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

v.

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

Respondent

and

CLARE HUDSON PAYNE, PHILIP STEELE, FRANCES M. BABB, and THE COMMITTEE FOR RANKED CHOICE VOTING,

Applicant Intervenors.

RESPONDENT-APPELLANT'S MOTION FOR STAY PENDING APPEAL WITH INCORPORATED MEMORANDUM OF LAW (M. R. App. P. 10 and M. R. Civ. P. 62(g))

Respondent-Appellant Secretary of State Matthew Dunlap (the Secretary) hereby moves pursuant to M.R. App. P. 10 and M.R. Civ. P. 62(g) for a stay pending resolution of his appeal from an 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." The outcome of the pending appeal will determine not only whether a people's veto question will appear on the November 2020 ballot, but also whether the electoral contest for President and Vice President will be decided by ranked-choice voting or by a plurality of votes cast.

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

[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.

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 made a factual error 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 has a strong likelihood of success in establishing these errors on appeal, and time is of the essence in this matter. The Secretary's office has already started designing the 350 different ballot styles that will be printed for the November 2020 general election in order to meet statutory deadlines for printing and distribution of absentee ballots. If the Superior Court's Order remains in effect, the ballots must reflect a plurality election for President, along with a ballot question asking voters "Do you want to reject a new law that would require presidential elections in Maine to be decided using ranked-choice voting?" If, on the other hand, the Secretary's

determination is upheld, then the people's veto referendum question will not appear on the ballot, and voters will have the opportunity to rank the candidates for President in order of preference instead of having to make only one choice.[2] The ballot layout can be changed within the next couple of days, if the Superior Court's Order is stayed immediately, but it will be too late to change the layout if the Court waits until the statutory deadline set forth in 21-A M.R.S. § 905(3) to decide the merits of this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

This people's veto referendum was initiated last winter, as described in *Payne v. Sec'y of State*, 2020 ME 110, and the stipulated factual record in that case. The proponents of the people's veto submitted a total of 9,482 signed petitions on June 15, 2020 – 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

[2] A total of five presidential candidates have qualified to appear on the ballot, in alphabetical order: Joseph R. Biden (Democratic Party), Roque "Rocky" De La Fuente (Alliance Party), Howard Hawkins (Green Party), Jo Jorgensen (Libertarian Party), and Donald J. Trump (Republican Party). *See* listing on the Secretary's web site, posted August 28, 2020: https://www.maine.gov/sos/cec/elec/upcoming/index.html

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 (the same plaintiffs in *Payne*), 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,[3] 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,[4] thereby increasing the number of valid signatures to 62,101 – still 966 below the magic number to qualify for the ballot. *See* Supplement to Amended Determination, filed with the Court on August 24, 2020 (included in Exhibit 1 attached to this Motion).

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

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

[4] 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.

proponents had not submitted enough valid signatures to qualify the people's veto question for the ballot.

ARGUMENT

A request for a stay pending appeal must meet the same standards as for obtaining injunctive relief in the trial court. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Election Practices*, 2015 ME 103, ¶ 14, 121 A.3d 792. Thus, the party seeking the stay has the burden of demonstrating

> that (1) it 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].

Id. (citations omitted).[5]

1. Likelihood of Success on the Merits

The Secretary is likely to succeed on the merits of this appeal because the Superior Court's Order validating 988 signatures on petitions circulated by Michelle Reardon and Monica Paul was based on an error of law as well as an error of fact.

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[5] Intervenors contend in their Motion for Stay, dated August 28, 2020, that the Superior Court's Order is automatically stayed pursuant to M.R. Civ. P. 62(e). The Secretary disagrees with that contention, based on his understanding that in Rule 80C actions for judicial review of administrative agency decisions, the stay provisions of 5 M.R.S. § 11004 apply, rather than M.R. Civ. P. 62(e). *See Nat'l Org. for Marriage*, 2015 ME 103, ¶¶ 10-12, 121 A.3d 792.

Error of Law. 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 Superior Court held that there is no "temporal" requirement in this provision and thus concluded that being a registered voter at the time the petitions were submitted to the Secretary was sufficient for Michelle Reardon and Monica Paul to qualify as circulators. Order at 9. This reading is contrary to the plain language of the Constitution, which is written in the present tense.

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.*

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).

Finally, the Superior Court's apparent concern that requiring petition circulators to be registered voters might offend the First Amendment to the

United States Constitution under the ruling in *Buckley* is not well founded. A few months after *Buckley* was decided, the federal court in Maine considered this very issue and upheld Maine's requirement 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 Supreme Court in *Buckley* struck down Colorado's circulator residency 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 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 Maine Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶¶ 28-29, 795 A.2d 75 (Dana, J. concurring).

By contrast, 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 Maine Taxpayers Action Network*, 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). The Court in *IRI* then held that Maine has important governmental interests supporting the registration requirement that were sufficient to justify the minimal burden. 1999 WL 33117172, at **14-15.

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,[6] which represents 96% of the voting age population of 1,095,370,

[6] *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

estimated by the U.S. Census Bureau in July 2019.[7] 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.

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). The Petitioners in this case did not challenge the constitutionality of Maine's circulator registration requirement – they only questioned its application to two of their circulators – and only responded to the First Amendment question when the Superior Court raised it *sua sponte* at

[7] *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 August 21, 2020 conference. The facts in the agency record do not support a First Amendment claim, even if it had been properly presented.[8]

Factual error. Even if this Court were to agree with the Superior Court's interpretation of Maine's circulator registration requirement, that interpretation does not support reversal of the Secretary's determination of validity on the agency record for the reasons explained below.

