STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-20-227

MATTHEW DUNLAP SECRETARY OF STATE

Respondent-Appellant

v.

DAVID A. JONES ET AL.

Petitioner-Appellee

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT-APPELLANT MATTHEW DUNLAP SECRETARY OF STATE

AARON M. FREY
Attorney General

THOMAS A. KNOWLTON
Deputy Attorney General

Of Counsel

PHYLLIS GARDINER
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800

Respondent-Appellant Secretary of State Matthew Dunlap (the Secretary) appeals from the Order of the Superior Court (McKeon, J.), issued on August 24, 2020, reversing the Secretary's Amended Determination of Validity of the petition for a people's veto of P.L. 2019, Chapter 539, "An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine."

In his Amended Determination of validity, following a remand to take additional evidence, the Secretary invalidated all of the signatures that had been collected by two circulators (Michelle Riordan and Monica Paul) who were not registered to vote at the time they circulated the petitions.[1] The Superior Court reversed the Secretary's determination, concluding that the Maine Constitution does not require circulators to be registered to vote at the time they collect signatures on petitions, but only at some later date when the petitions are submitted to the Secretary for review. Based on its legal interpretation and a statement in the Secretary's brief that the Paul and Riordan petitions contained 988 signatures invalidated for this reason, the court concluded that all 988 signatures should have been counted as valid,

[1] Copies of the Secretary's original Determination (Record item ("R.") 45), Amended Determination (R. 1), and the Supplement to Amended Determination filed on August 24, 2020, pursuant to a second remand order, are attached here for reference as Exhibit 1.

thereby exceeding the threshold to qualify the people's veto petition for the ballot. Order at 9, 17.

The Superior Court erred as a matter of law in interpreting the definition of "circulator" in the Maine Constitution. Me. Const. art. IV, pt. 3, § 20. The court also erred in concluding that its ruling would restore the validity of all signatures collected by Riordan and Paul, when the agency record shows that 92 of their signatures were either duplicates or signatures of unregistered voters and thus were invalid for reasons independent of the circulator's status. Even if this Court were to agree with the Superior Court's legal conclusion, therefore, the record shows that it would add a maximum of 910 valid signatures to the 62,101 signatures deemed valid by the Secretary – resulting in a total of 63,011 valid signatures, which is still 56 signatures below the threshold to qualify for the ballot.

The Secretary correctly applied the constitutional and statutory requirements in reviewing this people's veto petition. His determination is also supported by substantial evidence in the agency record and accordingly should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

Proponents of a petition for a people's veto of P.L. 2019, Chapter 539, "An Act to Implement Ranked-choice Voting for Presidential Primary and

General Elections in Maine" filed a total of 9,482 signed petitions on June 15, 2020, which was the deadline set forth in Me. Const. art. IV, pt. 3, § 17(1). The Secretary had 30 days in which to complete his review, pursuant to 21-A M.R.S. § 905(1), while simultaneously preparing for the July 14 primary election and implementing numerous added precautions to deal with the COVID-19 health threat. On July 15, 2020, the Secretary issued a Determination of Validity, which concluded that the petitions contained 61,334 valid signatures – 1,733 short of the minimum necessary to qualify for the ballot. R. 45.

Petitioners David Jones, Jonathan Kinney, and Joshua Morris filed this Rule 80C action challenging the Secretary's determination on July 27, 2020. Clare Hudson Payne, Philip Steele, Frances M. Babb, and The Committee for Ranked Choice Voting, promptly intervened. Petitioners subsequently moved, pursuant to M. R. Civ. P. 80C(e) and 5 M.R.S. § 11006(1)(B), to take additional evidence, proffering affidavits from four circulators regarding their registered voter status, and three municipal registrars describing circumstances that they believed had caused certain petitions to be erroneously rejected. The Secretary consented to a remand on August 3, 2020, to consider this new evidence, and both Petitioners and Intervenors submitted extensive exhibits, along with arguments challenging the Secretary's determinations of validity

and invalidity on approximately twenty different legal and factual grounds. R. 27-44. After a period of only four business days in which to review this additional material, the Secretary issued an Amended Determination on the evening of August 12, 2020. R. 1. The agency record was filed the next day.

