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.

APPENDIX TO EMERGENCY APPLICATION FOR INJUNCTION PENDING CERTIORARI REVIEW

Patrick Strawbridge
Counsel of Record
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(703) 243-9423
patrick@consovoymccarthy.com

Daniel Shapiro
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
daniel@consovoymccarthy.com

TABLE OF CONTENTS

MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 2020 ME 117
Docket: Cum-20-227
Argued: October 1, 2020
Decided: October 1, 2020

Panel: MEAD, GORMAN, JABAR, HUMPHREY, and HORTON, JJ.

DAVID A. JONES

v.

SECRETARY OF STATE et al.

PER CURIAM

[¶1] David A. Jones, Jonathan Kinney, and Joshua Morris (collectively, "Jones") have filed a motion to stay the effect of the mandate in our decision issued in this matter on September 22, 2020, *Jones v. Sec'y of State*, 2020 ME 113, --- A.3d ---, pending their petition for a writ of certiorari to the Supreme Court of the United States. *See* M.R. App. P. 14(a)(3).[1] The Committee for Ranked Choice Voting and three individuals (collectively, "Committee") and the Secretary of State oppose the motion. Because we conclude that Jones has not satisfied the test for us to stay the effect of the mandate, we deny the motion.

[1] We note that the Supreme Court also has the authority, by statute and rule, to grant a stay. *See* 28 U.S.C.S. § 2001(f) (LEXIS through Pub. L. No. 116-158); Sup. Ct. R. 23.

[¶2] A request for a stay in the Law Court is "subject to the same standards for obtaining injunctive relief that are applied in the trial courts." *Me. Equal Justice Partners v. Commissioner*, 2018 ME 127, ¶ 31, 193 A.3d 796. "To obtain a stay, the moving party must demonstrate that (1) it will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief 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 injunction." *Id.* (quotation marks omitted).

A. Irreparable Injury, Harm to Other Parties, and the Public Interest

[¶3] Jones argues that he will suffer irreparable harm if a stay is not granted because the ranked-choice-voting law will be in effect for the November election despite what he contends are an adequate number of signatures in support of the people's veto petition. The Secretary of State indicates, with support from the affidavit of the Deputy Secretary of State in charge of the Bureau of Corporations, Elections and Commissions, that he has already finalized templates and printed more than a million ballots. The Secretary of State further represents, also with support from the affidavit, that ranked-choice ballots have already been delivered to voters serving in the

military and to civilian voters living outside the United States, and that more than 1,800 ballots have already been returned by voters. *Cf. Knutson v. Dep't of Sec'y of State*, 2008 ME 129, ¶ 14, 954 A.2d 1054 (authorizing a stay when ballot templates had not been finalized). Jones does not dispute these facts.

[¶4] The public has a strong interest in using ranked-choice voting if—as the Secretary of State determined and we affirmed—the proponents of the people's veto did not obtain enough valid signatures and the Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, P.L. 2019, ch. 539, is legally in effect.[2] *See Jones*, 2020 ME 113, ¶ 35, --- A.3d ---. Voting 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.[3] *See Purcell v. Gonzalez*, 549 U.S. 1, 4-6 (2006).

---

[2] The effective date for the Act, absent a valid people's veto petition, would have been June 16, 2020—ninety days after the adjournment of the Second Regular Session of the Maine Legislature. *See* Me. Const. art. IV, pt. 3, § 16. Because the petition for a people's veto was submitted before that date, the effective date of the Act is September 23, 2020, the day following our mandate affirming the Secretary of State's determination that there were insufficient valid signatures. *See* Me. Const. art. IV, pt. 3, § 17, cl. 2; 21-A M.R.S. § 905 (2020).

[3] Although Jones contends that, even if our decision were vacated, the ranked-choice ballots could be tabulated without using ranked-choice voting by counting only the votes marked for the voter's first choice, the public would—in that situation—have been asked to vote on a ballot that was misleading or confusing and did not comply with all dictates of 21-A M.R.S. § 601 (2020), including the requirement that the ballot state how to designate choices, with special instructions for ranked-choice contests, *id.* § 601(2)(A).

The ballot samples supplied by the Secretary of State include the following instructions for the November ranked-choice ballots:

[¶5] Admittedly, if the ranked-choice law were not properly in effect because of a valid people's veto petition,[4] the public would have an interest in using non-ranked-choice voting and having the opportunity to vote on the people's veto question. The balance of harms and the public interest, however, weigh against our grant of Jones's requested stay.

B. Likelihood of Success on the Merits

[¶6] We next consider Jones's likelihood of success on the merits. Jones argues that our decision, which applies a standard less stringent than strict scrutiny, stands in contrast to federal courts' holdings that strict scrutiny applies to circulator requirements. Jones also contends that, even applying the standard that we used, the requirement in Maine law that petition circulators

---

To vote, fill in the oval like this ●

To rank your candidate choices, fill in the oval:

- In the 1st column for your 1st choice candidate.
- In the 2nd column for your 2nd choice candidate, and so on.

Continue until you have ranked as many or as few candidates as you like.

Fill in no more than one oval for each candidate or column.

To rank a Write-in candidate, write the person's name in the write-in space and fill in the oval for the ranking of your choice.

[4] The people's veto petition was submitted to the Secretary of State on June 15, 2020, within the time allowed by the Maine Constitution, and if the petition were valid, the Act would not take effect unless and until the voters rejected the people's veto question. *See* Me. Const. art. IV, pt. 3, § 17, cls. 1, 3.

be registered to vote in the municipalities where they reside, *see* Me. Const. art. IV, pt. 3, § 20; 21-A M.R.S. § 903-A (2020), is overly restrictive of First Amendment rights because an affidavit would adequately ensure that a person was a resident in Maine at the time of petition circulation.

[¶7] In support of his position that our legal reasoning conflicts with federal case law, Jones cites cases that are distinguishable from the matter before us because the courts in those cases did not review registration requirements in a jurisdiction in which the residency requirement had already been upheld in a strict-scrutiny analysis.[5] *See Hart v. Sec'y of State*, 1998 ME 189, ¶ 13, 715 A.2d 165, *cert. denied*, 525 U.S. 1139 (1999) (holding that Maine's residency requirement survives strict scrutiny). The cases that Jones cites in his motion apply strict scrutiny in their review of residency requirements—a review that we already performed in *Hart*, 1998 ME 189, 715 A.2d 165. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 311 (4th Cir. 2013) (reviewing a residency requirement for petition circulation); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1025 (10th Cir. 2008) (reviewing "Oklahoma's ban on

[5] Jones's argument for strict-scrutiny review rests on a mistaken characterization of the burden that Maine's laws impose upon circulators; it focuses narrowly on the severe consequence of *failing to comply* with the election laws in this particular case rather than on the burden of *compliance* with those laws, which was the dominant focus of the Court's decisions in *Meyer v. Grant*, 486 U.S. 414, 422-25 (1988), *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 191-97 (1999), and similar cases.

non-resident petition circulators"); *Nader v. Brewer*, 531 F.3d 1028, 1030 (9th Cir. 2008) (reviewing the "requirement that circulators of nomination petitions be residents of Arizona"); *Lerman v. Bd. of Elections*, 232 F.3d 135, 139 (2d Cir. 2000) (reviewing a residency requirement for signature witnesses). Thus, we are not persuaded that this line of cases undermines our opinion, *Jones*, 2020 ME 113, --- A.3d ---, which is supported by Supreme Court precedent. *See Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186-87, 192-97 (1999); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344-45 (1995); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983); *Storer v. Brown*, 415 U.S. 724, 730 (1974).

