STATE OF MAINE
CUMBERLAND, ss

LAW COURT
DOCKET NO. CUM-20-227

DAVID A. JONES, et al.
Petitioners,

v.

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

and

THE COMMITTEE FOR RANKED CHOICE VOTING, et al.
Intervenors

OPPOSITION TO INTERVENORS-APPELLANTS' AND SECRETARY'S MOTION TO STAY

INTRODUCTION

Intervenors-Appellants The Committee for Ranked Choice Voting, et al ("The Committee") and the Secretary of State seek a stay of the Superior Court's order below, which determined that a people's veto petition had gathered sufficient signatures to be placed on the upcoming general election ballot and reversed the Secretary's erroneous conclusion otherwise. This Court should deny the motions for stay, for multiple reasons.

To begin, the Committee's claim that M.R. Civ. P. 62(e) provides for an automatic stay of an appeal of agency action has been rejected by every court to consider it. The Secretary of State likewise disagrees that Rule 62(e) applies here. And the Committee's arguments contradict this Court's precedent and the plain terms of the

rules, which make clear that appeals of agency action are to be treated as claims for injunctive relief—which are not subject to Rule 62(e). *See* M.R. Civ. P. 81(c). As a result, no automatic stay applies here.

The Appellants' alternative motion for a traditional stay also fails. Both Appellants rely on arguments that were never presented or addressed below, using evidence that is not part of the record on appeal, to raise factual issues that this Court is precluded from reaching. The parties' attempt to litigate for the first time the validity of additional signatures violates the clear and mandatory statutory deadlines set forth in 21-A M.R.S. § 905, which requires all factual issues to be resolved by the Superior Court within 40 days of the Secretary's initial determination. Moreover, while the Superior Court is authorized to make written "findings of fact," this Court's further review is confined to "questions of law." 21-A M.R.S. § 905(2)-(3). The Secretary and the Committee had ample opportunity to raise their factual issues below, and the Superior Court did not err in accepting the Secretary's representations about the number of signatures affected by the arguments the parties advanced. And even if it were not too late to reopen the record, doing so would not change the result. Even assuming the Appellants' claims about alternative flaws of some signatures are accurate, Appellees can identify additional valid signatures that should be counted and which would put them back over the necessary threshold. Indeed, that is precisely what the Appellees would have done if the other parties had timely raised these arguments in the Superior Court. But they did not, and that alone is sufficient to deny the Committee's bid for a

stay.

Appellants' legal challenge to the decision below is also unlikely to prevail on appeal. The Superior Court applied directly pertinent Supreme Court authority rejecting under the First Amendment nearly identical requirements that petition circulators be registered voters, and there is a general consensus today that such requirements are subject to strict scrutiny. The Appellants do not even acknowledge the strict-scrutiny standard, let alone make any arguments suggesting they could meet their heavy burden of satisfying such scrutiny. Instead, they rely on an unreported decision that applied the wrong standard of review and which the Superior Court properly distinguished here. The Superior Court's application of binding federal constitutional law was correct, and Appellants can show no likelihood of prevailing on appeal.

None of the other relevant factors favor the Appellants, either. Their claim for irreparable harm is weak, given that the Superior Court's order at most simply maintains the longstanding status quo for Presidential elections in Maine. And the competing harms are great, given that a stay would deny the Appellees the ability to exercise their fundamental right to place the veto before the people of this state within the timeline mandated by the Maine Constitution. It could also likely lead to voter confusion—and wasted votes—if the ballot permitted a ranking of candidates but this Court ultimately ordered only the first choice to be counted.

For all of these reason, the Appellants cannot satisfy their burden of demonstrating that a stay is justified in this case, and the motion should be denied.

