No. __-___

In the Supreme Court of the United States

DAVID A. JONES, JONATHAN KINNEY, AND JOSHUA MORRIS,
Applicants,
v.
MATTHEW DUNLAP, IN HIS OFFICIAL CAPACITY AS THE MAINE SECRETARY OF STATE,
Respondents,
and
THE COMMITTEE FOR RANKED CHOICE VOTING, CLARE HUDSON PAYNE, PHILIP STEELE, FRANCES M. BABB,
Intervenor-Respondents.

EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI REVIEW

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicants are David A. Jones, Jonathan Kinney, and Joshua Morris. Applicants were the petitioners in Maine Superior Court and appellees in the Maine Supreme Judicial Court.

Respondent is Matthew Dunlap, in his official capacity as the Maine Secretary of State. Respondent was the respondent in Maine Superior Court and appellant in the Maine Supreme Judicial Court.

Intervenor-Respondents are the Committee for Ranked Choice Voting, Clare Hudson Payne, Philip Steele, and Frances M. Babb. Intervenor-Respondents were intervenors in Maine Superior Court and intervenor-appellants in the Maine Supreme Judicial Court.

The proceedings below were:

1. *David A. Jones v. Secretary of State et al.*, No. Cum-20-227 (Me.) – judgment entered September 22, 2020; injunction pending review and stay denied October 1, 2020.

2. *David A. Jones v. Secretary of State et al.*, No. AP 20-0016 (Me. Super.) – judgment entered August 24, 2020.

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Applicants each represent that they do not have any parent entities and do not issue stock.

Respectfully submitted,

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Dated: October 2, 2020

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TO THE HONORABLE STEPHEN BREYER, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FIRST CIRCUIT:

Maine's Secretary of State denied Applicants their fundamental First Amendment right to engage in the State's citizen petition process by applying an unconstitutional petition circulator voter registration requirement to invalidate a petition Applicants validly signed.

Maine's Constitution permits citizens to use their reserved legislative powers both to initiate and veto legislation. When a people's veto petition is submitted, the challenged legislation is automatically suspended until the petition is certified by the Secretary of State (one of the Respondents). If certified as valid, the legislation remains suspended until the people vote on the ballot question.

Applicants are three Maine citizens who signed a people's veto petition seeking to repeal recently enacted legislation requiring Maine to deploy a ranked-choice system of voting in Presidential elections. This would change the method by which Maine selects the winners of its electoral votes.[1] The winner would no longer be the candidate receiving the most votes, but instead would be determined by a series of "instant run-offs" based on rankings voters can give to each candidate on the ballot. Supporters of the effort to veto this change collected more than 70,000 signatures, which they submitted to the Secretary for certification. But the Secretary rejected more than 1,000 of the signatures as invalid because the circulators who collected them were not registered to vote at their current residence when they collected the

[1] Maine is one of two states that allocates some of its electoral votes by Congressional district. 21-A M.R.S. § 802 ("One presidential elector shall be chosen from each congressional district and 2 at large.").

signatures. Without these signatures, the petition fell just short of the requisite number for it to be placed on the ballot and the Secretary declined to certify the petition.

Applicants appealed this determination to the state courts. The trial court determined that the circulator registration requirement violated the First Amendment, relying on this Court's decision in *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), which invalidated an identical requirement in Colorado. The trial court ordered the petition to be certified. But on further review, the Supreme Judicial Court of Maine (known in its appellate capacity as the "Law Court") reversed the trial court and held that the circulator-registration requirement did not violate the First Amendment. Breaking with three Supreme Court decisions and the uniform practice of federal courts of appeals, the Law Court refused to apply strict scrutiny to the registration requirement and instead applied a particularly lenient form of the balancing test drawn from this Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). But this Court has consistently held that petition circulation is "core political speech" subject to "exacting" or "strict scrutiny." The Law Court's decision is the first case in decades to depart from the post-*Buckley* consensus rejecting circulator-registration laws, and the viability of Applicants' people's veto effort hinges on this flagrant error of federal law.

Compounding its error, the Law Court misapplied *Anderson-Burdick* by holding that Applicants had not shown a "severe" burden on the petition circulation

process, even though the requirement was the difference between success or failure of the petition. Moreover, the Law Court erred in holding that the State's only "germane" interest—having a convenient means to verify the circulator's residence—was a sufficiently important state interest to justify the burden. Courts considering residency requirements have always viewed them as means to another governmental interest, such as the prevention of fraud—not as an end of itself. And *Buckley* rejected the argument that requiring circulators to be registered voters was necessary to advance legitimate state interests, because those interests could be served in a more narrowly-tailored way such as requiring circulators to submit an affidavit. Maine already does this, so this Court can preserve any State interest and protect Applicants' First Amendment rights by enjoining the registration requirement.