[¶8] As to Jones's argument that an affidavit alone would be sufficient to establish residency, we reiterate the significance of simple and timely *verification* of residency. *See Jones*, 2020 ME 113, ¶ 33, --- A.3d ---. In Maine, local registrars perform the task of residency verification, requiring "proof of identity and residency" when a person registers to vote—a task that the Secretary of State would not have the time to perform when reviewing petitions within the truncated timeline set forth by statute. 21-A M.R.S. § 121(1-A) (2020); *see* 21-A M.R.S. §§ 111(3), (4), 112, 121, 122, 905(1) (2020). As we stated in our opinion, because we upheld the residency requirement in *Hart*,

1998 ME 189, ¶ 13, 715 A.2d 165, Maine has not violated the First Amendment by including in the Maine Constitution and elections statutes "a simple and, more importantly, *verifiable* way for the Secretary of State to determine a person's residency in Maine at the time of circulation of a petition." *Jones*, 2020 ME 113, ¶¶ 33-34, --- A.3d ---.

[¶9] We do not consider it likely that Jones will prevail in his petition to the Supreme Court, especially given the limited record presented with respect to the First Amendment challenge through judicial review of the Secretary of State's decision and the ongoing printing, distribution, and return of ranked-choice ballots. We cannot conclude that Jones has established at least "a substantial possibility" of success on the merits of either his petition for a writ of certiorari or the review that would follow if a writ of certiorari were granted.[6] *Me. Equal Justice Partners*, 2018 ME 127, ¶ 31, 193 A.3d 796.

[¶10] Finally, although in *Knutson*, 2008 ME 129, ¶ 14, 954 A.2d 1054, we granted a partial stay of our mandate for the brief, finite period preceding the creation of final ballot templates, the templates at issue here have already

[6] The Committee has argued that Jones lacks standing to petition for a writ of certiorari because 21-A M.R.S. § 905(2) (2020) allows an appeal by any signer of an invalidated petition without requiring a showing of a particularized injury. It is arguable, however, that the Legislature, by enacting section 905(2), established a particularized injury under state law. Because we need not decide this issue to rule on the motion before us, we decline to opine on the question.

been produced, more than a million ballots have been printed, and in some instances, ballots have been sent out to, and returned by, voters. We decline to stay the effect of our issued mandate in these circumstances.

The entry is:

Motion to stay the effect of the mandate denied.

Patrick N. Strawbridge, Esq. (orally), Consovoy McCarthy PLLC, Boston, Massachusetts, for movant-appellees David A. Jones et al.

Aaron M. Frey, Attorney General, and Phyllis Gardiner, Asst. Atty. Gen. (orally), Office of the Attorney General, Augusta, for respondent-appellant Secretary of State

James G. Monteleone, Esq. (orally), and Matthew J. Saldaña, Esq., Bernstein Shur, Portland, for respondent-appellants The Committee for Ranked Choice Voting et al.

Cumberland County Superior Court docket number AP-20-16
FOR CLERK REFERENCE ONLY

MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 2020 ME 113
Docket: Cum-20-227
Argued: September 15, 2020
Decided: September 22, 2020

Panel: MEAD, GORMAN, JABAR, HUMPHREY, and HORTON, JJ.

DAVID A. JONES et al.

v.

SECRETARY OF STATE et al.

PER CURIAM

[¶1] Intervenors The Committee for Ranked Choice Voting and three individuals (collectively, "Committee") and the Secretary of State appeal from a judgment of the Superior Court (Cumberland County, *McKeon, J.*) vacating the Secretary of State's determination that an inadequate number of valid signatures had been submitted to place on the ballot a people's veto of An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, P.L. 2019, ch. 539. *See* Me. Const. art. IV, pt. 3, § 17. Upon a petition for review of the Secretary of State's decision filed by David A. Jones, Jonathan Kinney, and Joshua Morris (collectively, "Jones"), the court concluded that it was unconstitutional for the State to require that every circulator who collected signatures be registered to vote in the circulator's municipality of

residence at the time of circulation. On the limited record presented to us, we conclude that Jones has not demonstrated that the requirement in Maine's Constitution and statutes that a circulator be a registered voter in the circulator's municipality of residence when collecting signatures violates the First Amendment. Accordingly, we vacate the court's judgment.[1]

I. BACKGROUND

[¶2] On July 15, 2020, the Secretary of State issued a written determination of the validity of a petition for the people's veto of An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, P.L. 2019, ch. 539.[2] He concluded that an insufficient number of valid signatures had been submitted in support of the petition.[3] *See* Me. Const. art. IV, pt. 3, § 17, cl. 1 (requiring "not . . . less than 10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition" for a people's veto to be placed on the ballot). For the petition to

[1] We need not, and do not, reach the parties' additional arguments regarding alternative bases for invalidating certain signatures. Nor do we entertain Jones's argument that the Superior Court erred in affirming the Secretary of State's determination that certain signatures submitted to the registrar in Freeport were invalid. Jones did not file a cross-appeal and therefore cannot raise claims of error. *See Johnson v. Home Depot USA, Inc.*, 2014 ME 140, ¶ 5 n.1, 106 A.3d 401.

[2] The signed petitions had been submitted to the Secretary of State on June 15, 2020.

[3] Because the Maine Constitution defines the term "written petition" as "*one or more petitions* written or printed," the term "petition" describes both the individual papers bearing signatures and the collection of those individual papers that constitutes the proponent's request to the Secretary of State that an act of the Legislature be "referred to the people." Me. Const. art. IV, pt. 3, § 17, cl. 1; Me. Const. art. IV, pt. 3, § 20 (emphasis added).

be valid, 63,067 signatures were necessary, and the Secretary of State determined that only 61,334 of the signatures submitted were valid.

[¶3] On July 27, 2020, Jones filed a petition for review of the Secretary of State's final agency action in the Superior Court. *See* 21-A M.R.S. § 905(2) (2020); M.R. Civ. P. 80C. The next day, Jones filed a motion requesting that the court remand the matter for the Secretary of State to take additional evidence to resolve multiple factual discrepancies. The Committee moved to intervene.

