STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Cum-20-227

September 8, 2020

DAVID JONES, et al.,

Petitioner-Appellees,

vs.

SECRETARY OF STATE,

Respondent-Appellant

and

THE COMMITTEE FOR RANKED CHOICE VOTING, et al.

Intervenor-Appellants

On appeal from the Cumberland County Superior Court
Docket No. AP 20-16

INTERVENOR-APPELLANTS' BRIEF

James G. Monteleone, Bar No. 5827
Matthew J. Saldaña, Bar No. 6385

Attorneys for Intervenor-Appellants

BERNSTEIN SHUR
100 Middle Street; P.O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
jmonteleone@bernsteinshur.com
msaldana@bernsteinshur.com

SUMMARY OF THE ARGUMENT

The Superior Court decision to qualify the people's veto petition at issue because:

(i) The Superior Court decision must be reversed for obvious error where 92 signatures that the Secretary of State had disqualified for other reasons were inadvertently included in the court's tally of total signatures;

(ii) The Superior Court erred as a matter of law when it held that Maine's constitutional requirements in Article IV, Part 3, Section 20 requiring circulators to be active, registered voters imposed an unconstitutional burden on circulators pursuant to the First Amendment to the U.S. Constitution and the U.S. Supreme Court decision in *Buckley v. American Const. Law Found.*, 525 U.S. 182 (1999); and

(iii) The Superior Court erred as a matter of law when it held that 21-A M.R.S.A. § 902 gave the Secretary discretion to validate signatures "so long as the circulator's oath is administered on the *same day* that the petition is submitted to the registrar."

ARGUMENT

I. The Superior Court's inadvertent count of 92 signatures invalidated by the Secretary of State for other reasons was an obvious error causing substantial injustice absent review.

The Superior Court decision erroneously included 92 signatures in its tally of valid petitions that the Secretary of State had disqualified for other reasons. No facts are in dispute as to the number of signatures miscounted. The petition falls 70 signatures below the required 63,067-signature minimum when correctly tallied based on the Secretary's record determination of each signature's validity. Failure to review this obvious error on appeal would allow a petition *known* to contain too few signatures to go forward, casting doubt on the validity of Maine's presidential election and the broader people's veto process. This Court has jurisdiction to correct the error because a failure to correct the inadvertent mistake would result in substantial injustice affecting the core rights of every Mainer who will cast a ballot in the November general election, and cast an impermeable cloud over the integrity of both Maine's presidential election and the entire people's veto process.

Even if the erroneous tally reflected in the Secretary of State's summary of the record was unpreserved because it was not identified while the Superior Court retained jurisdiction, this Court still can address and correct the mistake as an obvious error. "Unpreserved error is obvious and reversible if the error affects

substantial rights or results in a substantial injustice." *In re Joshua B.*, 2001 ME 115, ¶ 10, 776 A.2d 1240 (quotations omitted). *See also State v. Pabon*, 2011 ME 100, ¶ 29, 28 A.3d 1147. The obvious error standard requires reversal of a lower court ruling that relied upon the error if perpetuation of the error on appeal would "result in such a serious injustice that, in good conscience, the judgment cannot be allowed to stand." *In re Joshua B.*, 2001 ME 115, ¶ 11.

Above all, the issue is reviewable as obvious error because it does not present a question of fact requiring this Court to choose between competing versions of the truth. *See e.g.*, *State v. Hodgkins*, 2003 ME 57, ¶ 11, 822 A.2d 1187, 1193 (concluding that the trial court committed "obvious error" when it based its sentence on an element that "was not found as a fact by the trial court during the fact-finding phase."). The Superior Court did not enter any findings of fact as to the tally of signatures. Rather, the lower court heard and decided only questions of law, while deferring to the Secretary of State's findings of fact. Specifically, the Superior Court judgment held, as a matter of law, that the signatures collected by circulators Michelle Riordan and Monica Paul—which had been disqualified by the Secretary as CIRC disqualifications[1]—must be counted as valid. *See* Order at 7-10. The Secretary had tallied in a summary exhibit that 988