Injunctive relief under the All Writs Act is necessary **as soon as possible** to prevent irreparable harm to Applicants during the appellate process, and to preserve this Court's jurisdiction regarding the issues raised in this case. Accordingly, Applicants respectfully ask the Court to enter an injunction against the Maine Secretary of State under the All Writs Act directing that the challenged legislation not be implemented in the upcoming election until the Court can hear this case on the merits. This relief is necessary because the Maine Constitution *requires* the challenged legislation to remain suspended until a successful people's veto petition is submitted to a vote. And although the ballot used in this election has been printed in ranked-choice format, an injunction requiring the election be tabulated on a plurality basis—which is the method Mainers have used for decades to select their Presidential

electors—would ensure that each voter can participate in the election. Rapid relief would also help minimize voter confusion during the pending election. Finally, at a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application. *See, e.g.*, *Wheaton College v. Burwell*, 573 U.S. 943 (2014).

The decision below contravenes Supreme Court precedent and applies a lower level of scrutiny to petition-circulator requirement than any other appellate decision of the last twenty years. The First Amendment rights of Applicants have been encroached and injunctive relief is required immediately to vindicate their core political speech.

OPINIONS BELOW

The Maine Supreme Judicial Court's order denying the motion to stay and for an injunction pending appeal is not yet reported, but is reproduced at App. 1-8. The Law Court's opinion reversing the Superior Court is reported at *Jones v. Sec'y of State*, 2020 ME 113, __ A.3d __. The Superior Court's opinion vacating the Secretary's Determination is not reported, but is reproduced at App. 41-57.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. § 1257 and has authority to grant the relief that the Applicants request under the All Writs Act, 28 U.S.C. § 1651, and 28 U.S.C. § 2101. This authority includes the ability to issue writs to state officers in aid of certiorari jurisdiction. *See, e.g.*, *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306 (1987) (Blackmun, J., in chambers); *Kimble v. Swackhamer*, 439 U.S. 1385, 1385-86 (1978) (Rehnquist, J., in chambers).

BACKGROUND AND PROCEDURAL HISTORY

A. The People's Veto Petition.

The 129th Maine Legislature enacted L.D. 1083—expanding ranked-choice voting[2] to cover the selection of Presidential electors for both primary and general elections—at a one-day special session in August 2019. Because the Governor did not return L.D. 1083 to the Legislature within three days of the convening of the Second Regular Session, the bill was chaptered as P.L. 2019, ch. 539 on January 12, 2020. As a non-emergency measure, L.D. 1083 was slated to take effect 90 days following adjournment of the legislative session.

The Maine Constitution reserves to the people the ultimate legislative authority by allowing the people to vote to veto legislation before it takes effect. *See* Me. Const. art. IV, pt. 3, § 17. On February 3, 2020, the Secretary of State approved an application for a people's veto referendum petition against the Act. App. 42; *Payne v. Sec'y of State*, 2020 ME 110, ¶ 7, ___ A.3d ___.

Due largely to the COVID-19 pandemic and government-imposed restrictions, the petition effort faced unprecedented challenges. Public gatherings that would normally constitute the main opportunity to gather signatures came to an end in March. It took weeks for the petition effort to gain approval of circulators as essential service providers. The Governor generally exempted notaries from conducting

[2] Ranked-choice voting is a "method of casting and tabulating votes in which voters rank candidates in order of preference, tabulation proceeds in sequential rounds in which last-place candidates are defeated and the candidate with the most votes in the final round is elected." 21-A M.R.S. § 1(35-A). It thus operates as a form of "instant run-off" in elections with more than two candidates. *Maine Republican Party v. Dunlap*, 324 F. Supp. 3d 202, 205 (D. Me. 2018).

business face to face, but not for purposes of petition gathering. *See* Executive Order 37 FY 19/20, 2 (April 8, 2020). And petition proponents had to sue the City of Portland to gain access to election polling locations, and (although successful) were ultimately able only to gather signatures outside polling locations for half the day on the March "Super Tuesday" primary. *See* Randy Billings, *Maine Republicans win court order to petition at Portland polling locations*, Portland Press Herald (March 3, 2020).

Nonetheless, on June 15, 2020, people's veto referendum proponents filed with the Secretary of State more than 72,000 signatures, including those of Applicants. App. 42. The submission of the petition automatically suspended the Act from taking effect while the Secretary reviewed the petitions. Me. Const. art. IV, pt. 3, § 17(2).