[¶4] On August 3, the court (*McKeon, J.*) granted the motion to intervene and held a status conference. By agreement of the parties, the court granted the motion to remand and ordered the Secretary of State to take additional evidence and reconsider his decision, with a supplement to his determination and the administrative record to be filed by August 11, and also ordered a schedule of briefing that would conclude on August 21.[4]

[¶5] On August 12, 2020, the Secretary of State issued an amended determination of the validity of the petition in which he concluded, among other things, that the signatures submitted from some signature collectors were not valid because those collectors had not been registered voters on the voting lists

[4] The court later modified the order based on the parties' agreement to allow the Secretary of State an additional day to file his materials.

of their municipalities of residence at the time that they collected signatures.[5] *See* Me. Const. art. IV, pt. 3, § 20; 21-A M.R.S. § 903-A (2020); *id.* § 903-A(4)(C). The Secretary of State concluded that some other signatures that he had originally determined to be invalid were valid but still determined that there were insufficient valid signatures—only 61,292—for the people's veto to be placed on the ballot.

[¶6] On August 21, after receiving briefs, the court held a telephonic hearing and remanded the matter to the Secretary of State to complete an investigation related to one town office by noon on August 24, with briefs to be submitted from the other parties on the same day. The court also ordered that the parties would have until August 24 to submit briefs on the effect of *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), on the validity of the signatures that the Secretary of State had disqualified because the signature collectors were not registered as voters in their municipalities of residence at the time they collected signatures.

[5] The Secretary of State determined that one of the two people who circulated the petitions that are now in dispute had changed her residence for purposes of her driver's license in the late summer of 2019 but had not registered to vote in that municipality until after collecting petition signatures. Both of the individuals swore by affidavit that they were registered Maine voters; one averred that she had voted in 2016 and 2018 elections, and the other averred that she was an "active Maine voter" who had been registered since 1999.

[¶7] The parties submitted all required materials on August 24, and the Secretary of State additionally filed a supplement to his amended determination of the validity of the petition for a people's veto. The Secretary of State still concluded—although by a smaller margin—that there were not enough valid signatures for the people's veto to be placed on the ballot. He determined that only 62,101 of the signatures submitted were valid—966 signatures short of the necessary 63,067.

[¶8] On August 24, 2020, the court entered a judgment vacating the Secretary of State's determination that insufficient signatures had been collected. The court concluded that *Buckley* rendered the requirement that a circulator be a registered voter at the time he or she collected signatures to be a violation of the First Amendment of the United States Constitution and held that 988 signatures had been improperly invalidated on the basis of the circulator's registration status.

[¶9] Both the Secretary of State and the Committee appealed. *See* 21-A M.R.S. § 905(3) (2020); M.R. App. P. 2A, 2B. The Committee moved in the Superior Court for "clarification" of whether an automatic stay was in place. Jones opposed the motion, and the court ordered that it "would take no action on [the] motion." The Secretary of State and the Committee then filed motions with us to stay the execution of the Superior Court's judgment. We dismissed

the motions as moot after concluding that Rule 62(e) imposed an automatic stay on the Superior Court's judgment pending appeal. *See Jones v. Sec'y of State*, 2020 ME 111, --- A.3d ---. The merits of the appeals are now before us.

II. DISCUSSION

[¶10] In this opinion, we consider (A) whether Maine's Constitution and statutes require circulators to be registered voters in the municipality where they reside at the time they collect signatures on a people's veto petition and (B) if they do so require, whether, on the record presented, the registration requirement violated the First Amendment to the United States Constitution.

A. Constitutional and Statutory Requirement of Circulator Registration

[¶11] We interpret Maine's Constitution and statutes de novo as questions of law. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 13, --- A.3d ---; *Reed v. Sec'y of State*, 2020 ME 57, ¶ 14, --- A.3d ---. We will interpret the constitutional or statutory provision according to its plain meaning if the language is unambiguous. *See Avangrid Networks, Inc.*, 2020 ME 109, ¶ 14, --- A.3d ---; *Reed*, 2020 ME 57, ¶ 14, --- A.3d ---.

[¶12] As to the constitution, "[i]f the provision is ambiguous, we [will] determine the meaning by examining the purpose and history surrounding the provision." *Avangrid Networks, Inc.*, ¶ 14, --- A.3d --- (quotation marks omitted). With respect to the language of a statute within the expertise of an

administering agency, however, if the provision is ambiguous, meaning that it is "reasonably susceptible to different interpretations," we defer to the agency's reasonable construction. *Reed*, 2020 ME 57, ¶ 14, --- A.3d --- (quotation marks omitted). We have held before that the Secretary of State "is the constitutional officer entrusted with administering—and having expertise in—the laws pertaining to the direct initiative process." *Id.* ¶ 18. As we do with respect to the direct initiative process, we accord deference to the Secretary of State's reasonable interpretation of an ambiguous statute governing the people's veto process. *See id.*

[¶13] "'[C]irculator' means a person who solicits signatures for written petitions, and who must be a resident of this State and whose name must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor." Me. Const. art. IV, pt. 3. § 20. A person thus does not meet the definition of a "circulator" for purposes of the Maine Constitution unless and until that person's name "appear[s] on the voting list" in the municipality where the person resides as qualified to vote for Governor. *Id.*

[¶14] By statute, petitions "may be circulated by any Maine resident who is a registered voter acting as a circulator of a petition." 21-A M.R.S. § 903-A. A circulator is specifically required to execute an affidavit swearing, among

other things, "[t]hat the circulator was a resident of the State and a registered voter in the State *at the time of circulating* the petition." *Id.* § 903-A(4)(C) (emphasis added). To vote, a person must "have established and maintain a voting residence in [a] municipality" *and* be registered to vote *in that municipality*. 21-A M.R.S. §§ 111(3), (4), 112 (2020). Only a municipal registrar can determine that a person is qualified to register as a voter in the municipality, *see* 21-A M.R.S. § 121 (2020), and a person's residency in that municipality is a necessary qualification for registration, *see id.* § 111(3), (4), 112. "A change of residence is made only by the act of removal, joined with the intent to remain in another place. *A person can have only one residence at any given time.*" *Id.* § 112(2) (emphasis added).

[¶15] In sum, the Maine Constitution requires that a circulator be a resident "whose name must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor," Me. Const. art. IV, pt. 3. § 20; and the statutes require that a person be a resident of a municipality to be registered to vote, *see* 21-A M.R.S. §§ 111(3), (4), 112(2), 121; *see also* 21-A M.R.S. §§ 161(2-A), 162-A (2020) (providing for registrars' maintenance of voter registration information including address changes). These provisions are unambiguous.

[¶16] Even if the Maine Constitution were ambiguous, however, we would reach the same conclusion based on the history surrounding the adoption of the definition of "circulator." Effective November 24, 1975, the Maine Constitution was amended by legislative resolution approved by the electorate to add the definition of "circulator" to article IV, part 3, section 20. *See* Const. Res. 1975, ch. 2, *approved in* 1975. The Statement of Fact included with the proposed resolution provided: "The signature-gathering process is improved and tightened in several ways. Any *registered voter*, not just a person who is one of the signers of a petition, may circulate petitions." L.D. 188, Statement of Fact (107th Legis. 1975) (emphasis added). The Legislature's Committee on the Judiciary had recommended the change: "The committee . . . felt the circulator should be a registered voter. This was accomplished by adding to this section a definition of a circulator requiring him or her to be a resident of the state and a registered voter." Report of the Judiciary Committee on the Initiative and Referendum Process 14 (Dec. 2, 1974). These sources clearly indicate that the Legislature contemplated that circulators would *be* registered voters when they circulated petitions—not that they would become registered voters after circulation but before submitting the petitions. The Secretary of State's interpretation of section 903-A is consistent with the legislative history of article IV, part 3, section 20, and, if we discerned any

ambiguity in the statute, we would defer to his reasonable construction of it. *See Reed*, 2020 ME 57, ¶ 14, --- A.3d ---.