[1] Petition signatures are invalidated by the Secretary of State for a variety of issues, including issues related to circulator qualification (designated as a "CIRC" disqualification), issues caused by a petition signer who was not qualified to sign (designated as a "NR" disqualification), or a petitioner signer whose signature was already counted on an earlier petition form (designated as a "DUP" disqualification).

signatures collected by Ms. Paul and Ms. Riordan were disqualified for CIRC, and the Superior Court's judgment therefore added 988 signatures to the petition total without any factual determination of the raw signatures numbers. Consequently, the Secretary of State's original determination of the validity of each petition signature, indicated in handwritten markings on the lower right-hand corner of every petition in the record, stands undisturbed by the Superior Court's decision. The petition must fail on this undisputed record.

Following the Superior Court's August 24, 2020 Order, the Secretary subsequently recognized that its tally failed to account for secondary bases of disqualification independent of the CIRC disqualification. A corrected count of only those petitions affected by the Superior Court's judgment that the CIRC disqualifications were in error shows that 892 signatures would be counted, not the 988 tallied by the Superior Court in reliance on a summary exhibit. The Superior Court never had the opportunity to consider the issue because it was not identified by the Secretary until after the Superior Court's jurisdiction to decide the case had expired on August 24, 2020 pursuant to 21-A M.R.S.A. § 905.

The Petitioner-Appellees do not dispute that the Superior Court decision counted 92 signatures that the Secretary had invalided for other reasons unrelated to the Superior Court's holdings and unaffected by the decision. *See generally* Pet'rs' Opp. to Mot. for Stay. Still, Petitioner-Appellees contend that they should

benefit from the inadvertent error on the basis that the error is unreviewable on appeal. *Id.* At law, the issue presents an obvious error that must be reviewed to protect the integrity of Maine's elections and preserve core First Amendment rights of both voters and candidates. *In re Joshua B*., 2001 ME 115, ¶¶ 10-11; *see also Callaghan v. City of South Portland*, 2013 ME 78, ¶ 12, 76 A.3d 348. The error must be corrected here despite it being unpreserved and otherwise unaddressed by the lower court because these substantial political speech rights hang in the balance. Failure to act on the error risks substantial injustice to Maine's electoral process. Further still, the people's veto process provides a substantial right to *all* citizens, both those petitioning for people's veto and those relying on the state to ensure the legality of a referendum suspending a duly enacted law governing Maine's vote for the President of the United States. Consequently, failure to address these known issues here would invariably "result in such a serious injustice that, in good conscience, the judgment cannot be allowed to stand." *In re Joshua B*., 2001 ME 115, ¶ 11.

Petitioner-Appellees' claim that consideration of the obvious error on appeal should entitle them to renew arguments that the Superior Court deemed waived after omission from Petitioner-Appellees' Superior Court brief. *See* Pet'rs' Opp. to Mot. for Stay at 12. Renewal of legal arguments that the parties strategically jettisoned in the Superior Court is distinguishable from the review of an obvious

error that was inadvertently overlooked during the expedited lower court proceeding. This Court can review Respondent-Appellants' unpreserved factual error raised on appeal for obvious error. *See Hodgkins*, 2003 ME 57, ¶ 11, 822 A.2d 1187, 1193. Petitioner-Appellees' complete failure to raise available *legal* argument at trial, however, should render those arguments waived on appeal. *See Poire v. Manchester*, 506 A.2d 1160, 1164 (Me. 1986) (concluding that legal arguments were "deemed waived for purposes of appeal because [they were] not raised before the trial justice."). A strategically abandoned legal argument cannot be equated with an inadvertent counting error undisputed by the parties, particularly where the record demonstrates Petitioner-Appellees presented arguments challenging hundreds of additional signatures, and that their litigation strategy did not depend exclusively on the erroneous summary exhibit that led the Superior Court's tally astray.