In his Amended Determination, the Secretary found that the petitions contained a total of 61,292 valid signatures – still 1,775 signatures short of the minimum number required. R. 1, ¶ 14. Accordingly, his conclusion that the petition did not qualify for the ballot remained unchanged. In their briefs to the Superior Court after remand, the Petitioners narrowed the scope of their appeal, challenging only the Secretary's decisions to invalidate: 1) petitions submitted to the Town of Turner after the constitutional deadline, 2) petitions circulated by Monica Paul and Michelle Riordan when they were not registered to vote, 3) signatures certified by the Town of Freeport before the circulator took her oath, and 4) material alterations to the dates of certain voter signatures. The Intervenors asserted that the Secretary had erroneously failed to invalidate numerous additional signatures on petitions that were allegedly certified by town registrars before the circulators took their oaths, and petitions for which the circulator's oath was administered by notaries with an alleged conflict of interest that should have disqualified them pursuant to 21-A M.R.S. § 903-E.

After reviewing the parties' briefs, the Superior Court convened a conference of counsel on August 21, 2020, to discuss two issues: 1) a possible remand to the Secretary to further investigate the circumstances surrounding the date on which petitions were submitted to the Town of Turner, and 2) whether the United States Supreme Court's decision in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), required reversal of the Secretary's decision to invalidate signatures based on the circulators' registered voter status. At the conclusion of the conference, the Court remanded the first issue to the Secretary and invited the parties to submit supplemental briefs on the second issue by the morning of August 24, 2020.

Based on an interview with the Deputy Clerk of Turner,[2] the Secretary determined that the petitions the Deputy Clerk had certified on June 11-12, 2020, had in fact been received by the Town on June 10, 2020 – the deadline set forth in Me. Const. art. IV, pt. 3, § 20. He thus added 809 signatures to the total number of valid signatures,[3] thereby increasing the number of valid signatures to 62,101 – still 966 below the magic number to qualify for the

[2] The Secretary's office had been unable to reach the Deputy Clerk to interview her during the remand period. *See* R. 1 ¶ 6(b).

[3] The Secretary calculated that 32 of the 841 signatures on the Turner petitions were invalid as duplicates, leaving a total of 809 otherwise valid signatures. R. 1, ¶ 6(b). Intervenors have since claimed that the Secretary erred in this calculation, and they contend that 70 more signatures on the Turner petitions were deemed invalid for independent reasons. *See* Intervenors' Motion for Stay at 6, n. 2. The Secretary has not yet had an opportunity to evaluate this claim.

ballot. *See* Supplement to Amended Determination, filed with the Court on August 24, 2020 (copy attached as Exhibit 1 to the Secretary's Motion for Stay, filed August 31, 2020).

The Superior Court issued its decision on August 24, 2020, as required by 21-A M.R.S. § 905(2). The court upheld the Secretary's determinations on all contested issues but one – the petitions submitted by Michelle Riordan and Monica Paul – but reversed the Secretary's ultimate determination that the proponents had not submitted enough valid signatures to qualify the people's veto question for the ballot.

Both the Secretary and the Intervenors filed notices of appeal on August 27, 2020, followed by motions for stay on August 28 and 31, 2020. Earlier today, this Court ruled that the Superior Court's order was stayed automatically, pursuant to M.R. Civ. P. 62(e). *Jones v. Sec'y of State*, 2020 ME 111.

STATEMENT OF THE ISSUES

I. Whether the Secretary erred as a matter of law in determining that the Maine Constitution, Article IV, Part 3, Section 20 requires circulators to be registered voters in the municipality where they reside at the time they collect signatures on a people's veto petition.

II. Whether the Secretary's determination regarding the requirement that circulators be registered voters complies with the First Amendment of the United States Constitution, and whether that issue is properly before this Court, having not been raised by petitioners in their Rule 80C petition.

