STATE OF MAINE

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

DAVID A. JONES, JONATHAN KINNEY, and JOSHUA MORRIS,

Petitioners-Appellees

v.

MATTHEW DUNLAP, in his capacity as the MAINE SECRETARY OF STATE,

Respondent-Appellant

and

THE COMMITTEE FOR RANKED CHOICE VOTING, et al.,

Intervenors-Appellants.

RESPONDENT-APPELLANT'S MEMORANDUM IN OPPOSITION TO PETITIONERS'-APPELLEES' MOTION TO STAY THE MANDATE AND FOR AN INJUNCTION

INTRODUCTION

After losing on the merits of their Rule 80C challenge, Petitioners now ask this Court to stay its mandate and enjoin implementation of the Secretary of State's determination, which the Court just upheld in *Jones v. Sec'y of State*, 2020 ME 113, so that they may file a petition for writ of certiorari in the United States Supreme Court on a First Amendment claim that Petitioners

never raised below. They do not have a strong likelihood of reaching the Supreme Court or overturning this Court's application of First Amendment law to the facts of this case. Even more significant, however, is that the relief they seek could disenfranchise voters and undermine the legitimacy of an election that is already underway. Any injunction at this point would directly contravene the public interest.

Ballots reflecting the ranked-choice method of voting in the presidential contest have been printed and are already being distributed to absentee voters. *See* attached Affidavit of Deputy Secretary of State Julie L. Flynn (Flynn Aff.), ¶¶ 14-16 & Exs. 1 & 2. Voters serving in the military and civilian voters living outside the United States are already casting ballots using the ranked-choice method (RCV) of voting. *Id*. ¶ 13. Petitioners imply in their motion that a stay or an injunction would simply require election officials to count the first-choice rankings to determine the outcome by plurality. This suggestion ignores the reality that voters may make different choices if they are ranking candidates in order of preference in an RCV race as opposed to picking only one candidate in a contest to be determined by plurality. Changing the rules by which an election will be determined after voters have begun voting threatens to disenfranchise voters who would have made a different choice if this were a plurality election. Contrary to Petitioners' contention (*see* Pet.

Motion at 2), this Motion is not just about giving them the opportunity to litigate "the method of tabulation that shall be used" in the upcoming election – it goes to the heart of how voters will express their choices on ballots that have already been printed and are being cast. It is simply too late to grant the relief that Petitioners seek.[1]

PROCEDURAL STATUS AND RELIEF REQUESTED BY PETITIONERS

In its decision on the merits issued on September 22, 2020, this Court vacated the judgment of the Superior Court and remanded with instructions to affirm the Secretary's determination that the people's veto petition lacked sufficient signatures to suspend the effect of P.L. 2019, Chapter 539, and to place a question on the ballot asking the voters if they wished to reject the new law, P.L. 2019, Chapter 539, expanding ranked-choice voting to presidential elections.[2] *Jones v. Sec'y of State*, 2020 ME 113, ¶ 35. The Court specified that the mandate would "issue immediately." *Id*. Later that same day, the Superior Court issued an order on remand affirming the Secretary's determination. *See* attached copy. Since the automatic stay remained in effect

[1] By contrast, when this Court stayed its mandate for one week in *Knutson v. Dep't of Sec'y of State*, 2008 ME 124, ¶14, 954 A.2d 1054, it was late August and the ballots had not yet been printed. Accordingly, there was still time to add Herbert Hoffman's name as a candidate for U.S. Senate if the U.S. Supreme Court had granted his petition for certiorari before the stay expired.

[2] The text of the proposed ballot question printed on the petition is: "Do you want to reject the new law that would require presidential elections in Maine to be decided using ranked-choice voting?" *See* R. 52 H.

while the appeal was pending pursuant to M. R. Civ. P. 62(e), as held in *Jones v. Sec'y of State*, 2020 ME 111, ¶¶ 3, 7-9, the Secretary's determination has remained in effect. The status quo under that determination is that ranked-choice voting applies to this presidential election and no people's veto question will appear on the ballot.