[¶17] Because we conclude that the Maine Constitution and statutes require a petition circulator to be registered in the municipality of residence when circulating a petition, we must next consider whether the court erred in concluding that this constitutional and statutory requirement violated the First Amendment.

B. First Amendment

[¶18] A person challenging the constitutionality of a legislative enactment "bears a heavy burden of proving unconstitutionality[,] since all acts of the Legislature are presumed constitutional." *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341 (quotation marks omitted). To overcome the presumption of constitutionality, the party challenging a law must "demonstrate convincingly" that the law and the Constitution conflict. *Id.* (quotation marks omitted). "[A]ll reasonable doubts must be resolved in favor of the constitutionality" of the enactment. *Id.* (quotation marks omitted).

[¶19] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. amend. I. The freedom of speech "secured by the First Amendment against abridgment by the United States, [is] among the fundamental personal rights and liberties which are

secured to all persons by the Fourteenth Amendment against abridgment by a State." *Meyer v. Grant*, 486 U.S. 414, 420 (1988).

1. Level of Scrutiny Applicable to Ballot-Access Regulations

[¶20] The circulation of petitions for a ballot initiative such as a people's veto constitutes "core political speech." *See Buckley*, 525 U.S. at 186 (quotation marks omitted); *Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶ 8, 795 A.2d 75 (quotation marks omitted). Although state regulations affecting core political speech must ordinarily "be narrowly tailored to carry out a compelling state purpose," *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 8, 795 A.2d 75 (quotation marks omitted), application of the strict scrutiny standard has not always been required in cases involving the regulation of ballot access, including cases involving the regulation of petition circulation, because "'there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Buckley*, 525 U.S. at 187 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)); *see Burdick v. Takushi*, 504 U.S. 428, 430, 433 (1992) (reviewing a Hawaii regulation prohibiting write-in voting); *Anderson v. Celebrezze*, 460 U.S. 780, 782-83, 788 (1983) (reviewing an Ohio regulation imposing an early filing deadline for petitions to nominate an independent presidential candidate). Unlike 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 because of the need for fairness and order in the democratic process. *See Buckley*, 525 U.S. at 187; *Burdick*, 504 U.S. at 433-34.

[¶21] To ensure fairness and order, the United States Supreme Court has therefore adopted a specific framework for cases involving the regulation of ballot access that does not always require application of the strict scrutiny standard. *See Arizonans for Second Chances, Rehab., & Pub. Safety v. Hobbs*, No. CV-20-0098-SA, 2020 Ariz. LEXIS 279, at *24, --- P.3d --- (Sept. 4, 2020) (citing *Burdick*, 504 U.S. at 434; *Anderson*, 460 U.S. at 789). This approach is in contrast to the mandatory application of the strict scrutiny standard in reviewing restrictions on core political speech—or content-based restrictions on speech—that do not regulate ballot access. *Cf. FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 455-56, 464-65 (2007) (applying strict scrutiny to review a statute prohibiting certain corporate broadcasts to the electorate naming political candidates); *Cent. Me. Power Co. v. Pub. Utils. Comm'n*, 1999 ME 119, ¶¶ 18-23, 734 A.2d 1120 (applying strict scrutiny to review restrictions on the content of an electric transmission-and-distribution facility's consumer education materials). When a statute "does not control the mechanics of the electoral process" and "is a regulation of pure speech," the ballot-access

framework will not apply. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344-45 (1995).

[¶22] Thus, unlike in *Mowles v. Commission on Governmental Ethics & Election Practices*, 2008 ME 160, ¶¶ 1, 10-31, 958 A.2d 897, where we applied strict scrutiny to review restrictions on the "pure speech" of campaign advertisements,[6] here we are reviewing a regulation regarding petition circulation—a ballot-access regulation pertaining to the "mechanics of the electoral process." *McIntyre*, 514 U.S. at 345; *see Buckley*, 525 U.S. at 186-87; *Burdick*, 504 U.S. at 433-34; *Anderson*, 460 U.S. at 789. As we stated in *Mowles*, we ordinarily determine "whether the speech being regulated is core political speech," and apply strict scrutiny if it is. *Mowles*, 2008 ME 160, ¶¶ 15-17, 958 A.2d 897. Ballot-access regulations such as regulations of petition circulation, although regulating core political speech, *see Buckley*, 525 U.S. at 186; *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 8, 795 A.2d 75, require us to undertake a further inquiry to determine the appropriate level of scrutiny. *See Buckley*, 525 U.S. at 186-87; *Burdick*, 504 U.S. at 433-34; *Anderson*, 460 U.S. at 789.

[6] We concluded in *Mowles* that the regulations were subject to strict scrutiny both because they regulated core political speech and because they placed content-based restrictions on that speech. *See Mowles v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 160, ¶¶ 18-19, 958 A.2d 897.

[¶23] Specifically, pursuant to the framework adopted by the Supreme Court, to determine whether a ballot-access regulation governing the "mechanics of the electoral process," *McIntyre*, 514 U.S. at 345, violates the United States Constitution, a court "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson*, 460 U.S. at 789. The court must both "determine the legitimacy and strength of each of those interests" and "consider the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.*

[¶24] When First Amendment rights "are subjected to severe restrictions, [a] regulation must be narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434 (quotation marks omitted). In contrast, "when a state election law provision imposes only reasonable, nondiscriminatory restrictions" on First Amendment rights, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Id.* (quotation marks omitted); *see also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358-59 (1997). As we have stated, "there is no litmus test for determining whether an election regulation imposes an

impermissible burden on free speech, and states are accorded considerable leeway in the regulation of the initiative process in order to promote their legitimate state purposes." *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 8, 795 A.2d 75; *see also Buckley*, 525 U.S. at 192.

[¶25] We applied the analysis set forth by the Supreme Court in *Anderson* and *Burdick* in *Maine Taxpayers Action Network*:

> We agree with the Secretary, then, that requiring circulators to correctly identify themselves in their oath and affidavit is narrowly tailored to carry out the state's *reasonable* interest in locating circulators within or without the state's borders. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 434, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992) (stating that 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" (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)).