B. The Secretary's Determinations and Challenges in the Maine Superior Court.

The Secretary took the entirety of the 30-day review period allowed for him to decide whether to certify the petition. 21-A M.R.S. § 905(1). In his initial "written decision stating the reasons for the decision," *id.*, he identified several categories of signatures that were invalidated and concluded that "of the 9,482 petition forms filed with the Secretary of State, I find that 11,178 signatures are invalid and 61,334 signatures are valid. The number of signatures required for a valid petition is 63,067. As petitioners have failed to submit a sufficient number of valid signatures, I find the petition to be invalid." App. 42.

As relevant here, the invalidated signatures included more than 1,000 signatures that were invalid for "CIRC," shorthand for the Secretary's determination that "the circulator collected signatures prior to becoming registered to vote in the

state of Maine." App. 42-43. Other invalid signatures challenged by Applicants were later deemed valid, *see* App. 13, leaving the signatures collected by circulators who were not registered to vote as the key issue in the case.

Applicants are three individuals who validly signed the people's veto petition in question. Maine law authorizes such individuals to challenge the Secretary's decision, 21-A M.R.S. § 905(2), and Applicants filed this action in Maine Superior Court on July 27, 2020, within ten days of the Secretary's Determination. App. 11. The Committee for Ranked-Choice Voting, which supports L.D. 1083, intervened in this case to defend the Secretary's decision. As required by Maine law, review of that appeal proceeded on an accelerated basis. It included two remands to the Secretary of State for consideration of evidence. App. 11-13. And the Superior Court also requested and received supplemental briefs specific to the effect of the First Amendment and *Buckley* on Maine's requirement that circulators be registered to vote in Maine.[3] App. 12.

C. The Maine Superior Court's Decision.

The Superior Court issued its decision on August 24, 2020, the last day allowed by statute. *See* 21-A M.R.S. § 905(2). Its primary holding was that "that the Secretary improperly invalidated the signatures collected by" unregistered circulators. App. 41-42. It noted that *Buckley* had ruled that Colorado's identical requirement "is unjustified and infringes on the [F]irst [A]mendment rights of the circulators to conduct core political speech," and that "the state interest of fraud detection or

[3] *See* Me. Const. art. IV, pt. 3, § 20; 21-A M.R.S. § 903-A.

administrative efficiency" could not justify the requirement. App. 48 (citing *Buckley*, 525 U.S. at 192, 197). The Court therefore found "that the Petitioners collected enough signatures to place their petition on the November 2020 ballot and hereby reverses the Secretary's decision." App. 41-42.[4]

D. Proceedings in the Law Court.

The Secretary and Intervenors filed notices of appeal on August 27, within the deadline required by 21-A M.R.S. § 905(3). Both of those parties subsequently filed motions to stay the Superior Court's order pending appeal, prompted in part because of the looming deadline to print ballots for the upcoming election. Applicants opposed the stay, and the Law Court heard argument on that motion on September 3, 2020.

On September 8, the Law Court issued a decision denying the Respondents' motion to stay as moot because, in its view, the Maine Rules of Civil Procedure automatically stayed the Superior Court's decision. That decision did not relate in any way to the merits of this appeal, and no party argued that it would moot or resolve any part of the case. To the contrary, one of the Respondents specifically argued that "even with a stay, Maine's Presidential election could move forward based on a plurality alone" and that the court "could order" that form of tabulation. Intervenor Mot. to Stay 8, *available at* shorturl.at/mMS06. Indeed, such an order would be necessary to implement the Maine Constitution's requirement that an act subject to a valid people's veto be suspended until the vote takes place. Me. Const. art. IV, pt.

[4] The Superior Court also specifically rejected the Secretary's argument that Applicants had not raised a constitutional challenge to the registration requirement. App. 50. It noted that Applicants had pled constitutional violations in their Petition, and that the Court specifically "raised the issue with the parties at its August 21 conference and the parties had time to brief it." *Id.*

3, § 17(2). The people's veto question would by law then be placed on the ballot for the "next statewide or general election, whichever comes first." *Id.*

On September 22, two weeks after determining the automatic stay was in place, the Law Court vacated the Superior Court's decision and reinstated the Secretary's determination that the petition had not reached the threshold level of signatures. The court first determined that the Maine Constitution "unambiguous[ly]" includes a circulator registration requirement. App. 16. The court then explicitly held that strict scrutiny does not always apply to "cases involving the regulation of petition circulation" because "a regulation regarding petition circulation" is "a ballot-access regulation pertaining to the mechanics of the electoral process." App. 21 (internal quotation marks omitted). The court reasoned that such ballot access regulations, "although regulating core political speech" are not subject to strict scrutiny and are instead subject to the less demanding *Anderson-Burdick* balancing test. *Id.*