III. Whether the Secretary's determination that the people's veto petition does not contain enough valid signatures to qualify for the ballot complied with Me. Const. art. IV, pt. 3, §§ 17 & 20 and 21-A M.R.S. §§ 901-905, and is supported by substantial evidence in the agency record.

ARGUMENT

I. The Secretary correctly determined that Article IV, Part 3, Section 20 of the Maine Constitution requires circulators to be registered voters in the municipality where they reside at the time they collect signatures on petitions.

A. Standard of Review

Questions of interpretation of the Maine Constitution, just as with statutes, are reviewed by the Court *de novo*. *See McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933.

B. The plain language of Article IV, Part 3, Section 20 supports the Secretary's interpretation.

The term "circulator" is defined in the Maine Constitution to mean:

> *a person who solicits signatures for written petitions*, and who must be a resident of this State and *whose 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 (emphasis added). The Secretary reads this provision as plainly including a "temporal" requirement – that a circulator must be a registered voter *when collecting* signatures on petitions for a people's veto or initiative petition – not at some later point in time, such as when petitions are filed with the Secretary. For that reason, he invalidated all signatures collected by circulators Michelle Reardon and Monica Paul. It is undisputed that these two circulators' names did not appear as registered to vote in the towns where they resided until after they had collected all the signatures on their petitions. The Superior Court erroneously reached a contrary reading of Maine's Constitution in its Order with respect to these two circulators. *See* Order at 9.

In *Reed v. Secretary of State*, 2020 ME 57, ¶ 16, this Court found it significant that the notary conflict of interest statute, 21-A M.R.S. § 903-E, precluding a notary who "provides services" to a referendum campaign from administering oaths to petition circulators was phrased in the present tense. The Court declined to limit the present tense prohibition in *Reed* to situations where a notary was providing those other services "at the precise time that he

or she performs a notarial act," because "such a reading would defeat the obvious legislative purpose of discouraging fraudulent notarizations related to direct initiative campaigns" by allowing notaries to "simply alternate between performing notarial and non-notarial work without violating [the statute]." *Reed*, 2020 ME 57, ¶ 17. The Court was "confident the Legislature did not intend this absurd result." *Id*. The more logical reading adopted by the Secretary and upheld in *Reed* was that a notary who was currently providing or had *previously* provided non-notarial services to a campaign would be disqualified from administering oaths to circulators. *Id*. ¶ 19.

The interpretation in this case is easier to resolve than in *Reed* because the literal present tense meaning of the circulator definition in Me. Const. art. IV, pt. 3, § 20 is also the most logical interpretation and avoids absurd results. If one must be a Maine resident and registered to vote in the town where one resides in order to be a circulator, and if circulating petitions means to "solicit signatures for written petitions," the most logical reading is that the circulator must *be a* resident and a *registered voter when "soliciting"* or collecting signatures on petitions, not at some future time. That is what the plain language of that constitutional provision says. *Reed*, 2020 ME 57, ¶ 14 (plain language interpretation controls if unambiguous); *see also Farris ex rel. Dorsky*

v. Goss, 143 Me. 227, 230, 60 A.2d 908, 910 (1948) (principles governing construction of statutes apply to construction of constitution).

In enacting implementing statutes for the initiative and referendum process, the Legislature has adopted the same interpretation. Title 21-A, section 903-A, for example, provides that "[p]etitions issued under this chapter may be circulated by any Maine resident who is a registered voter acting as a circulator of a petition." Another provision of the same statute requires every petition circulator to execute an affidavit including a statement "that the circulator was a resident of the State and a registered voter in the State *at the time of circulating* the petition." *Id*. § 903-A(4)(C) (emphasis added). Even though the affidavit need only be filed with the Secretary at the time the petitions are filed, it must include an affirmation that the circulator was registered to vote "at the time of circulating the petition." *Id*.