II. Maine's requirement for circulators to be active, registered voters does not impose an unreasonable burden on circulator's First Amendment rights.

The Superior Court erred as a matter of law when it held that Maine's constitutional requirements in Article IV, Part 3, Section 20 requiring circulators to be active, registered voters imposed an unconstitutional burden on circulators pursuant to the First Amendment to the U.S. Constitution and the U.S. Supreme Court decision in *Buckley v. American Const. Law Found.*, 525 U.S. 182 (1999).

In fact, Maine's requirement that petition circulators shall be lawfully registered Maine voters does not offend the First Amendment because the requirement does *not* meaningfully impose a burden on political expression. The requirement does, however, promote the State's interest in ensuring Mainers are at the helm of the constitutional referendum process that develops Maine law. Contrary to Petitioner-Respondent's assertion, strict scrutiny does not apply to the analysis of burden on referendum activity.

Buckley v. American Constitutional Law Foundation, Inc. held that a Colorado law requiring petition circulators to be registered Colorado voters was unconstitutional because the registration requirement in that state excluded more than one in every six[2] Coloradans from circulating petitions. 525 U.S. at 193-94. Colorado's voter registration data considered by the Court established that Colorado's "requirement of registration limits the number of persons available to circulate and sign initiative petitions and, accordingly, restricts core political speech." 525 U.S. at 194. (internal alteration omitted).

Buckley nonetheless emphasized that petition circulator requirements must be analyzed on a case-by-base basis to determine whether the specific burdens the challenged law imposes on protected political speech in that particular state fall within the "considerable leeway" states are given "to protect the integrity and

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[2] *Buckley* established that that Colorado had just 1.9 million registered voters among its population of 2.3 million eligible voters, leaving approximately 17 percent of eligible voters (or about one in six) unregistered.

reliability of the initiative process." 525 U.S. at 191. *Buckley* explained that "no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions." 525 U.S. at 192.

Other courts applying *Buckley* in Maine correctly recognized that Maine's registered voter population does not impose the type of burden on political speech that occurred in Colorado, because approximately 98 percent of eligible Maine voters are actively registered, leaving just one in 50 ineligible to participate in referendum petition circulation. The United States District Court for the District of Maine, in *Initiative & Referendum Institute v. Secretary of State*, No. CIV 98-104-B-C, 1999 WL 33117172 (D. Me. Apr. 23, 1999) ("*IRI*"), held that *Buckley* did not invalidate Maine's voter registration requirement for petition circulators. The Court held that the Maine law imposed only a slight and justifiable burden, because 98.8 percent of Maine's voter-eligible population was then registered to vote. 1999 WL 33117172 at *14-15. The Court held that "[t]hese numbers do not in themselves sustain a claim of severe burden." Id. at *15. *IRI* explained that Maine's important regulatory interests are sufficient to justify the circulator restrictions that imposed just a slight burden on political speech, 1999 WL 33117172 at *15 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), which holds: "When a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of

voters, the State's important regulatory interests are generally sufficient to justify the restrictions.”). *See also Maine Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, 795 A.2d 75 (Dana, J. concurring).

Applying a tailored analysis demonstrates that Maine’s law requiring circulators to be registered Maine voters does *not* offend the First Amendment because the law, even if it could be removed from the residency requirement, does not exclude any meaningful number of message carriers from the referendum process. Maine’s constitutional requirement that circulators be registered voters does not meaningfully diminish the number of available “message carriers” in Maine because approximately 49 of every 50 voting age adults living in Maine are, in fact, registered to vote. Those individuals all are eligible to participate in the people’s veto process as petition circulators. Where Maine’s law imposes only a slight burden on political speech, and that burden is reasonably justified by Maine’s interest in restricting promotion of legislative initiatives to Mainers, the Superior Court’s decision must be reversed as an error of law.