Applying this less exacting standard, the Law Court held that the circulator registration requirement is not a severe burden on core political speech because "there has been no trial or summary judgment motion to generate evidence" demonstrating that the registration burden is severe. App. 25. The court further held that the State's "one" "germane" justification for the registration requirement—to determine the "circulator's Maine residency at the time the circulator collects signatures"—"is sufficient to justify the restriction" because it imposes "only 'reasonable, nondiscriminatory restrictions' on the First Amendment rights of

petition supporters for purpose of ensuring compliance with the residency requirement of the Maine Constitution." App. 30 (quoting *Burdick*, 504 U.S. at 434). Accordingly, the Law Court vacated the Superior Court's reinstatement of the signatures and remanded with "instructions to affirm the Secretary of State's determinations that the 988 signatures contested on appeal to us are invalid and that therefore an inadequate number of valid signatures had been submitted to place the people's veto on the ballot." App. 31.

The next day, September 23, 2020, Applicants filed a motion with the Law Court requesting a stay pending appeal to this Court, or in the alternative, an injunction pending appeal. The court denied this motion on October 1, 2020. The court reaffirmed its holding that *Buckley* and *Meyer* do not apply to Maine's circulator registration requirement. App. 5-6. Additionally, the court again rejected Applicants' contention that Maine's existing circulator affidavit requirement is a less restrictive means to achieve the State's interest. App. 6-7.

ARGUMENT

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice or the Court to issue an injunction when (1) the circumstances presented are "critical and exigent"; (2) the legal rights at issue are "indisputably clear"; and (3) injunctive relief is "necessary or appropriate in aid of [the Court's] jurisdictio[n]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312-14 (1986) (Scalia, J., in chambers) (quoting *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (1976) (Marshall, J., in chambers), *Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (Rehnquist, J., in chambers)). This "extraordinary" relief is

warranted in cases involving the imminent and indisputable violation of First Amendment rights. *See McCarthy v. Briscoe*, 429 U.S. 1317, 1322 (1976) (Powell, J., in chambers) (ordering state Secretary of State to include name on ballot to avoid First Amendment harm); *Williams v. Rhodes*, 89 S. Ct. 1, 1-2 (1968) (Stewart, J., in chambers) (same).

Applicants present such a case.

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

The right of citizens to circulate election petitions is "'core political speech' for which First Amendment protection is 'at its zenith.'" *Buckley*, 525 U.S. at 183 (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). This Court has long recognized that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer*, 486 U.S. at 421-22. And it is clearly established that strict scrutiny applies to requirements—like Maine's—that petition circulators register to vote before collecting signatures. *Buckley*, 525 U.S. at 192 n.12; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 n.10 (1995) ("In *Meyer*, we unanimously applied strict scrutiny to invalidate an election-related law making it illegal to pay petition circulators for obtaining signatures to place an initiative on the state ballot."). Such regulations present two distinct First Amendment harms: (1) reducing the "number of voices who will convey" the initiative's message and (2) "reducing the chances that initiative proponents would gather signatures sufficient in number to qualify for the ballot, and thus limiting proponents' ability to make the matter the focus of statewide

discussion." *Buckley*, 525 U.S. at 194-95 (citing *Meyer*, 486 U.S. at 422-23) (cleaned up). Both of these harms are present here; the Secretary's application of Maine's registration requirement eliminated more than 1,000 signatures collected by ten different unregistered circulators, and that decision made the difference between the success or failure of adding the veto question to the ballot.

Thus, the regulation of petition circulation—which constitutes "core political speech"—"must be narrowly tailored to serve a compelling state interest." *Buckley*, 525 U.S. at 183, 192 n.12. But the Law Court refused to apply strict scrutiny, instead upholding the requirement despite *Buckley* and a consensus of other appellate courts. *See infra,* at 15-22. This deprived Applicants of the ability to have their question submitted to the voters of the state, and it lifted the suspension of the challenged legislation, meaning that Maine will use ranked-choice voting in the upcoming election unless this Court steps in.

Applicants have nowhere left to turn for the vindication of their core rights. They have exhausted their appeals through the Maine court system. Moreover, a mere stay of the Law Court's decision from this Court would not provide redress because the Superior Court's decision—reinstating the invalidated signatures after properly applying strict scrutiny—was deemed automatically stayed as a matter of State law. *See Jones v. Sec'y of State*, 2020 ME 111. In short, without an injunction from the Court directing the Secretary to use the pre-LD 1083 form of tabulation for the upcoming election, Petitioners will have been divested of the rights inherent in the petition process.