ARGUMENT

I. Rule 62(e) does not apply to appeals of agency action.

The Committee first contends that a stay of the decision below is automatically in place, relying on Rule 62(e)'s provision, in certain cases, of an automatic "stay of execution upon judgment" pending appeal. Comm. Mot. 2-4. But this is not one of the cases to which Rule 62(e)applies. This case arises under 21 M.R.S. 905(2), under which appeals of the Secretary's determination are generally to be "conducted in accordance with Rule 80C." *Id.* On two recent occasions, the Business and Consumer Court directly addressed this question and rejected The Committee's position:

> The automatic stay provision of M.R. Civ. P. 62(e) does not apply to orders issued by the Superior Court on administrative appeals pursuant to M.R. Civ. P. 80C. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶12, 121 A.3d 792. Rule 62(e) provides for stay of execution of a final judgment pending a filed appeal, with certain exceptions. … In *Nat'l Org. for Marriage*, the Law Court stated that "the plain language of 'execution upon the judgment' in Rule 62(e) does not include agency actions because they are not judgments upon which an execution may issue." *Id.* ¶ 10 (citing M.R. Civ. P. 69). The [order under appeal] constituted the Court's ruling on an administrative appeal brought pursuant to M.R. Civ. P. 80C. As such, there is no applicable automatic Rule 62(e) stay effectuated by Respondent's filing of an appeal.

Maine Equal Justice Partners v. Hamilton, No. BCD-AP-18-02, 2018 WL 10400173, at *2 (B.C.D. June 15, 2018) (Murphy, J.). *See also Maine Equal Justice Partners v. Com'r, Maine Dept. of Health and Human Services*, 2018 WL 10400171, *1 (B.C.D. Dec. 6, 2018) ("conclud[ing] that Rule 62(e) does not apply to this appeal of an agency action").

These decisions follow directly from *Nat'l Org. for Marriage*, in which this Court rejected the argument that Rule 62(e) automatically stayed an agency's decision against the appellant while he appealed the denial of his Rule 80C challenge in the Law Court. Among other things, the Court noted that 5 M.R.S. § 11004 "precludes an automatic stay of the agency's decision pursuant to M.R. Civ. P. 62(e)at least at the initial review stage" and that "[i]t would make little sense to read Rule 62(e)to entitle a litigant to an automatic stay of agency action pending appeal in the Law Court, but not during review by the Superior Court." 2015 ME 103, ¶ 11, 121 A.3d at 797. Moreover, *Nat'l Org. for Marriage* also favorably cited *Allied Res., Inc. v. Dep't of Pub. Safety*, 2010 ME 64, 999 A.2d 940, in which the Law Court twice granted a stay after the Superior Court issued a ruling on the Appellant's Rule 80C appeal, but never "discuss[ed] the possibility of an automatic stay pursuant to M.R. Civ. P. 62€)." 2010 ME 64, ¶¶ 6–8, 999 A.2d at 797.

The Committee tries to distinguish *NOM* on the basis that the Superior Court *affirmed* the agency action, whereas in this case the Court *reversed* the agency action. The Committee therefore suggests that, unlike *NOM*, the appellants do not seek a stay of the underlying agency action. Comm. Mot. 3-4. But that is a distinction without a difference. As in *NOM*, it "would make little sense" to automatically stay a Superior Court judgment reversing an agency determination if the agency determination itself is not subject to an automatic stay under 5 M.R.S. § 11004. This, no doubt, is why the Secretary agrees with Appellees that "in Rule 80C actions for judicial review of final actions by administrative agencies, the stay provisions of 5 M.R.S. § 11004 apply, rather

than M.R. Civ. P. 62€." Sec'y Mot. 8 n.5.

The text of the rules themselves reinforce this reading. *First*, Rule 62(e) applies to automatically stay only "*execution* upon the judgment." *Id.* (emphasis added). Execution traditionally refers to the enforcement of money judgments. *See, e.g.,* M.R. Civ. P. 69 ("Process to enforce *a judgment for the payment of money* shall be a writ of execution, unless the court directs otherwise.").[1] One cannot execute a favorable Rule 80C judgment on an agency—and certainly not the judgment requiring the Secretary to place the people's veto on the ballot—by sheriff's sale, lien, foreclosure, or other process that would apply to an ordinary damages claim. And actions for injunctive relief are expressly excluded from Rule 62(e). *See* M.R. Civ. P. 62(a) ("The provisions of subdivision (d) of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal"); M.R. Civ. P. 62(d) ("When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.").