Strict scrutiny cannot apply absent a showing of substantial burden, which is not shown in the Superior Court’s record. Petitioner-Appellees rely upon *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316–17 (4th Cir. 2013) to support the proposition that courts have evolved their application of *Buckley* to adopt a consensus that strict scrutiny applies. *Libertarian Party of Virginia*,

however, is inapposite here because it addresses residency restrictions affecting circulators of candidate ballot-qualification petitions. Maine's voter registration requirement for circulators does not apply to ballot qualification petitions. *See* Me. Const. Art. IV, Pt. 3, § 20. In fact, the Petitioner-Appellees' cited case law demonstrates that no consensus has emerged" regarding residency requirements for referendum circulators.

At bottom, Petitioner-Appellees have skipped over the critical step of demonstrating that a significant burden on political speech is caused by the requirement for petition circulators to be active, registered voters. As *Buckley, ISI* and *Hart v. Sec'y of State*, 1998 ME 189, ably demonstrate, evaluation of burden must be done on a case-by-case basis. No such showing was presented here. To simply assume, as Petitioners do, that a "strict scrutiny" standard applies in the field of "petitioning restrictions" would needlessly, and without adequate support in the law, reverse course on Maine's state and federal precedent. Moreover, it would do so on the basis of a purported "consensus" on ballot initiatives that does not exist outside of the Tenth Circuit. This Court must reject Petitioners' invitation to apply strict scrutiny in this way. Intervenors have demonstrated that Maine's constitutional requirement that ballot-initiative circulators be registered Maine voters *at the time they are circulating ballot-initiative petitions for signatures* has

imposed no significant burden on Petitioners' First Amendment or voting rights; therefore, strict scrutiny is not appropriate.

III. The Superior Court erroneously construed 21-A M.R.S.A. § 902 to allow registrar verification of petitions prior to completion of the circulator's oath.

The Superior Court erred as a matter of law when it held that 21-A M.R.S.A. § 902 gave the Secretary discretion to validate signatures "so long as the circulator's oath is administered on the *same day* that the petition is submitted to the registrar." Order at 15 (emphasis added). Rather, Section 902 expressly prohibits registrars from taking any action to verify a petition prior to completion of the circulator's oath. The true construction of Section 902 requires 303 petition signatures erroneously validated by the Secretary's determination to be disqualified as a violation of the statute governing petition certification.

This Court reviews the Superior Court's construction of Section 902 *de novo*. *Kroeger v. Dep't of Envtl. Prot.*, 2005 ME 50, ¶ 7, 870 A.2d 566. An agency's interpretation of statute is reviewed based upon the statute's plain meaning where the statute is unambiguous. *Street v. Bd. of Licensing of Auctioneers*, 2006 ME 6, ¶ 9, 889 A.2d 319.

Here, the Superior Court affirmed the Secretary's determination that evidence in the record confirms that certain petitions from the towns of Boothbay, Sydney, Dexter and Warren containing a total of 303 validated signatures were

certified by town registrars prior to completion of the circulator's oath section of the petition form. Order at 14. The Superior Court's findings affirmed the Secretary's determination that "the registrar administered the [circulator] oath on the same day as the certification – just not in the right sequence." Secretary's Amended Determination at 3.

The Superior Court erred as a matter of law when it construed Section 902 to impose no strict requirements regarding the sequencing of same-day circulator's oath verifications. Section 902 requires:

> The circulator of a petition must sign the petition and verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations that the circulator personally witnessed all of the signatures to the petition and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be and that each signature authorized under section 153-A was made by the authorized signer in the presence and at the direction of the voter. After administering the oath to the circulator, the notary public or other authorized person must sign the notarial certificate on the petition while in the presence of the circulator. After the petition is signed and verified in this manner, the petition must be submitted to the registrar for certification in accordance with the Constitution of Maine, Article IV, Part Third, Section 20. If the petitions submitted to the registrar are not signed and verified in accordance with this paragraph, the registrar may not certify the petitions and is required only to return the petitions.

21-A M.R.S.A. § 902.