The circumstances here closely track other cases in which Circuit Justices have granted injunctions pending appeal in cases implicating core political speech. For example, in *Williams v. Rhodes*, Justice Stewart granted an injunction compelling the Ohio Secretary of State to include a presidential candidate on the ballot so the Court could "consider and decide the merits" of the candidate's First Amendment challenge to his exclusion from the ballot. 89 S. Ct. at 1-2 (Stewart, J., in chambers); *see also Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (describing the First Amendment challenge). Justice Stewart noted that in the absence of an injunction, "difficult if not insurmountable practical problems in the preparation of ballots would result, should the judgment of the [lower court] be reversed by this Court." *Williams*, 89 S. Ct. at 2. So too here—without an injunction, ranked choice voting will be the standard for counting votes and the people's valid veto petition disregarded based on a failure to apply the First Amendment.

The Law Court denied the stay in part because ballots have been printed in the ranked-choice format, "[v]oting has begun with voters using this method, and there is a strong public interest in not changing the rules for voting at this late time." App. 3 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006)). But that cannot justify a refusal to protect Applicants' rights here. To begin, Applicants bought this action as soon as they possibly could; the timing of this appeal has been dictated by the Secretary's use of the full 30-day period provided by law to review and certify the petition and the statutory deadlines for the ensuing appeal. This is hardly a case where Applicants chose to challenge a longstanding statute on the "eve of an election."

Republican National Committee v. Democratic National Committee, 140 S. Ct. 1205, 1207 (2020).

Moreover, the *Purcell* principle is grounded in the sensible concern that courts setting aside state election laws could cause voter confusion and encourage them to stay away from the polls. 549 U.S. at 4-5. But in this case, the suspension of the challenged law is required by the State Constitution. To the extent that *Purcell* arises in part from recognition that the Elections Clause vests primary power for elections in the hands of States, *see Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 40-41 (2013) (Alito, J., dissenting), enforcing the State's own constitutional restrictions on that power is hardly improper.

Nor can the Secretary's deadline to print ballots trump the Maine Constitution's requirement of suspension. Indeed, the Law Court acknowledged that "if the ranked-choice law were not properly in effect because of a valid people veto's petition, the public would have an interest in using non-ranked-choice voting and having the opportunity to vote on the people's veto question." App. 4; *see also id.* n.4 ("[I]f the petition were valid, the Act would not take effect unless and until the voters rejected the people's veto question."). And during briefing below on whether the trial court's order should be stayed, neither of the Respondents contended that printing the ballots would prevent vindication of Applicants' rights. To the contrary, the Intervenors explicitly asserted—without objection from the Secretary—that a stay of the trial court's order would not irreparably harm Applicants because "if the ballots permit ranked choice voting, this Court could order that only a voter's first choice for

President is counted." Intervenor Mot. to Stay 8, *available at* shorturl.at/mMS06. That is precisely what Applicants request here. Voters using the ranked-choice ballot will not be disenfranchised because their first-choice vote will be counted, and the Secretary and election officials can take further steps to educate voters in the coming month about the form of tabulation that will be used in the 2020 Presidential election.

II. APPLICANTS HAVE AN INDISPUTABLY CLEAR RIGHT TO RELIEF.

A. The Law Court's rejection of strict scrutiny to Maine's circulator-registration requirement contravenes this Court's decisions and the consensus within the appellate courts.

The Law Court disregarded three Supreme Court opinions and the uniform weight of federal appellate authority by refusing to apply strict scrutiny to Maine's regulation of core political speech. Instead, the court applied a tepid form of *Anderson-Burdick* balancing to uphold Maine's circulator registration requirement. Although the lower appellate courts have divided over their approach to circulator *residency* requirements, none has ever upheld a *registration* requirement after *Buckley*. The Law Court's decision is thus an extreme outlier warranting immediate correction.