The Secretary has consistently represented in this and in other election-related appeals heard by the Court this summer[3] that his office needed to know the final contents of the ballot for the general election by August 28, 2020, in order to have sufficient time to design and lay out all the different ballot styles, and get the ballots printed, packaged, labeled, and distributed to 500 municipalities and voters by applicable deadlines in federal and state law. *See* Flynn Aff. ¶¶ 4-10. In the Secretary's motion for stay of the Superior Court's decision, filed on August 31, 2020, the Secretary expressly stated that a decision on that motion would determine the layout of the ballot, which could be changed "within the next couple of days" but not thereafter. *See* Secretary's Motion for Stay at 3-4.

As attested in the attached affidavit of Deputy Secretary of State Julie L. Flynn, over 1,100,000 ballots have now been printed, with the federal offices

[3] *E.g., Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109; *Payne v. Sec'y of State*, 2020 ME 110.

of president and vice president, U.S. Senator, and Representative to Congress as ranked-choice contests on one side of the ballot, and all other state and county offices to be determined by plurality on the opposite side. *See* Flynn Aff. ¶¶16-17 & Exs. 1 & 2 (sample ballots). The voter instructions printed on each side of the ballot are tailored to the two different methods of voting and counting ballots. *Id*. ¶17.

Perhaps recognizing this reality, the Petitioners do not appear to be asking this Court to enjoin ballot production, or even to order the Secretary to print an extra ballot with a people's veto question on it – indeed, neither of those remedies would be possible to implement at this late stage of the election process. Instead, they suggest that what remains to be determined is "the form of tabulation that will be used in the Presidential race." Pet. Motion at 7. As discussed below, however, ranked-choice voting is not merely another form of tabulating or counting votes; it involves a different method of voting as well. The two components of the RCV law cannot be severed.

ARGUMENT

Petitioners are asking this Court to stay the effect of its mandate – which has already been implemented by the Superior Court – and to require the Secretary to count the votes cast in the presidential election (to be held 36 days from today) according to a plurality of first-choice votes, not according to

the ranked-choice method of tabulation. Apart from the voter disenfranchisement and chaos this could create (discussed in part III of the argument below), this remedy seems to be beyond what is contemplated by either M.R. Civ. P. 62(g) or M.R. App. P. 14(a)(3)(A). Indeed, Petitioners cite no precedent for this Court fashioning a partial injunction of an agency determination that it has upheld on appeal, while the losing party seeks a petition for certiorari.

I. Petitioners do not have a strong likelihood of success in obtaining review and prevailing on the merits of an appeal to the U.S. Supreme Court.

To obtain a stay of the effect of this Court's mandate and an injunction as described above, Petitioners concede that they must show a strong likelihood of success on the merits (Pet. Motion at 3), and at this procedural stage, that means success in both obtaining review by the United States Supreme Court and prevailing on appeal to that Court. *See Knutson v. Dep't of Sec'y of State*, 2008 ME 129, ¶ 3, 954 A.2d 1054. Petitioners fail to make that showing for several reasons.

First, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), does not stand for the proposition that strict scrutiny automatically applies to review of any requirement that petition circulators be registered voters. The Court in *Buckley* applied that standard only after assessing – on a

full factual record developed after cross-motions for summary judgment and a bench trial – the degree to which Colorado's registered voter requirement actually burdened the First Amendment rights of the circulators and petition drive organizers who were the plaintiffs in that case. The evidence in *Buckley* showed "[b]eyond question [that] Colorado's registration requirement drastically reduces the number of persons, both volunteer and paid, available to circulate petitions." 525 U.S. at 193. The state had acknowledged that at least 400,000 persons eligible to vote were unregistered, but the Supreme Court also pointed to more recent statistics in the record that fewer than 65% of eligible voters in Colorado were registered, meaning that the "Colorado's registration requirement would exclude approximately 964,000 unregistered by voter-eligible residents from circulating petitions." *Id*. at n.15.

It was this factual record that led the Court in *Buckley* to find the state's regulations imposed "severe burdens" on the core political speech that circulators engage in when collecting signatures on their petitions. *See id*. at 192 n.12. That holding does not equate to a *per se* rule or set a precedent that warrants striking down Maine's registration requirement on a factual record that in no way resembles Colorado's.