The statue establishes an unambiguous, three-step sequence of actions for circulator and municipal registrar verification of every petition: *First*, the

circulator of a petition must sign the petition and verify by oath or affirmation the validity of the signatures before a notary public or other authorized person. *Second*, the notary public, a*fter* administering the oath to the circulator, must sign the notarial certificate on the petition while in the presence of the circulator. And finally, "*[a]fter* the petition is signed and verified in this manner, the petition must be submitted to the registrar for certification in accordance with the Constitution of Maine, Article IV, Part Third, Section 20." *Id.* (emphasis added). Critically, the Statute provides *no exception* for actions that are performed out of order so long as they are done on the "same day." Rather, Section 902 expressly requires that "the registrar may not certify the petitions and is required only to return the petitions." As described below, the Court's holding, creating such an exception, was legal error.

While the Secretary's practice of validating signatures without further investigation where the notary's signature (step two) and the registrar's signature (step three) are each dated the same day, may be perfectly workable, and may even result in some out-of-sequence petitions being validated without the Secretary's knowledge, this historical practice does not introduce a new *legal* exception to the clear statutory prescription that petitions may be validly submitted to a town's registrar for certification only *"after"* the circulator's oath is taken (step one) and a notary public signs the notarial certificate (step two). And, on the record before

the Superior Court, there was *no dispute* that petitions certified by the towns of Boothbay, Sidney, Dexter, and Warren failed to follow this statutorily required sequencing.

Yet, on the record before it—which undisputedly demonstrated a failure to comply with the sequencing of Section 902 for certain signatures validated from these towns—the Superior Court nonetheless determined the Secretary's validation of these signatures not to be "unreasonable." Order at 15. In support of this holding, the Court reasoned that Section 902 is ambiguous as to the *consequences* of failing to follow the statutorily prescribed sequencing. Specifically, the Court ruled that Section 902 "does not state that a petition submitted to the registrar must be *rejected* if the circulator's oath has not been completed, only that the registrar must return the petition." *Id.* (emphasis in original). This reading of the statute is clearly erroneous. As described above, Section 902 clearly establishes a required sequencing of actions, aided by the term "after" in steps two and three. Moreover, registrars who receive petitions that are "not signed and verified in accordance with this paragraph" not only must "return the petitions," which the Superior Court emphasizes, but also "may not certify" them. 21-A M.R.S.A. § 902. This language clearly is not intended to relax Section 902's requirements for out-of-sequence, same-day circulator oath verification. Rather, it *further restricts* registrars from accepting such petitions.

Whatever practices the Secretary establishes for its own investigation of the validity of petition signatures, Section 902 clearly requires a sequence of circulator oath verification that the undisputed record evidence demonstrates was not followed here. As there is no applicable statutory exception, the registrar was prohibited from certifying these signatures, and the Secretary did not have discretion to validate them. The Court's construction of Section 902 to the contrary was clearly erroneous and must be overturned as a matter of law.

CONCLUSION

For the aforementioned reasons, the Court should reverse the decision of the Superior Court, and affirm the Secretary of State's determination that the people's veto ballot at issue fails to satisfy the requirements of the Maine Constitution, Article IV, Part 3, Section 17.

Dated at Portland, Maine this 8th day of September, 2020.

Respectfully submitted,

/s/ James G. Monteleone

James G. Monteleone, Bar No. 5827
Matthew J. Saldaña, Bar No. 6385

BERNSTEIN SHUR
100 Middle Street; P.O. Box 9729
Portland, Maine 04104-5029
(207) 774-1200
jmonteleone@bernsteinshur.com
msaldana@bernsteinshur.com

CERTIFICATE OF SERVICE

I, James G. Monteleone, hereby certify that on September 8, 2020, two copies of the Appellants' Brief were served via electronic and first-class mail upon counsel of record as follows:

Phyllis Gardiner, AAG
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
phyllis.gardiner@maine.gov

Patrick Strawbridge
Consovoy McCarthy PLLC
Ten Post Office Square
8th Floor South PMB # 706
Boston, MA 02019
patrick@consovoymccarthy.com

/s/James G. Monteleone______________
James G. Monteleone