As an initial matter, Applicants submitted sufficient evidence establishing a substantial impairment of their First Amendment rights. When the Secretary rejected the people's veto petition, he completely deprived Applicants of their ability to further engage in this petition process. That goes beyond the injuries held to be severe in *Meyer* and *Buckley*. Those cases involved burdens that reduced "the number of voices" conveying a petition's message, *Buckley*, 525 U.S. at 194-95, and made it "less likely" that petition would "garner the number of signatures necessary to place

the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion," *Meyer*, 486 U.S. at 423. Here, the uncontested evidence shows a far more severe burden—Applicants' ability to advance this matter was *extinguished* by the Secretary's application of the registration requirement. Likewise, the Court's decision squelched all of the petitions circulated by ten separate individuals, unquestionably infringing on their ability to interact with the public and promote the petition. The Applicants have thus established a violation of their "core political speech" through evidence that the signatures were illegally invalidated by the Secretary.[5] Their further exclusion from the petition process altogether is a severe burden, even assuming *Anderson-Burdick* applies. *Cf. Buckley*, 525 U.S. at 208 (Thomas, J., concurring in the judgment) ("I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a 'severe burden.'").

But *Anderson-Burdick* does not apply. The heart of this case is the legal dispute over whether First Amendment strict scrutiny or *Anderson-Burdick* balancing applies to a circulator registration requirement. No further factual development is necessary to determine that strict scrutiny applies. And since it does, the registration requirement cannot survive because Maine's existing affidavit

[5] In the stay proceedings below, Intervenors suggested—incredibly—that Petitioners lacked standing to request this Court review the Law Court's decision on the First Amendment. But the Secretary's rejection of the petition they support is an injury arising from the Law Court's misreading of the Constitution, and state law unambiguously gives Applicants the right to vindicate that injury in court. That injury can be redressed by an injunction from this Court to the Secretary to reinstate the signatures. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019).

requirement is a less restrictive means to accomplish the State's interest. A straightforward reading of *Meyer* and *Buckley* dictates this conclusion; decades of circuit courts striking down circulator registration requirements under strict scrutiny confirm it.

In *Meyer*, this Court reviewed a State provision forbidding the use of paid petition circulators. The Court recognized that "the circulation of a petition involves … 'core political speech.'" *Meyer*, 486 U.S. at 421-22. It further observed that limitations on petition circulation not only "limits the number of voices who will convey appellees' message," but also "make[] it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." *Id.* at 422-23. Because the First Amendment's protection of petition circulation is "at its zenith," the Court held that the State's burden to justify a restriction on petition circulation "is well-nigh insurmountable." *Id.* at 425. Under this "exacting" standard, the Court easily found the State's paid petitioner prohibition to be unconstitutional. *Id.*

Next, in *McIntyre v. Ohio Elections Comm'n*, this Court rejected a State's assertion that *Anderson-Burdick* applies to election handbilling restrictions. 514 U.S. at 334. Relying on *Meyer*, the Court held that strict scrutiny cannot be circumvented by characterizing a regulation as controlling only "the mechanics of the electoral process." *Id.* at 345. Instead, the Court applied *Meyer* to hold that restrictions on "pure speech," like handbilling or petition circulation, are not "ordinary election restriction[s]," but instead "'involves a limitation on political

expression subject to exacting scrutiny.'" *Id.* at 346 (quoting *Meyer*, 486 U.S. at 420). Moreover, the Court specified that the "exacting scrutiny" applied in *Meyer* (and later *Buckley*) is synonymous with strict scrutiny: "In *Meyer*, we unanimously applied strict scrutiny to invalidate an election-related law making it illegal to pay petition circulators for obtaining signatures to place an initiative on the state ballot." *Id.* at 346 n.10.

Third, in *Buckley*, the Court applied the same "exacting scrutiny" to invalidate Colorado's state constitutional requirement that petition circulators be registered to vote at the time they collect signatures. *Buckley* reaffirmed that "[p]etition circulation is … core political speech" and that "First Amendment protection for such interaction … is 'at its zenith.'" 525 U.S. at 187 (quoting *Meyer*, 486 U.S. at 425). The Court therefore applied the "'now-settled approach' that state regulations 'impos[ing] severe burdens on speech ... [must] be narrowly tailored to serve a compelling state interest.'" 525 U.S. at 192 n.12 (quoting *id.* at 206 (Thomas, J., concurring in the judgment)). The Court specifically observed that the registration requirement was invalid not only because it burdened the number of available circulators but also because it infringed the First Amendment rights of those individual circulators for whom the failure to register was itself a "form of ... private and public protest" that "implicates political thought and expression." *Id.* at 196. Thus, the "ease with which qualified voters may register to vote" did "not lift the burden on speech at petition circulation time." *Id.* at 195. Finally, the Court held that the registration requirement was not narrowly tailored because circulators could merely attest to

their place of residency rather than register to vote. *Id.* at 196-97.