2002 ME 64, ¶ 20, 795 A.2d 75 (emphasis added).

2. Courts' Consideration of Circulator Registration Requirements

[¶26] The Supreme Court applied the *Anderson*/*Burdick* test in 1999 to determine whether a registration requirement for petition circulators violated the First Amendment.[7] *See Buckley*, 525 U.S. at 193 (citing *Timmons*, 520 U.S. at

[7] The Court noted that its opinion "is entirely in keeping with the now-settled approach that state regulations impos[ing] severe burdens on speech . . . [must] be narrowly tailored to serve a compelling state interest," though it did not indicate that it was applying that standard, and Justice Thomas concurred in the judgment but opined that strict scrutiny should have been applied. *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 n.12 (1999); *id.* at 206-09 (Thomas, J., dissenting).

358 (summarizing the *Anderson*/*Burdick* test)). Specifically, the Court considered whether the State of Colorado's concerns warranted the burden on First Amendment rights that arose from a statutory requirement that initiative circulators be registered voters. *Id.* The Court held that Colorado's statutory requirement violated the First Amendment. *See Buckley*, 525 U.S. at 192-97.

[¶27] The Court reached this holding after a trial at which an election official testified that, although there were 1,900,000 registered voters in Colorado, at least 400,000 eligible people—more than 17 percent of all eligible voters—were not registered. *Id.* at 193.[8] The Court concluded that the government had not presented "impelling cause" to require circulators to register to vote to exercise their First Amendment rights by circulating petitions. *Id.* at 197. The court held that the government's asserted interests in ensuring that circulators are not breaking the law and would be amenable to the subpoena power were insufficient grounds for curtailing First Amendment rights. *Id.* at 195-97. The Court considered in its analysis that, "*given the uncontested numbers*," the registration requirement "decrease[d] the pool of

Justice Thomas further opined that assessing the severity of burdens on core political speech to determine the necessary level of scrutiny can lead to inconsistent results. *Id.* at 206-09 (Thomas, J., dissenting).

[8] The Court noted that, given United States Census statistics, the numbers might be even higher. *Buckley*, 525 U.S. at 193 n.15.

potential circulators" and limited the number of voices that could convey the message in favor of the petition. *Id.* at 194-95 (emphasis added). The Court specifically relied on testimony of some of those eligible to vote that they had chosen not to register as a form of protest. *Id.* at 196. As the Court's opinion demonstrates, the determination of the extent of an election regulation's burden on First Amendment rights is fact-intensive and may depend on broad statistical evidence and direct testimony from those eligible to vote. *See id.* at 192-97.

[¶28] After the Court's decision in *Buckley*, the United States District Court for the District of Maine considered Maine's requirement of voter registration to serve as a circulator. *See Initiative & Referendum Inst. v. Sec'y of State*, No. CIV. 98-104-B-C, 1999 WL 33117172 (Apr. 23, 1999). The court concluded that, because it was undisputed on summary judgment that 98.8 percent of those eligible to vote in Maine were registered, the imposition on First Amendment rights was minimal and the registration requirement, although less compelling than a simple residency requirement, was sufficiently compelling to justify the minor intrusion. *Id.* at *14-15.

[¶29] Unlike in *Buckley* and *Initiative & Reform Institute*, there has been no trial or summary judgment motion to generate evidence for the trial court's—or our—consideration here. *Cf. Buckley*, 525 U.S. at 192-97; *Initiative*

& Referendum Inst., No. CIV. 98-104-B-C, 1999 WL 33117172, at *1. Nor was any independent claim joined that could produce the kind of crucial evidence that is sometimes necessary to succeed in a First Amendment challenge in this context. *Cf. Libertarian Party of Va. v. Judd*, 718 F.3d 308, 311-12 (4th Cir. 2013) (reviewing a summary judgment entered in an action brought pursuant to 42 U.S.C.S. § 1983 (LEXIS through Pub. L. No. 116-158)[9]); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1025-27 (10th Cir. 2008) (reviewing a judgment entered after an evidentiary hearing on a § 1983 claim).[10] Such a record is vital, as the briefs of the parties demonstrate, with both the Secretary of State and Jones citing information from various sources concerning voter registration statistics and patterns and speculating about voter behavior given Maine's registration procedures.[11]

[9] Although section 1983 was amended after the *Meyer* decision, that amendment does not affect our analysis here, and we cite to the current statute. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3851.

[10] We did consider a First Amendment challenge in an appeal from a Superior Court judgment entered in an appeal from the Secretary of State's decision in *Hart v. Sec'y of State*, 1998 ME 189, ¶¶ 1, 3-4, 715 A.2d 165, *cert. denied*, 525 U.S. 1139 (1999). That decision predates *Buckley*, however, and the reasoning in *Buckley* persuades us that a factual record is often necessary to establish that a restriction on petition circulators violates the First Amendment. *Buckley*, 525 U.S. at 192-97.

[11] The Secretary of State indicates in his brief that 96 percent of those eligible to vote in Maine are registered. Jones argues that this statistic is meaningless because that number does not represent the number of residents who are registered *in their current place of residence*. The administrative record, however, does not contain statewide statistical evidence.

3. Review of Maine's Requirement of Registration in the Municipality of Residence Before Circulation

[¶30] Here, the court was ruling only on a Rule 80C petition for review of final agency action. Thus, the record presented to the trial court is not extensive. We proceed to consider, based on the limited record, whether Jones has shown that the requirement of registration in the municipality of residence *before* circulating petitions violates the First Amendment. *See Goggin*, 2018 ME 111, ¶ 20, 191 A.3d 341.

a. Character and Magnitude of the Burden on First Amendment Rights

[¶31] On this record, we cannot conclude that "the character and magnitude of the asserted injury" to First Amendment rights, *Anderson*, 460 U.S. at 789, is severe. The only statistics available in the administrative record pertain to this petition. It is undisputed that less than two percent of the people who collected signatures for this specific petition were determined to have been unregistered at the time they collected signatures. *Cf. Bernbeck v. Moore*, 126 F.3d 1114, 1116-17 (8th Cir. 1997) (holding that a circulator registration requirement violated the First Amendment when the trial court had found, based on undisputed evidence, that the number of individuals that petition organizers could find "was grossly insufficient to the task" (quotation marks omitted)). Unlike some of those who testified in *Buckley*, 525 U.S. at 195-96,

the individual circulators whose petitions are in dispute here were not opposed to registering to vote and indeed became registered voters in their municipalities, albeit *after* they circulated the disputed petitions. Thus, although the *effect* of the signature collectors' failure to timely register in their new municipalities of residence may be severe in this case, we cannot say that the *burden* of the registration requirement on the exercise of petition supporters' First Amendment rights is severe either as applied in this case or more broadly in Maine. *See Me. Taxpayers Action Network*, 2002 ME 64, ¶ 29, 795 A.2d 75 (Dana, J., concurring) ("In the absence of any evidence to suggest that Maine's voter registration requirement presents a severe burden on the right of free speech, I would uphold the voter registration requirement . . . .").

b. Interests Put Forward by the State

[¶32] We turn next to "the precise interests put forward by the State as justifications" for the restrictions. *Anderson*, 460 U.S. at 789. The Secretary of State has argued that the regulation is designed to enable him to (1) locate circulators in the event that there are any questions of fraud or forgery, (2) subpoena circulators if necessary, and (3) determine residency in Maine as of the time of circulation without extensive factual inquiry. The argument as to the first two reasons is not germane to this case. As long as a circulator registers to vote in the circulator's municipality of residence at some point

before the petitions are submitted to the Secretary of State, *see* 21-A M.R.S. § 902 (2020), the Secretary of State would be able to locate and subpoena the circulator after receiving the petitions. *Cf. Me. Taxpayers Action Network*, 2002 ME 64, ¶ 29, 795 A.2d 75 (Dana, J., concurring) ("Maine's voter registration requirement serves a purpose of providing a convenient and administratively efficient means of identifying and locating circulators as part of the validation process, if necessary, or to investigate potential misconduct.").