The Secretary's determinations of validity are recorded in the lower right-hand corner of each petition, labeled "Petition Log." Signatures of voters who have already signed another petition (coded as "DUP" for "duplicate"), and signatures of individuals determined by the registrar not to be registered voters (marked as "NR" for "not registered"), are noted in that block as invalid. The same is true for material alterations (coded as "ALT").[9]

There may be more than one reason for invalidating signatures, including an overarching reason to invalidate the entire petition – such as the circulator not being registered to vote in their town when they collected the signatures on the petition. This reason is coded as "CIRC," for "circulator."

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[8] To present a First Amendment challenge to the requirement in Maine's Constitution that circulators of initiative petitions be registered voters, Petitioners would have needed to include 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.

[9] The notation "Also" is used to flag the signature of a voter that is duplicated on another petition.

Up to three reasons for invalidation may be entered in the spreadsheet that the Secretary's staff creates to aggregate the results of their review (*see* R. 47 Master List). However, only the primary reasons for invalidation are reflected in the lettered paragraphs of the Secretary's determination of validity. *See* R. 1, ¶13(A)-(O) & R. 45, ¶ 3(A)-(N). If the entire petition is invalidated for a reason such as "CIRC," then the other reasons are not recorded in the Secretary's final determination – in order to avoid discounting the same signatures twice.

All of the determinations that the Secretary made with respect to individual voter signatures on petitions circulated by Monica Paul and Michelle Riordan are shown on the face of those petitions, which are part of the agency record.[10] Review of those determinations plainly shows that 26 signatures collected by Ms. Riordan and 66 signatures collected by Ms. Paul were also rejected because they were duplicates of voter signatures counted on other petitions or because the voters were not registered. *See* copies of petitions attached hereto as Exhibits 2 and 3, and the handwritten tally sheets attached as Exhibit C to Intervenors' Motion for Stay, dated August 28, 2020.

[10] Copies of all 9,482 petitions reviewed by the Secretary in this case were provided to the Superior Court in electronic form, at the Court's request, as noted in the agency record, R. 47 n.2.

The Superior Court had a very short time period in which to review a wide range of contested issues and to make a decision in this case by August 24, 2020. The parties also had limited time to prepare and file their briefs. While the Secretary's briefs noted the number of signatures invalidated for CIRC on these petitions, the Secretary did not set forth the net number that would be deemed valid if the CIRC determinations were reversed.

Accordingly, without reviewing the individual petitions described above and attached to this motion, the Superior Court was unaware of what that number might be. Nonetheless, the role of this Court is to review the agency's determination directly based on the entire agency record. *Reed*, 2020 ME 57, ¶ 12. That record shows that a maximum of 910 signatures on the Paul and Riordan petitions would be deemed valid if this Court were to determine, as a matter of law, that the circulators did not need to be registered to vote at the time they circulated these petitions. *See* Exhibits 2 & 3 attached hereto, and Exhibit C to Intervenors' Motion for Stay. Adding 910 signatures to the 62,101 signatures deemed valid by the Secretary totals 63,011, would still leave the petitioners below the minimum number needed to qualify for the ballot. Accordingly, the petition would remain invalid.

2. Irreparable Injury

Without a stay of the Superior Court's order, a people's veto petition that has not met the threshold of support required to be submitted to the voters for approval will nonetheless appear on the ballot in November, and the Secretary's appeal of a significant legal issue regarding the interpretation of the circulator voter registration requirement may be deemed moot.

The Secretary's interest lies in upholding the integrity of the petition process and reaching a determination that is correct on the law and the facts, regardless of whether that determination results in a particular referendum question qualifying for the ballot or not. He is neither for nor against Chapter 539 of the Public Laws of 2019, but strongly believes that when Maine voters are presented with a ballot question, they should be confident that all applicable constitutional and statutory requirements to qualify the measure for the ballot have been satisfied. The requirement that circulators be registered to vote when they collect signatures is an important constitutional requirement. Absent a stay, this appeal could become moot, thereby harming the Secretary's ability to apply what he believes to be a valid constitutional requirement in the future.

3. Balance of Harms

If a stay is granted, the petitioners will be harmed because their people's veto question will not appear on the ballot. If the Secretary's determination is correct, however, their referendum has not qualified for the ballot and no harm would be incurred by keeping it off the ballot. And without a stay, a people's veto petition that has not met the threshold of support required to be submitted to the voters for approval will nonetheless appear on the ballot in November.

4. Public Interest

The public interest lies in assuring that Maine voters have an opportunity to vote on a people's veto referendum question when that question has met all constitutional and statutory requirements to appear on the ballot. This particular referendum question has not met those qualifications and should not be presented to the voters in November.

CONCLUSION

The Secretary's final determination of the validity (or invalidity) of the people's veto of ranked-choice voting in presidential elections is correct as a matter of law and is supported by substantial evidence in the agency record. Given the strong likelihood of success on the merits, and the immediate need for the Secretary to finalize ballot layouts in time to distribute absentee

ballots for the November 2020 election, this Court should stay the Superior Court's Order of August 24, 2020, and leave the Secretary's determination in effect pending the final outcome of this appeal. The Secretary respectfully requests the Court to grant this Motion for Stay.

Dated: August 31, 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 motion and attached exhibits by depositing them in the U.S. mail, postage prepaid, addressed as follows:

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