Second, the rules expressly address the treatment of agency appeals in Rule 81(c). That rule governs the applicability of all of the civil rules to various actions. And its text is crystal clear:

[1] The Committee's focus on the word "judgment," and Rule 54(a), *see* Comm. Mot. 2, is misplaced. Rule 62(e) stays only "*execution* upon the judgment." *Id.* (emphasis added).

> In any proceedings for such review or relief in which an order that an agency or other party do or refrain from doing an act is sought, all provisions of these rules applicable to injunctions shall apply.

M.R. Civ. P. 81(c). This confirms what Rule 62(e) plainly contemplates: the automatic stay applies only to ordinary claims for damages, and certainly not Rule 80C proceedings that challenge an agency's action or inaction. This case unquestionably qualifies as a "proceeding" "in which an order that an agency … do or refrain from doing an act is sought"—Appellees sought and obtained an order requiring the Secretary to accept signatures gathered in support of the people's veto and place it on the ballot. The Superior Court granted that order. As a result, the provisions "applicable to injunctions" apply to this case, and that means Rule 62(d)—not Rule 62(e)—governs any stay of the Court's order pending appeal.

II. The Committee and the Secretary cannot meet their burden of obtaining a stay pending appeal.

"Requests for stays or injunctions before the Law Court are subject to the same standards for obtaining injunctive relief that are applied in the trial courts." *Nat'l Org. for Marriage*, 2015 ME 103, ¶ 14, 121 A.3d at 797 (quoting *Maine Appellate Practice* §10.1 at 107–08 (4th ed. 2013)). The burden of demonstrating entitlement to a stay is on the moving party. *Id.; see also Bangor Historic Track, Inc. v. Dept. of Agriculture*, 2003 ME 140, ¶ 9, 837 A.2d 129, 132. The Appellants thus must show 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, 2015 ME 103, ¶ 14, 121 A.3d at 797. Here, neither the Committee nor the Secretary can carry its burden.

A. The Committee and Secretary cannot demonstrate a likelihood of success on the merits.

The Appellants cannot establish any likelihood of success on the merits—the "sine qua non of th[e] four-part inquiry" for a stay. *Nat'l Org. for Marriage*, 2015 ME 103, ¶28, 121 A.3d at 801. The Committee's primary argument is a factual challenge that is precluded at this stage of the case, was never presented to the district court, relies on purported evidence not in the record below, and which would fail even if the record could be reopened now. And their actual legal challenge ignores the applicable standard of review, which is decisive here.

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

The Appellants' request for a stay revolves almost entirely around their argument that the *Secretary* incorrectly tallied the number of signatures that were invalid due to a circulator registration requirement that the Superior Court reversed. The signature numbers used by the Superior Court came directly from the Secretary's *own filings* in this case. *See* Sup. Court Order 3 n.1, 8, 11, 17.[2]

[2] The Secretary's brief wrongly implies that the totals used by the Superior Court derived from "the lettered paragraphs of the Secretary's determination of validity." Sec'y Mot. 16. That is not the case. The totals used by the Superior Court came from briefs the Secretary filed below in which he

Instead, the Appellants are relying on a further review by the Secretary *after* the Superior Court's decision, *see* Comm. Mot. 6; Sec'y Mot. 17. But neither the Secretary nor the Intervenor identified these alleged alternate reasons below. They do not appear in the Secretary's formal determinations or in his briefing to the Superior Court—which is why the Committee resorts to relying on "tally sheets" that the Secretary prepared *after* the Superior Court's decision, that were *never* presented to that Court, and which are not part of the appellate record here. *See* Comm. Mot. 5-6, Ex. B.[3]

This is not a mere foot-fault. The statute governing the timing and judicial review of the Secretary's determination on citizens' initiative 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. Secretary of State*, 896 A.2d 933, 939 (Me. 2006). 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

made representations about the signatures that were at issue—a point he concedes in his motion. *See* Sec'y Br. 17; Sup. Court Oder 3 n.1.