Finally, the record reflects that petitioners understood this requirement when they began their petition drive. The Secretary is required by law to provide petitioners with copies of the laws and rules governing the petition process to give to their circulators and "may also include comments that may aid in the comprehension of those laws and rules." *Id*. § 903-A(3). The instructions that the Secretary provided to the organizers of this people's veto petition effort spell out clearly that "[p]etitions may be circulated by any

Maine resident who is a registered voter," and [t]he circulator must be registered to vote in the municipality where they reside." *See* R. 52(G) (Instructions to Petition Organizers for People's Veto Petitions).

II. The Secretary's application of the registered voter requirement for petition circulators does not violate the First Amendment of the U.S. Constitution, and that issue is not properly before this Court now.

In a conference of counsel on August 21, 2020, the Superior Court asked the question whether requiring petition circulators to be registered voters might offend the First Amendment to the United States Constitution under the U.S. Supreme Court's ruling in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999). App. ___. Petitioners in this case did not challenge the constitutionality of Maine's circulator registration requirement – they only questioned its temporal application by the Secretary to two of their circulators, as discussed in part I of this argument. Petitioners responded to the First Amendment question only when the Superior Court raised it *sua sponte* at the August 21, 2020 conference.[4] Accordingly, Petitioners should be deemed to have waived any First Amendment claim in

[4] It is plainly not a jurisdictional issue and thus not subject to review regardless of whether the petitioners presented it. To present a First Amendment challenge to the requirement in Maine's Constitution that circulators of initiative petitions be registered voters, Petitioners should have included an independent claim for relief in their Rule 80C petition and file a motion to determine the future course of proceedings pursuant to M.R. Civ. P. 80C(i). They did not include such a claim.

this appeal.[5] *Foster v. Oral Surgery Assocs., P.A.*, 2008 ME 21, ¶ 22, 940 A.2d 1102. Even if not waived, the claim should be rejected by this Court.

The constitutionality of Maine's registered voter requirement for circulators has been challenged in two prior petition cases. In *Hart v. Sec'y of State*, 1998 ME 189, 715 A.2d 165, *cert. denied*, 525 U.S. 1139 (Feb. 22, 1999), petitioners challenged the validity of both the residency and registered voter requirements for circulators in Maine's Constitution. This Court upheld the residency requirement, but declined to reach the other issue because the petition fell below the threshold to qualify for the ballot once the non-resident circulators' petitions were invalidated. *Hart*, 1998 ME 189, ¶ 5, 715 A.2d at 166-167. In *Maine Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, 795 A.2d 75 ("MTAN"), the same constitutional issue with respect to a circulator's registered voter status was raised. Although the First Amendment issue was not decided by the majority, it was discussed in a concurring opinion by Justice Dana. 2002 ME 64, ¶¶ 27-29.

Analysis of whether a particular restriction on petition circulators violates the First Amendment requires a two-part factual inquiry under the Supreme Court's test established in *Anderson v. Celebrezze*, 460 U.S. 780, 788

[5] Just as with any statute, the provisions of Maine's Constitution are presumed to be constitutional, and any challenger bears a heavy burden of overcoming that presumption. *See Davies Warehouse Co v. Bowles*, 321 U.S. 144, 153 (1944).

(1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). First, the court must "consider the character and magnitude of the asserted injury" to First and Fourteenth Amendment rights to engage in core political speech. Only if the restriction imposes a severe burden must the state demonstrate that it is narrowly tailored to serve a compelling state interest. *Burdick*, 504 U.S. at 434; *see Anderson*, 460 U.S. at 788-89. If the burden is less than severe, then the State need only show important regulatory interests to justify a reasonable, non-discriminatory restriction. *Burdick*, 504 U.S. at 434; *MTAN*, 2002 ME 64, 120**,** 795 A.2d 951. Assessing the degree of burden thus requires development of facts.[6]