This Court's analysis of *Buckley* in *Jones* is entirely correct, and its application of the *Anderson-Burdick* balancing test to the limited facts

presented in this agency record is consistent with *Buckley*. Contrary to Petitioners' assertion (Pet. Motion at 5), *Jones* is a ballot access case to which the *Anderson-Burdick* balancing test properly applies. *Buckley* did not "carve out" any exception to the applicability of that test for the regulation of signature-gathering on initiative petitions (Pet. Motion at 4).

Assessing the degree to which any regulation of petition circulation burdens First Amendment political speech rights under the *Anderson-Burdick* test is a highly fact-dependent inquiry, and yet Petitioners failed to present any facts to prove a severe burden.[4] As this Court noted, the record here is devoid of any evidence that requiring circulators to be registered to vote in the community where they have established a voting residence, pursuant to 21-A M.R.S. § 112 – the only place where one can be lawfully registered to vote in Maine – imposed a severe burden on their First Amendment rights to sign a petition and support a people's veto effort. *Jones*, 2020 ME 113, ¶¶ 30-31.[5] The mere fact that the people's veto petition fell short of the minimum

[4] Indeed, Petitioners did not plead a First Amendment claim in their Rule 80C petition and did not mention the First Amendment in briefing on appeal to the Superior Court – until after the Superior Court *sua sponte* raised a question about *Buckley* during a conference with the parties' counsel on Friday, September 21, 2020. Accordingly, in the Secretary's view, Petitioners waived any First Amendment claim.

[5] The core political speech protected by the First Amendment is the speech engaged in by circulators when they interact with voters to collect petition signatures. *See Buckley*, 525 U.S. at 186, discussing *Meyer v. Grant*, 486 U.S. 414, 422 (1988). In further contrast to *Buckley* and the other cases relied upon by Petitioners (Pet. Motion at 3-4), this case does not involve claims by any circulator that Maine's registered voter requirements burden their First Amendment rights. All of

number of valid signatures to qualify for the ballot does not prove that the procedural requirements were unduly burdensome to the First Amendment rights of these Petitioners. *Id*. ¶ 31.

Having found the burden to be less than severe, this Court properly assessed the State's supporting interests and correctly concluded that the registration requirement imposes "reasonable, nondiscriminatory restrictions on the First Amendment rights of petition supporters for the purpose of ensuring compliance with the residency requirement of the Maine Constitution." *Id*. ¶ 34. Voter registration takes place at the local level in Maine, and is recorded in a central voter registration system to which both state and local election officials have access. It is an easy requirement for circulators to fulfill and provides a verifiable way to determine residency and be able to contact or subpoena the circulator if necessary. [6]

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the cases relied upon by Petitioners involved challenges to the state's petition requirements brought by candidates, circulators, or petition organizations. Petitioners have not shown that they have standing to bring the same type of challenge merely because they signed the people's veto petition and wish to see the newly enacted public law suspended.

[6] Two of the cases Petitioners rely on, *Libertarian Party of Virginia v. Judd*, 718 F. 3d 308, 318 (4th Cir. 2013), and *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1030 (10th Cir. 2008), suggest that a more narrowly tailored option would be to require circulators to enter into a binding agreement with the State to comply with any subpoena or swearing to return to the state in the event of a challenge to the petition. Such a requirement would seem to be more onerous than simply registering to vote where one resides, as Maine requires.

In short, the Court's analysis is consistent with Supreme Court precedent, and Petitioners have not shown that it is likely that the Supreme Court would grant certiorari to review a claim that was not even properly raised or litigated as a First Amendment challenge to the state's petitioning regulations. Under the *Purcell* doctrine, it is also extremely unlikely that the U.S. Supreme Court would consider changing the rules governing an election that is only 36 days away and for which voting is already occurring. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, __ U.S. ___, 140 S. Ct. 1205, 1207 (2020) (*Purcell* principle of not altering election rules on the eve of an election seeks to avoid judicially created confusion).