[3] Because these tally sheets were never submitted to the trial court clerk, and do not reflect "what occurred in the trial court," they ae not part of the record on appeal and cannot be considered by this Court. *See* M.R. App. P. 5(a), (e).

Court is expressly limited to "questions of law," *id.* § 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 Intervenor failed to raise below.

Nor is this a case where the parties lacked a fair opportunity to raise these issues before the Superior Court. When the Superior Court first remanded the case to the Secretary for the taking of additional evidence, both parties made extensive evidentiary submissions to the Secretary. These submissions included efforts to flag precisely the types of issues the Committee belatedly raises now. *See* Secretary's Amended Determination (attached as Exhibit 1) at 4 ¶6(d) (assessing 39 petitions Intervenors identified as submitted after constitutional deadline); 7 ¶10 (assessing errors in determination that voters were registered); ¶11 (assessing "tabulation errors" identified by Petitioners).

The Committee protests that they could not have raised their factual arguments before now because "the Secretary's inadvertent inability to track secondary bases for signature disqualification was not known to the parties." Comm. Mot. 6-7. That is simply not true. The Secretary's Amended Determination itself includes several examples of the Secretary rejecting signatures on alternative bases. For example, the Secretary agreed that he had erroneously invalidated signatures circulated by Mark Longworth for CIRC, but determined that "[t]he signatures were not those of registered voters, however, and should have been invalidated for REG." Ex. 1 at 2 ¶2. 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). 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, and it is too late now.[4]

The deadlines at issue here are particularly important. 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, § 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 v. Quinn*, 459 A.2d 1098, 1102–03 (Me. 1983).

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

[4] The court's reliance on party presentation is a necessity for these types of cases; there were more than 9,400 separate petition forms submitted in this case, containing more than 70,000 signatures. Courts cannot be expected to conduct a *de novo* review of every form to make an independent judgment of the Secretary's determinations as to each signature. And the Secretary cannot be permitted to hide the ball from the parties and the Court simply because copies of every petition is in the record. *See* Sec'y Mot. 16 n.10.

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 any likelihood of success on the merits of the Committee's appeal. If the factual record were to be reopened to allow the Secretary and Committee to make new arguments, fundamental fairness would at least require Petitioners be permitted to renew their initial challenge to the disqualification of signatures by Michael Patterson. *See* Amend. Determ. 1-2 ¶ 2. 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* Exhibit 1 (attached).[5] 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).

[5] Appellees cannot meaningfully respond to the Committee's unsupported insinuations about invalid signatures from the Town of Turner, *see* Comm. Mot. 6 n.7, but strongly suspect that the Committee is mistakenly viewing as invalid signatures that were duplicated and invalidated on other petitions, but are properly counted on the initial petition where they appear. But again, this is a factual issue not appropriately presented on appeal.

2. The Secretary has not shown a likelihood of success on the merits of its legal challenge to the decision below.

The Secretary contends that it is likely to succeed on the merits of its appeal because the Superior Court erred in reversing signatures collected by Ms. Casey and Ms. Paul. But the Superior Court's decision carefully and properly weighed the relevant text, legal principles, and constitutional concerns. Most notably, the Superior Court correctly applied strict scrutiny to the Secretary's application of the circulator registration requirement, and the Appellants do not even try to suggest they could satisfy the requirements of strict scrutiny here. That weakness is fatal to their requests for a stay.

To begin, the Secretary's arguments ignore a number of the guiding principles that apply to the people's "absolute right" to initiate or veto legislation. *McGee*, 2006 ME 50, ¶ 21, 896 A.2d 933, 940. This Court recently explained that courts must "interpret constitutional provisions liberally to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate[.] " *Payne v. Secretary of State*, 2020 ME 110, ¶ 29, ___ A.3d __. (emphasis added). Moreover, 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, 78. 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 v. Sec'y of State*, 625 A.2d 307, 311 (Me. 1993).