The Supreme Court in *Buckley* struck down Colorado's circulator registration requirement on the grounds that it imposed a severe burden on political speech by limiting the pool of potential circulators who could carry the message to voters about a citizens' initiative. The finding of severe burden was based on the lower court's factual findings that a minimum of 400,000 – and possibly as many as 620,000 or even 964,000 – eligible voters in Colorado (up to 65% of the voting age population) were not registered to vote and were

[6] Contrary to Petitioners' argument on the motion for stay, there is no controlling case law holding that strict scrutiny applies to judicial review of all restrictions on petition circulators. Indeed, most of the cases cited by Petitioners from other federal circuits address candidate or party petitions, not initiative petitions.

thereby disqualified from circulating initiative petitions. 525 U.S. at 193 & n.15. Given these "uncontested numbers," the Court held that the registration requirement "decreases the pool of potential circulators" to an impermissible extent and "cuts down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. at 194, 197; *see MTAN*, 2002 ME 64, ¶¶ 28-29, 795 A.2d 75 (Dana, J. concurring).

A few months after *Buckley* was decided, an as-applied challenge to the validity of Maine's requirements for circulators was litigated in *Initiative & Referendum Institute v. Sec'y of State*, No. CIV-98-104-B-C, 1999 WL 33117172 (D. Me. Apr. 23, 1999) ("*IRI*"). The federal court in *IRI* found undisputed evidence that

> the estimated voting-age population of Maine (i.e., Maine residents age 18 and over) was 944,785 as of July 1997, compared with a pool of Maine registered voters totaling 933,753 as of November 1998. Earlier data is comparable, showing a voting-age population of 943,797 in 1996 and a total of 953,368 registered voters as of November 1998. Thus, approximately 98.8 percent of Maine's voter-eligible population is registered to vote. These numbers do not in themselves sustain a claim of severe burden.

2019 WL 331171712, at *15. Based on this record, the district court concluded "[i]nasmuch as the evidence demonstrates at most the imposition of a slight burden, the less stringent standard of review applies." *Id.*; *see MTAN*, 2002 ME 64, ¶¶ 27-28, 795 A.2d 75 (Dana, J. concurring) (no evidence

to support assertion in *IRI* that Maine's voter registration requirement would have similar impact on number of potential circulators as the Colorado requirement).

Voter registration numbers have not changed significantly since *IRI* was decided. As of November 2018, there were 1,054,952 active registered voters in Maine,[7] which represents 96% of the voting age population of 1,095,370, estimated by the U.S. Census Bureau in July 2019.[8] The plaintiffs in *IRI* could not prove a severe burden with a pool of 98% of the voting age population eligible to circulate petitions in 1999, and these Petitioners would be unable to do so today even if they had tried, given that 96% of the voter-eligible population is in the available pool of circulators. Moreover, Petitioners have not claimed any difficulty in finding a sufficient number of registered voters to serve as circulators of this people's veto referendum petition. They successfully engaged a total of 543 circulators, only 10 of whom were found to be unregistered at the time they collected signatures. *See* R. 49. In short, the facts in the agency record do not support a finding of severe burden, even if it had been properly presented.

---

[7] *See* data posted on Secretary of State's web page at: https://www.maine.gov/sos/cec/elec/data/data-pdf/r-e-active1118.pdf

[8] *See* U.S. Census projections posted in the Federal Register at: https://www.federalregister.gov/documents/2020/02/14/2020-03000/estimates-of-the-voting-age-population-for-2019

The federal court in *IRI* also held that Maine has important governmental interests supporting the registration requirement that were sufficient to justify the minimal burden imposed. 1999 WL 33117172, at **14-15. If this Court reaches the First Amendment issue, it should confirm that conclusion for several reasons. First, the registration requirement goes hand-in-hand with the residency requirement already been upheld by this Court in *Hart*. Both help to ensure the integrity of the petition process by making it easier to locate circulators if there are questions regarding potential fraud or forgery, *see Reed v. Sec'y of State*, 2020 ME 57, ¶23, and to subpoena them if necessary. *See Hart*, 1998 ME 189, ¶13; *MTAN*, 2002 ME 64, ¶ 19.