These cases thus established that restrictions on petition circulators implicate core political speech and are subject to strict scrutiny. The lower courts have understood and followed these clear and indisputable holdings; a "consensus" has emerged that strict scrutiny applies to these types of circulator requirements. *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316-17 (4th Cir. 2013); *see, e.g.*, *id.* at 316-19 (after applying strict scrutiny, holding unconstitutional Virginia's state residency requirement for petition circulators); *Wilmoth v. Sec'y of New Jersey*, 731 F. App'x 97, 102 (3d Cir. 2018); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028-29 (10th Cir. 2008) (after applying strict scrutiny, holding 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).

Indeed, circulator registration requirements in particular are viewed as practically *per se* invalid under *Buckley*. *See, e.g.*, *Nader*, 545 F.3d at 476.[6] The Sixth Circuit has categorically held that the "enforcement of … registration requirements against … circulators violate[s] … First Amendment rights." *See id.* The broad agreement on this point led the Chief Justice to observe *ten years ago* that *Buckley* "differentiate[s] between registration requirements, which were before the Court,

[6] None of these cases support the Law Court's suggestion that the application of strict scrutiny to restrictions on petition-circulation is "fact-intensive and may depend on broad statistical evidence and direct testimony from those eligible to vote." App. 25.

and residency requirements, which were not" and the courts of appeals have reached divergent results only "with respect to the validity of state residency requirements." *Lux v. Rodrigues*, 561 U.S. 1306, 1308 (2010) (Roberts, C.J., in chambers).

The Law Court's decision breaks that continuity. It is the first case in twenty years—since an unpublished federal magistrate opinion issued only a few months after *Buckley*[7]—that any court has upheld a circulator registration requirement. Unsurprisingly, it fails to justify its departure from the logic of this Court's decisions.

The Law Court declared that, "[u]nlike with other regulations of core political speech, an important—but not necessarily compelling—governmental interest in regulating ballot access may outweigh the burden placed on even core political speech." App. 19-20. This simply ignores the specific regime of exacting/strict scrutiny applicable to petition circulation requirements and instead applies traditional *Anderson-Burdick* balancing. But *Buckley* explicitly held that circulator registration requirements implicate "core political speech" and are therefore subject to "exacting scrutiny." 525 U.S. at 202 & n.12. As another court recently recognized, "the *Meyer-Buckley* standard is different from, and (where applicable) obviates, the *Anderson-Burdick* framework." *Lichtenstein v. Hargett*, No. 3:20-CV-00736, 2020 WL 5658732, at *10 (M.D. Tenn. Sept. 23, 2020)). Petition circulation restrictions therefore must be justified by a "compelling" state interest and must be narrowly tailored—and not merely "outweigh the burden" on core political speech. That is how federal circuit courts have uniformly interpreted *Buckley*, *see supra*, and indeed it is how the Law

[7] *Initiative & Referendum Inst. v. Secretary of State*, No. 98-cv-104, 1999 WL 33117172 (D. Me. Apr. 23, 1999) (Cohen, Mag. J.).

Court itself previously understood *Meyer*. *See Hart v. Secretary of State,* 1998 ME 189, ¶ 13, 715 A.2d 165 (upholding residency requirement for circulators as a "compelling state interest" that "is narrowly tailored").

The decision below thus fails when it dismisses the circulator registration requirement as merely a "ballot-access regulation pertaining to the 'mechanics of the electoral process.'" A. __. This ignores the First Amendment implications inherent in petition circulation. Indeed, four justices of this Court recently noted a circuit split regarding the level of scrutiny applicable to actual ballot access restrictions (such as deadlines or the number of signatures required to qualify a petition for the ballot). But those same justices noted that even those courts of appeals that have rejected First Amendment concerns have done so only "so long as the State does not restrict political discussion or *petition circulation*." *Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2616-17 (2020) (Roberts, C.J., concurring in grant of stay) (collecting cases) (emphasis added).

Any doubt on this point is dispelled by *McIntyre*, where this Court recognized that strict scrutiny cannot be circumvented by characterizing a regulation as controlling only "the mechanics of the electoral process." 514 U.S. at 345 (citing *Meyer*, 486 U.S. at 420). The Court recognized that measures regulating activities such as handbilling and petition circulation are not "ordinary election restriction[s]" because "unlike the statutory provisions challenged in [*Anderson*]" they are "regulation[s] of pure speech" that must be "subject to exacting scrutiny." *Id.* (citing *Meyer*, 486 U.S. at 420). *See also Lerman*, 232 F.3d at 146 ("The petition circulation

activity at issue in this case, while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny."); *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir.2000) (stating that "circulating nominating petitions [for political candidates] necessarily entails political speech").