The Superior Court properly applied these principles when it reversed the

Secretary's rejection of hundreds of valid signatures collected by a circulator who was registered to vote at their current address when the petition was submitted, but not when they collected the signatures. Sup. Ct. Order 8-9. The Superior Court's decision hinged on *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which held that a Colorado statute requiring initiative-petition circulators to be registered voters violated the First Amendment. 525 U.S. at 186-87. Colorado's registration requirement was unconstitutional because it directly "limit[ed] 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). Colorado's interests—including upholding the integrity of the initiative process—failed to justify the law under strict scrutiny. *Id.* at 195-97.[6]

The Committees and the Secretary attack the Superior Court's decision almost exclusively on the basis of an unreported federal magistrate's decision, *Initiative & Referendum Institute (IRI) v. Secretary of State*, No. 98-cv-104, 1999 WL 33117172 (D. Maine

[6] Because the Superior Court's decision hinges upon application of the First Amendment, the Secretary's considerable efforts to read a registration timing requirement into the Maine Constitution's language defining circulators is largely irrelevant. *See* Sec'y Br. 9-10. Whether statutory or constitutional, state provisions must yield to the federal Constitution. But the Secretary is incorrect even on this point; the Maine Constitution requires circulators to be listed on the voting rolls of their current towns, but it is silent as to whether that registration needs to take place before signatures are collected or simply before the petition is submitted. *See* Sup. Ct. Order. 9 (noting that the "temporal voter registration requirements… do not appear either in the Maine Constitution or in statute"). And the Secretary's reliance on *Reed v. Sec'y of State*, 2020 ME 57, is unavailing; that decision 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 7at 79; *see also LeBlanc v. United Engineers & Constructors Inc.*, 584 A.2d 675, 677 (Me. 1991).

Apr. 23, 1999) (Cohen, Mag. J.). But the Superior Court explained why *IRI* was factually distinguishable, *see* Sup. Court Order 8-9. Specifically, in *IRI* the court 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 Secretary's requirement imposed a severe burden on this petition effort, striking hundreds of otherwise valid signatures.

More importantly, *IRI* was decided shortly after *Buckley*, and applied a "less stringent standard of review" to uphold the registration requirement. *Id.* at *15. But since that time, "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 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). 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 interest" that "is narrowly tailored"); *see also Wyman*, 625 A.2d at 311.

Because "[s]trict scrutiny is the proper standard," *Libertarian Party of Virginia*, 718 F.3d at 31, the Superior Court's decision is proper and overwhelmingly likely to stand on appeal. On this point, the Secretary has no response. His filing does not even *mention* strict scrutiny, let alone refute the Superior Court's proper application of that standard. He even resorts to citing a 1944 case—predating much of the current First Amendment jurisprudence—to try and shift the burden back to the Appellees. Sec'y Br. 14.

To be sure, the Secretary doubles down on the kind of cursory evidence that satisfied "the less stringent standard of review" in *IRI*. *See* Sec'y Mot. 13-14. But even if that standard were the correct one—and it is not—the Superior Court explained the differences between that case and this one. Moreover, the Secretary's use the voter registration statistics is misleading. He relies on the relative percentage of Maine residents who are registered to vote in Maine. *See* Sec'y Mot. 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.

This highlights an additional flaw the Secretary's approach. The process for voter registration in Maine is a liberal one. 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 easy registration 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. 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*, 459 A.2d at 1098, 1102-03, and circulators' established right to free speech. Because the Secretary ignores the applicable standard of review and the clear weight of First Amendment authority supporting the Superior Court's decision, he is unlikely to

succeed on the merits of his appeal.[7]

B. The Appellants have not adequately demonstrated irreparable harm.

Appellants assert irreparable harm arising from upcoming ballot printing deadlines, which the Committee contends will result in "the inability of Mainers to vote ranked-choice in the 2020 Presidential election." Comm. Mot. 8. Of course, Mainers have never cast such votes in a Presidential election before, and so it is a dubious suggestion that adhering to the long-time status quo in Maine for one additional election could rise to the level of irreparable harm. Nor can the Committee claim that delaying the implementation of ranked-choice voting by one election will harm a particular candidate; they assert no interest in the outcome of any particular election.