Voter registration is an administrative mechanism to show residency because a voter needs to establish residency in order to register to vote. *See* 21-A M.R.S. § 112. Without the registration requirement, the Secretary would have no administratively feasible way to determine the residency of the circulator at the time of circulating petitions without having to engage in what could be an extensive factual inquiry. *See Poirier v. City of Saco*, 529 A.2d 329, 330 (Me. 1987) (residency for voting purposes is equivalent to domicile). Indeed, the Superior Court in *Hart* recognized this, concluding after an evidentiary hearing to determine the residency status of several circulators in that petition drive that it was difficult to "imagine how a democratic

government could fashion a more narrowly tailored or less intrusive requirement [than registration] for determining residency." *See Hart and Mainers for Medical Rights v. Secretary of State Dan A. Gwadosky,* (Me. Super. Ct., Ken. Cty., Docket No. AP-08-30 (Kravchuk, J.) at 10, attached as Addendum. Registering to vote requires an individual to complete, and submit to their city or town office, a simple two-sided card, listing their legal name, physical address, mailing address (if different), date of birth, driver's license number – or state identification number or last four digits of a social security number in the absence of a driver's license – signature, and municipality and state where previously registered. *See* https://www.maine.gov/sos/cec/elec/voter-info/index.html.

Moreover, voter registration in Maine is done at the municipal level. Thus, one does not register to vote in Maine – one registers to vote in a *particular municipality* in Maine. That is why Maine's Constitution requires the circulator's name to "appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote." Me. Const. art. IV, pt. 3, § 20. Having one's name appear on the voting list of the town where the circulator resides conveys the current residence address of the circulator – not an address where they lived at some other point in time.

Requiring all circulators to have taken this simple step of registering to vote where they live before circulating petitions serves the State's important (and compelling) interests in protecting the integrity of the petition process, by helping to ensure that the Secretary can locate the circulator where they reside when collecting signatures.

III. The Secretary's determination that the people's veto petition does not contain enough valid signatures to qualify for the ballot complies with Me. Const. art. IV, pt. 3, §§ 17 & 20 and 21-A M.R.S. §§ 901-905, and is supported by substantial evidence in the agency record.

The Secretary incorporates here by reference the arguments made in his Motion for Stay with regard to determinations of the validity of signatures on petitions circulated by Monica Paul and Michelle Riordan.

With regard to the remaining aspects of the Secretary's determination that were challenged by both the Petitioners and Intervenors below, the Superior Court accurately applied the governing standard of review and correctly determined that the Secretary acted within the bounds of his discretion. App. ___ (Order, at 10-17).

CONCLUSION

The Secretary's Amended Determination of Validity, dated August 12, 2020, as supplemented on August 24, 2020, is correct as a matter of law and is supported by substantial evidence in the agency record. The Secretary respectfully requests that it be affirmed.

Dated: September 8, 2020

Respectfully submitted,

AARON M. FREY
Attorney General

PHYLLIS GARDINER
Assistant Attorney General
6 State House Station
Augusta, Maine 04333-0006
Tel. (207) 626-8830
Fax (207) 287-3145

Attorneys for Respondent Appellant
Secretary of State Matthew Dunlap

CERTIFICATE OF SERVICE

I, Phyllis Gardiner, Assistant Attorney General for the State of Maine, do hereby certify that I have provided counsel of record with electronic copies of this brief as of this date:

James Monteleone
Bernstein, Shur, Sawyer & Nelson, P.A.
100 Middle Street
P.O. Box 9727
Portland, ME 04104-5029
207-774-1200
jmonteleone@bernsteinshur.com

Patrick Strawbridge
Consovoy McCarthy PLLC
10 Post Office Square
8th Floor South PMB #706
Boston, MA 02109
703-243-9423
patrick@consovoymccarthy.com

Dated: September 8, 2020

PHYLLIS GARDINER
Maine Bar No. 2809
Assistant Attorney General
Office of Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8830