would control over the Petitioners' exercise of their fundamental right to legislate and the Constitution's suspension provision, which facilitates this right. *Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971) ("[T]he people, as sovereign, have retaken unto themselves legislative power."). The restraint on both

the Petitioners' federal First Amendment rights and fundamental right to legislate is clearly an irreparable injury. *See Nat'l Org. for Marriage*, 2015 ME 103, ¶ 15, 121 A.3d 792.

III. The public interest and balance of harms weigh in favor of a stay and injunctive relief.

Finally, the public interest and balance of harms weigh heavily in favor of Petitioners. As Intervenor-Appellants have conceded in the prior stay proceedings—without any dispute from the Secretary—the election can still proceed with the current ballot, which precludes any harm to the broader public interest in the conduct of the general election. The public interest also favors strong protection of the First Amendment and the people's fundamental right to exercise the reserved power to legislate. The balance of harms also favors Petitioners' because their First Amendment and sovereign people's veto right will be irreparably harmed absent a stay and the public interest will be not be harmed by the requested relief.

IV. Motion for Expedited Response

Given the imminence of the election and the need to provide notice to voters as to the form of tabulation that will be used in the Presidential race, Petitioners also move to expedite the briefing schedule for this matter pursuant to Maine Rule of Appellate Procedure 7(b)(4), 10, and by shortening Defendant-Appellant and Intervenor-Appellant's time for any response to two business days (to Friday, September 23). Petitioners have conferred with Defendant-Appellant and Intervenor-Appellant, who each indicated that they would not object to shortening their time to respond to three

business days (Monday, September 28), if the Law Court wishes to hear from them before acting on the motion. *See* M.R. App. P 10(a)(4) ("Motions may be acted upon at any time, without waiting for a response thereto.").

CONCLUSION

For the reasons set forth above, Petitioners request that this Court enter an expedited briefing schedule, stay the mandate, and enter an injunction against the enforcement of the Secretary's Determination.

Dated: September 23, 2020

Respectfully submitted,

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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.

Patrick Strawbridge