[¶33] This leaves only one other justification for the registration requirement—the determination of the circulator's Maine residency at the time the circulator collects signatures. We determined in 1998 that the residency requirement itself does not violate the First Amendment. *See* Me. Const. art. IV, pt. 3, § 20; *Hart v. Sec'y of State*, 1998 ME 189, ¶ 13, 715 A.2d 165, *cert. denied*, 525 U.S. 1139 (1999) ("[A]ny interference with proponents' right to unfettered political expression is justified by the State's compelling state interest in protecting the integrity of the initiative process, and the residency requirement set forth in the Maine Constitution is narrowly tailored to serve that interest.").[12] Voter registration in Maine, which occurs at the local level, *see*

[12] In *Hart*, which we decided before *Buckley*, we applied strict scrutiny without any citation to *Anderson* or *Burdick*. *Hart*, 1998 ME 189, ¶ 13, 715 A.2d 165. The Supreme Court denied the petition for a writ of certiorari in that matter after publication of the *Buckley* decision. *See* 525 U.S. 1139 (1999).

21-A M.R.S. §§ 101, 121 (2020), is a simple[13] and, more importantly, *verifiable* way for the Secretary of State to determine a person's residency in Maine at the time of circulation of a petition—a consideration that was not discussed in *Buckley*, 525 U.S. at 195-97. The Secretary of State has access to municipal registrars and to the central voter registration system that they are required to maintain. *See* 21-A M.R.S. § 161(2-A); *see also Hart v. Gwadosky*, No. AP-98-30, 1998 Me. Super. LEXIS 130, *14 (May 15, 1998) ("Ensuring that a circulator is a resident is most easily accomplished by requiring that the [circulator] be a registered voter."). This efficient method of confirming circulator residency is vital to the expedited review process that the Secretary of State must undertake after the petitions are submitted. *See* 21-A M.R.S. § 905(1).

[¶34] The requirement that a circulator be registered in the circulator's municipality of residence while circulating a petition therefore imposes only "reasonable, nondiscriminatory restrictions" on the First Amendment rights of petition supporters for the purpose of ensuring compliance with the residency requirement of the Maine Constitution. *Burdick*, 504 U.S. at 434 (quotation

[13] The two-sided voter registration card used in Maine requires a Maine resident to provide the municipality with only basic information regarding eligibility to vote; party affiliation, if any; and residency and identifying information. *See* 21-A M.R.S. § 152(1) (2020) (specifying the contents of an application to register as a voter); *see also* 21-A M.R.S. § 111 (2020) (requiring, for a person to vote in a municipality, that the person be a United States citizen; be at least eighteen years of age; reside in the municipality; be registered to vote in that municipality; and, for party caucuses, conventions, or primaries, be a member of the party unless the party authorizes nonmembers to vote).

marks omitted). Thus, we conclude that the government's interest is sufficient to justify the restriction that the requirement places on petitioners' First Amendment rights. *See Burdick*, 504 U.S. at 434. The Superior Court erred in concluding, on the record before it, that Jones had satisfied his burden of overcoming the presumption of constitutionality. *Goggin*, 2018 ME 111, ¶ 20, 191 A.3d 341.

[¶35] We therefore vacate the judgment of the Superior Court in which it vacated the Secretary of State's decision as to the 988 signatures that it determined were valid. Because our decision results in a deficit in the number of signatures required for the people's veto to be placed on the ballot, we do not reach or consider the Committee's arguments regarding other signatures that it contends were improperly validated.

The entry is:

> Judgment of the Superior Court vacated. 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. Mandate to issue immediately.

James G. Monteleone, Esq. (orally), and Matthew J. Saldaña, Esq., Bernstein Shur, Portland, for appellants The Committee for Ranked Choice Voting et al.

Aaron M. Frey, Attorney General, and Phyllis Gardiner, Asst. Atty. Gen. (orally), Office of the Attorney General, Augusta, for appellant Secretary of State

Patrick N. Strawbridge, Esq. (orally), Consovoy McCarthy PLLC, Boston, Massachusetts, for appellees David A. Jones, et al.

Cumberland County Superior Court docket number AP-20-16
FOR CLERK REFERENCE ONLY

MAINE SUPREME JUDICIAL COURT Reporter of Decisions
Decision: 2020 ME 111
Docket: Cum-20-227
Argued: September 3, 2020
Decided: September 8, 2020

Panel: MEAD, GORMAN, JABAR, HUMPHREY, and HORTON, JJ.

DAVID A. JONES et al.

v.

SECRETARY OF STATE et al.

PER CURIAM

[¶1] On August 24, 2020, the Superior Court (Cumberland County, *McKeon, J.*) entered a judgment on a petition for judicial review brought by David A. Jones and others (collectively, "Jones") to challenge a decision of the Secretary of State. *See* 5 M.R.S. § 11001 (2020); 21-A M.R.S. § 905(2) (2020); M.R. Civ. P. 80C. The court vacated the Secretary of State's determination that insufficient signatures had been collected to place on the November 2020 ballot a people's veto of An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, P.L. 2019, ch. 539.

[¶2] Both the Secretary of State and intervenors The Committee for Ranked Choice Voting and three individuals (collectively, "Committee") have moved to stay the execution of the Superior Court's judgment pending their

appeals to us from that judgment. The Committee argues that a stay of the court's judgment is automatically in place pursuant to Rule 62(e) of the Maine Rules of Civil Procedure, and argues alternatively that, if there is no automatic stay, we should enter an order staying the execution of the Superior Court's judgment because "the Superior Court decision erroneously and inadvertently included at least 162 signatures that the Secretary's tally of signature[] totals failed to account." The Secretary of State argues only that we should enter an injunction in the form of a stay pursuant to Rule 62(g) in order to "preserve the status quo or the effectiveness of the judgment subsequently to be entered."[1] Jones has filed an opposition to both motions, asserting that judgments entered by the Superior Court on petitions for judicial review of final agency action are not subject to the automatic stay pending appeal but rather are subject only to the stay provisions of 5 M.R.S. § 11004 (2020), and that we should not order a stay as a form of injunctive relief.

[1] Rule 62(g) provides,

> **(g) Power of Reviewing Court Not Limited.** The provisions in this rule do not limit any power of the Superior Court or Law Court during the pendency of an appeal to suspend, modify, restore, or grant an injunction or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

[¶3] Because we conclude that execution of the judgment is automatically stayed upon appeal, we do not reach the arguments regarding injunctive relief. We dismiss both motions to stay as moot.