Simply put, "in those cases in which the regulation clearly and directly restricts core political speech, as opposed to the mechanics of the electoral process, it may make little difference whether we determine burden first, since restrictions on core political speech so plainly impose a severe burden that application of strict scrutiny clearly will be necessary." *Lerman*, 232 F.3d at 146 (cleaned up). Because petition circulator restrictions implicate "core political speech," even if they are "part of the ballot access process," they are subject to strict scrutiny. *Id.* Accordingly, once the Law Court correctly determined that the registration requirement "restricts core political speech," it was required to apply strict scrutiny.[8]

Because circulator registration requirements are subject to *Meyer* and *Buckley*'s "well-nigh insurmountable" standard of review rather than the standard applied by the Maine court, Applicants have established an indisputably clear right to relief.

[8] In its denial of Applicants' motion for stay pending appeal, the Law Court underscored its misreading of *Buckley* and *Meyer* by asserting that those cases are "limited to the burden of compliance with [registration] laws" and their holdings do not extend to the "severe consequence of failing to comply with the election laws." App. 5 n.5. But those cases actually reject this distinction: "The ease with which qualified voters may register to vote, however, does not lift the burden on speech at petition circulation time. … the ease of registration misses the point." *Buckley*, 525 U.S. at 195-96.

B. Maine's Circulator Registration Requirement Cannot Satisfy Strict Scrutiny.

The State has failed both to identify a compelling interest and to demonstrate that the registration requirement is narrowly tailored. The State's "only" "germane" "justification for the registration requirement—the determination of the circulator's Maine residency at the time the circulator collects signatures"—has never been considered a compelling state interest. App. 28, 29. Instead, residency and registration requirements are alternative means to other compelling state interests such as "policing lawbreakers among petition circulators," *Buckley*, 525 U.S. at 196, "preventing fraud in the electoral process," *Lerman*, 232 F.3d at 149, and "ensuring the integrity of the election process," *Nader*, 531 F.3d at 1037. Until this decision, no court appears to have treated a residency requirement as a compelling state interest unto itself. And it is debatable whether residency requirements are *even appropriate means to achieve a recognized compelling state interest*, much less a compelling interest unto itself. *See Judd*, 718 F.3d at 316-19; *Yes on Term Limits, Inc.*, 550 F.3d at 1028-29; *Nader*, 545 F.3d at 475-76; *Nader*, 531 F.3d at 1038; *Lerman*, 232 F.3d at 146-47.

Additionally, the Law Court's holding that the registration requirement is narrowly tailored, App. 29-30, directly conflicts with *Buckley*. In holding that the registration requirement "is vital to the expedited [residency] review process," *id.*, the Court ignored *Buckley*'s identification of alternative means to verify circulator's residence: an affidavit. *Buckley* held that a registration requirement was not necessary to further the State's "strong interest in policing lawbreakers among

petition circulators" because this interest "is served by the requirement … that each circulator submit an affidavit setting out, among several particulars, the address at which he or she resides, including the street name and number, the city or town, [and] the county." 525 U.S. at 196 (quotation marks omitted). Like Colorado's affidavit requirement in *Buckley*, Maine also requires circulators to submit an affidavit attesting that they meet various requirements, including as to their registration status, and the affidavit must include the "physical address at which the circulator resides … at the time the petition is filed." 21-A M.R.S. § 903-A(4). Accordingly, as in *Buckley*, "the added registration requirement is not warranted. That requirement cuts down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. at 197.

In sum, Applicants have established that the Law Court transgressed clearly established law in upholding the registration requirement.

III. INJUNCTIVE RELIEF WOULD AID THIS COURT'S JURISDICTION.

An injunction under the All Writs Act would be "in aid of" this Court's certiorari jurisdiction. *See* 28 U.S.C. § 1651(a). The Court's authority under the All Writs Act "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966). The Court may issue a writ to maintain the status quo and take action "in aid of the appellate jurisdiction which might otherwise be defeated." *McClellan v. Carland*, 217 U.S. 268, 280 (1910); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit

Justice to upset an interim decision by a court of appeals would be to protect this Court's power to entertain a petition for certiorari before or after [a] final judgment.").

Applicants will be irreparably injured if the election takes place under the ranked choice tabulation method that unquestionably would have been suspended if not for the invalidation of the signatures. Without an injunction, *status quo ante* will be permanently altered. And "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.).

CONCLUSION

For the foregoing reasons, Applicants respectfully ask the Court to enter an injunction against the Secretary under the All Writs Act during the pendency of this appeal, preventing him from using ranked choice voting in producing or tabulating ballots. Finally, at a minimum, Applicants request a temporary injunction to allow for full briefing and consideration of this Application.

Respectfully submitted,

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