But even if the loss of the opportunity to cast a ranked-choice ballot could count as harm, the offsetting harms and the weakness of the merits arguments advanced by the Committee overcome this factor. That was the case in *Nat'l Org. for Marriage*, where this Court concluded that the appellants would "likely suffer irreparable injury," but still declined to enter a stay "because there clearly is no substantial possibility that [they] will succeed on the merits of its claims." 2015 ME 103, ¶¶28-29, 121 A.3d at 801.

[7] Contrary to the Secretary's suggestion, the First Amendment issue has been "properly presented," Mot. 15, because it was presented to and passed upon in the Superior Court. *See McAfee v. Cole*, 637 A.2d 463, 467 (Me. 1994) (internal quotation marks omitted) (issue properly presented when "the trial court ha[d] a full opportunity to dispose finally of the action" and "determine[d] the propriety of the relief requested"). Moreover, 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").

Indeed, this case is even weaker than that one; unlike the appellants in *Nat'l Org. for Marriage*, the Committee does not contend that this case will become moot absent a stay. *See id.*

C. The balance of harms does not favor the Appellants.

The balance of harms tips in the Appellees' favor. Assuming that the ballot deadline does in fact require the printing of ballots before this appeal is resolved, than a stay will deprive the Appellees of their exercise of a fundamental right: "to enact legislation and approve or disapprove legislation enacted by the legislature." *Farris ex rel. Dorsky v. Goss*, 60 A.2d 908, 910–11, 143 Me. 227, 230-31 (1948). Appellees were part of an extraordinary petition effort to gather signatures in the middle of an unprecedent pandemic. They managed to present more than 70,000 signatures in support of their petition, and the Superior Court has determined they have satisfied the applicable requirements. As a result, the Maine Constitution commands that the people's veto question be placed on the ballot for the upcoming general election, and that the legislation in question be suspended in the interim. Me. Const. art. IV, § 17(1), (3).

In sum, ballot deadlines are going to affect the rights of one of the interested parties to this case by determining the form of the choice presented to voters. But denying the citizens the right to put their veto question to the people within the Constitutional deadline is a far greater harm than the continuation of the current Presidential voting method for one more election. Any doubt as to the weight given to the competing harms should be resolved by this Court's long recognition that the

people's veto provisions "must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *Allen*, 459 A.2d at 1102–03 (Me. 1983) (quoting *Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971)).

D. The public interest weighs against any stay.

Both appellants' analysis of the public-interest prong merely restate their merits arguments. Comm. Mot. 9; Sec'y Mot. 19. But because their attempt to introduce new facts at the appellate stage is precluded both by 21-A M.R.S. § 905 and ordinary appellate practice, those merits arguments cannot possibly implicate the public interest. And given the fundamental nature of the public's right to exercise their reserved legislative powers through the people's veto measure, *Allen*, 459 A.2d at 1102–03, the public interest weighs in Appellees' favor.

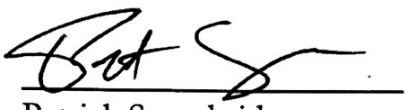
Moreover, the Committee's proffered solution creates the substantial risk of public confusion. The Committee contends that under a stay, although a ranked-choice ballot may be deployed in the upcoming election, "this Court could order that only a voter's first choice for President is counted." Comm. Mot. 8. That is a recipe for voter confusion and the loss or wasting of certain individuals' votes. *See Am. Fed. of Labor v. Eu*, 686 P.2d 609, 629 n.27 (Cal. 1984) (noting "deception on the voters" if an "invalid" measure is left on the ballot). The entire point of ranked-choice voting is to allow voters to cast conditional votes, knowing that their second or third choices will be counted. Having the ballot in one format but applying a different rule for counting is contrary to the public interest and further confirms that a stay should be denied.

CONCLUSION

For the reasons set forth above, Petitioners request that this Court deny Appellants' Motions for Stay Pending Appeal.

Dated: August 31, 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