[¶4] Rule 62 governs the stay upon appeal of proceedings in Maine courts. It provides, in pertinent part,

> **(e) Stay Upon Appeal.** Except as provided in subdivisions (c) and (d) of this rule, the taking of an appeal from a judgment shall operate as a stay of execution upon the judgment during the pendency of the appeal, and no supersedeas bond or other security shall be required as a condition of such stay.

M.R. Civ. P. 62.[2] Thus, pursuant to Rule 62(e), the docketing of an appeal will ordinarily operate as a stay of a trial court's order, including with respect to an

[2] The exceptions to the stay set forth in Rule 62(c) and (d) are as follows:

> **(c) Order for Immediate Execution.** In its discretion, the court on motion may, for cause shown and subject to such conditions as it deems proper, order execution to issue at any time after the entry of judgment and before an appeal from the judgment has been taken or a motion made pursuant to Rule 50, 52(b), 59, or 60; but no such order shall issue if a representation, subject to the obligations set forth in Rule 11, is made that a party intends to appeal or to make such motion. When an order for immediate execution under this subdivision is denied, the court may, upon a showing of good cause, at any time prior to appeal or during the pendency of an appeal order the party against whom execution was sought to give bond in an amount fixed by the court conditioned upon satisfaction of the damages for delay, interest, and costs if for any reason the appeal is not taken or is dismissed, or if the judgment is affirmed.
>
> **(d) Injunction Pending Appeal.** 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.

administrative appeal. *See Doggett v. Town of Gouldsboro*, 2002 ME 175, ¶ 6, 812 A.2d 256 (holding that an appeal to us from a municipal decision pursuant to M.R. Civ. P. 80B "suspend[ed] the trial court's authority over the matter and stay[ed] the effect" of its remand to a municipality); *cf. Hawkes Television, Inc. v. Me. Bureau of Consumer Credit Prot.*, 462 A.2d 1167, 1169 (Me. 1983) (dissolving an injunction that the Superior Court issued in a Rule 80B case while the matter was automatically stayed pending appeal to us).

[¶5] Jones has not filed a motion for immediate execution of the judgment in the Superior Court.[3] *See* M.R. Civ. P. 62(c). Jones urges us to conclude, however, that the Superior Court, in vacating the Secretary of State's decision, entered an order "granting, dissolving, or denying an injunction"—a decision that is not subject to the automatic stay pending appeal. M.R. Civ. P. 62(d), (e).[4] Jones argues that M.R. Civ. P. 81(c) requires us to treat the

[3] Nor has Jones otherwise sought to expedite matters at any time during the proceedings before the Superior Court. We note that motions to the trial court pursuant to Rule 62(c) or (d)—which are excepted from the automatic stay pending appeal—should precede any motion requesting that we exercise our authority pursuant to Rule 62(g). *See* 3 Harvey & Merritt, *Maine Civil Practice* § 62:8 at 320 (3d, 2019-2020 ed. 2019) ("Resort to the appellate court under this Rule should only be sought when relief cannot be had in the trial court."); *see, e.g.*, *Senty v. Bd. of Osteopathic Examination & Registration*, 594 A.2d 1068, 1069 (Me. 1991) (issuing a stay, after the trial court refused to do so, of an injunction that required the issuance of a professional license and ordering an expedited briefing schedule).

[4] Jones also contends that "execution" of a judgment means only the execution of a judgment for money damages, citing M.R. Civ. P. 69. Rule 62 does not, however, reference Rule 69 as a limit on the meaning of "execution," and the exceptions included in Rule 62(a)—for injunctions and receiverships, as well as orders "relating to the care, custody and support of minor children or to the

Superior Court's order as an injunction. Rule 81(c) does not, however, provide that all administrative appeals are to be construed as seeking injunctions; rather it establishes new procedural mechanisms to replace outmoded writs:

> **Scire Facias and Certain Extraordinary Writs Abolished.** The writs of scire facias, mandamus, prohibition, certiorari, and quo warranto are abolished. Review of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, shall be in accordance with procedure prescribed by Rule 80B. Any other relief heretofore available by any of such writs may be obtained by appropriate action or motion under the practice prescribed by these rules. 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). The rule thus makes clear that (1) the named writs are abolished, (2) the Rules supply a new process for judicial review of governmental agency actions, and (3) any other relief previously available pursuant to the now-abolished writs may be obtained under the Rules of Civil Procedure, with any request for a party to do or refrain from doing an act to be brought as a claim for injunctive relief. *See id.*; *see also* 3 Harvey & Merritt, *Maine Civil Practice* §§ 81:8-81:12 at 569-74 (3d, 2019-2020 ed. 2019). The rule does not, however, convert every Rule 80B or Rule 80C action into a claim

---

separate support or personal liberty of a person or for the protection of a person from abuse or harassment"—make clear that all types of judgments not listed are subject to the automatic stay of execution pending appeal. M.R. Civ. P. 62(a), (e).

for injunctive relief, and certainly in the matter before us, the test for granting an injunction has not been applied.[5] Jones never requested injunctive relief, and the court did not reach findings of irreparable injury, balance any competing harms, or consider the public interest. *See Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129.

[¶6] Jones and the Secretary of State further contend that the Superior Court's judgment is not automatically stayed because in *National Organization for Marriage v. Commission on Governmental Ethics and Elections Practices*, 2015 ME 103, 121 A.3d 792, we held that an *agency's decision* was not stayed pending appeal. We were not asked in that case to review whether the *Superior Court's* judgment was automatically stayed. *Id.* ¶¶ 1-2. Rather, we held there that the *agency's* decision was not a "judgment" as defined in M.R. Civ. P. 54(a), and that the petition for judicial review filed in the Superior Court did not effectuate an automatic stay of the agency's decision, nor did an appeal from

[5] An injunction may be issued only if the court finds that "(1) [the moving party] will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; (3) [the moving party] 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 injunction." *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129. To the extent that we have exercised the authority to suspend an injunction entered in a Rule 80C matter, we have done so when the trial court found in the plaintiff's favor on an independent claim for injunctive relief. *See Senty*, 594 A.2d at 1069 (staying an injunction that required the issuance of a professional license and ordering an expedited briefing schedule); *see also* M.R. Civ. P. 62(g).

that Superior Court decision to us. *See Nat'l Org. for Marriage*, 2015 ME 103, ¶¶ 10-11, 121 A.3d 792. Rather, to obtain a stay of an agency's decision, a party must request the stay from the agency or, if such a request is impracticable or is denied by the agency, from the Superior Court. 5 M.R.S. § 11004; *Nat'l Org. for Marriage*, 2015 ME 103, ¶ 11, 121 A.3d 792.