II. Petitioners will not be irreparably harmed absent a stay and the injunctive relief they seek.

Petitioners assert that they will suffer irreparable harm "absent the requested relief" because "the ranked choice voting law will go into effect" rather than being suspended by the people's veto petition that they signed and wanted to put before the voters. *See* Pet. Motion at 6. This assertion ignores the reality that Chapter 539 already has taken effect as a public law and did so the day after the Secretary's final determination of invalidity, pursuant to Me. Const. art. IV, pt. 3, § 17(2). Moreover, neither a stay nor an injunction issued at this point would prevent voters from casting ranked-

choice ballots for President and Vice President. Any harm that Petitioners claim they will suffer as a result of ballots being tabulated according to the ranked-choice voting method (if no candidate wins a majority of all the first choice votes cast) is slight at best and cannot be remedied by an injunction without risking the disenfranchisement of other voters.[7]

III. Granting a stay or an injunction would harm voters' fundamental rights and adversely affect the public interest

The last two factors of the test for a stay or injunction weigh heavily against the Petitioners in this case. The ranked-choice and plurality methods of voting and tallying votes are markedly different, as recognized in *Opinion of the Justices*, 2017 ME 100, ¶¶ 65-67, 162 A.3d 188, and in *Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 19, n.12, 183 A.3d 749. Voters presented with a ranked-choice ballot are asked to rank their preferences among the candidates. *See* Exs. 1 & 2 to Flynn Aff. A voter may select one of the minor party or unenrolled candidates as their first choice and give lower rankings to other candidates with the confidence that if their first-choice candidate does not receive enough votes and is eliminated after round one, their second choice will still count. If the election were to be determined by plurality, the

[7] Voters who wish to vote for only one presidential candidate will be free to do so using the RCV ballot, and if that candidate continues to the final round, their vote will be counted. *See Hagopian v. Dunlap*, 2020 WL 4736460 (D. Me. Aug. 14. 2020).

same voter might decide to make a strategic choice to vote for one of the major party candidates, even if they did not prefer that candidate.

Because ranked-choice is not simply a method of tabulating ballots but also a method of voting, changing the tabulation method to plurality after a voter has voted a ranked-choice ballot would create the very strong possibility of negating that voter's choice and thereby effectively disenfranchising that voter. Such a result would cause irreparable harm to those voters and be directly contrary to the public interest.

Attempting to inform voters now that they should ignore the instructions printed on their ballot regarding the ranking of candidates for President according to the voter's preference, and instead fill in the first choice oval for only one candidate as they would in a plurality election, would likely prove ineffective and would almost certainly confuse voters – not only about the presidential race but also about how to vote in the other ranked-choice races for U.S. Senator and Representative to Congress on the same side of the ballot. Such voter confusion would undermine the legitimacy of the election in all of those races because there would be no way to correct any errors that voters made as a result of wrong information or wrong assumptions. In short, changing the rules after an election is underway may well cause chaos as well as disenfranchisement.

For this reason, as the U. S. Supreme Court held in *Purcell v. Gonzales*, 549 U.S. 1 (2006), and in other election cases since then such as *Republican Nat'l Comm*., 140 S. Ct. at 1207, courts should avoid issuing orders changing the rules of an election too close in time to the election because of the concerns about confusing voters and election officials, as well as undermining public confidence in the election outcome. [8] Voter anxiety about the election process is already heightened this year to an unprecedented level, and this Court (and the U.S. Supreme Court) should avoid taking any action that could exacerbate those concerns.

[8] The *Purcell* doctrine is generally followed in election cases. *See, e.g., Common Cause v. Thomsen*, No. 19-cv-323-JDP, 2020 WL 5665475, at *1-2 (W.D. Wis. Sept. 23, 2020) (declining to resolve the parties' motions for summary judgment until after the election because six weeks before the presidential election is "well within the sensitive time frame" that *Purcell* dictates courts should avoid chaos and voter confusion).

CONCLUSION

For all of the above reasons, Petitioners' Motion to Stay the Mandate and for an Injunction Pending Relief from the United States Supreme Court should be denied.

Dated: September 28, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Phyllis Gardiner, Assistant Attorney General for the State of Maine, do hereby certify that, in addition to providing counsel of record with electronic copies, I have served a copy of this memorandum, with the attached affidavit and exhibits by depositing them in the U.S. mail, postage prepaid, addressed as follows:

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