[¶7] Here, because the "petition for review shall not operate as a stay of the final agency action pending judicial review," 5 M.R.S. § 11004, and no stay was granted by the Secretary of State or the Superior Court, the agency action has plainly not been stayed. An automatic stay of the Superior Court's judgment *is* in place, however, while the present appeal is pending. *See* M.R. Civ. P. 62(e).

[¶8] Thus, the motions to stay seek relief that Rule 62(e) already provides, and we dismiss them as moot. *See In re Involuntary Treatment of K.*, 2020 ME 39, ¶ 9, 228 A.3d 445 (stating that "issues are moot . . . when they have lost their controversial vitality, and [a] decision would not provide . . . any real or effective relief" (quotation marks omitted)).

[¶9] Because an automatic stay is in place, the motions to stay are dismissed.

The entry is:

Motions to stay dismissed.

James G. Monteleone, Esq. (orally), and Matthew J. Saldaña, Esq., Bernstein Shur, Portland, for appellants The Committee for Ranked Choice Voting et al.

Phyllis Gardiner, Esq. (orally), Office of the Attorney General, Augusta, for appellant Secretary of State

Patrick N. Strawbridge, Esq. (orally), Consovoy McCarthy PLLC, Boston, Massachusetts, for appellees David A. Jones, et al.

Cumberland County Superior Court docket number AP-20-16
FOR CLERK REFERENCE ONLY

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP 20-0016

DAVID A. JONES *et. al.*,
Petitioner

v.

SECRETARY OF STATE,
Respondent

and

COMMITTEE FOR RANKED
CHOICE VOTING, *et. al.*
Intervenors

ORDER

OVERVIEW

Backers of a petition (Petitioners) seek to place a "peoples' veto" referendum on the ballot that would repeal legislation submitting presidential elections in Maine to ranked choice voting. The Petitioners appeal the Secretary of State's ("Secretary") decision that there were an insufficient number of valid signatures to place the issue on the November 2020 ballot. The Secretary opposes the appeal. The Committee for Ranked Choice Voting and others ("Committee"), all proponents of ranked choice voting, intervened and oppose the appeal as well. Neither the legality nor the desirability of ranked choice voting is at issue in this appeal. The issue here is whether the Secretary improperly invalidated or validated petitions and individual signatures seeking to place the issue on the ballot. Upon review of the facts and law governing this case, and in light of the Secretary's Amended and Supplemental Determinations, this court finds that the Secretary improperly invalidated the signatures collected by Monica Paul and Michelle

Riordan. As such, the court finds that the Petitioners collected enough signatures to place their petition on the November 2020 ballot and hereby reverses the Secretary's decision.

FACTS

The Petitioners are supporters of a petition that seeks to place on the November ballot a "people's veto" of Pub Laws 2019, CH. 5389 known as "An Act to Implement Ranked Choice Voting for Presidential Primary and General Elections in Maine" ("Act"). The Secretary approved the timely application for a people's veto referendum petition. *Payne v. Sec'y of State*, 2020 ME 110, ___ A.3d ___.

The proponents of the people's veto set out to collect the 63,067 signatures necessary to put the veto on the ballot. On June 15, 2020, the proponents filed a number of petitions with the Secretary that contained a total of 72,512 signatures; at which time the Secretary began the process to determine whether the petitions and the signatures complied with the Maine Constitution and Maine law. On July 15, the Secretary issued his Determination of the Validity of a Petition for People's Veto of (the Act) ("Determination"). The Secretary invalidated 11,178 signatures, leaving the petition with only 61,334 signatures and short of the required number of signatures.

The Petitioners brought a timely appeal raising a variety of issues challenging the Secretary's Determination. The Committee intervened. After a conference with counsel on August 3, the court remanded the matter to the Secretary without objection. On remand, the Secretary was to reconsider its invalidations in light of the additional evidence provided by both the Petitioners and the Committee. The Secretary issued an Amended Declaration on August 12. The Secretary invalidated 11,299 signatures, leaving a shortfall of 1,775 signatures. Amended Declaration, pp. 8-9.

Because the court must decide the issue by August 24, the parties agreed to an accelerated briefing schedule. On Friday, August 21, the court held a status conference

with counsel. The court, with the agreement of the Secretary and the Petitioners, but over the objection of the Committee, remanded this case back to the Secretary for further findings with respect to the petitions from the Town of Turner and allowed supplemental briefs to be filed on August 24.

The Petitioner's original challenge focuses on several categories of ballots that the Secretary determined to be invalid in an effort to overcome the shortfall.

1. Town of Turner	809 signatures
2. Circulators Riordan and Paul	988 signatures[1]
3. Town of Freeport	160 signatures
4. Notary Pettengill	24 signatures
5. Materially altered signatures	12 signatures
	1993 signatures

On August 24, the Secretary issued a Supplement to its Amended Determination ("Supplement"). This Supplement reinstated 809 signatures that were previously invalidated. There are now 10,490 invalidated signatures, a shortfall of 966 signatures.

Altogether, the Petitioner now challenges enough qualifications to get over the 966-signature gap. In addition, the Intervenor objects to the validation of the 809 signatures from the Town of Turner.

ANALYSIS

When the Superior Court hears an appeal of a decision by a state agency, the court may:

A. Affirm the decision of the agency;

[1] The Secretary noted in a supplemental memorandum that the Secretary invalidated 306 signatures on the Monica Paul petition, not 262 as previously calculated.

B. Remand the case for further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such action as the court deems necessary; or

C. Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:

1) In violation of constitutional or statutory provisions;
2) In excess of the statutory authority of the agency;
3) Made upon unlawful procedure;
4) Affected by bias or error of law;
5) Unsupported by substantial evidence on the whole record; or
6) Arbitrary or capricious or characterized by abuse of discretion.

5 M.R.S. § 11007. The court reviews the evidence for findings not supported by the evidence, errors of law, or abuse of discretion. *Knutson v. Dep't of Sec'y of State*, 2008 ME 124, ¶8, 954 A.2d 1054.

"The Secretary of State is the constitutional officer entrusted with administering—and having expertise in—the laws pertaining to the direct initiative process." *Reed v. Sec'y of State*, 2020 ME 57, ¶ 18, ___ A.3d ___. The court must defer to the Secretary's interpretation of the relevant law as long as it is reasonable. *Id.* The court can only reverse the Secretary on the grounds of abuse of discretion if the Secretary "exceeded the bounds of the reasonable choices available to him." *Forest Ecology Network v. LURC*, 2012 ME 36, ¶ 28, 39 A.3d 74. With respect to the Secretary's findings of fact, the court must examine:

> "the entire record to determine whether, on the basis of all the testimony and exhibits before it, the agency could fairly and reasonably find the facts as it did. [The reviewing court] must affirm findings of fact if they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency. The 'substantial evidence' standard does not involve any weighing of the merits of evidence. Instead it requires [the court] to determine whether there is any competent evidence in the record to support a finding. Administrative agency findings of fact will be vacated only if there is no competent evidence in the record to support a decision. Any [c]ourt review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial

> decision-making, without giving due regard to the agency's expertise, and would exceed [the court's] statutory authority."

Friends of Lincoln Lakes v. Bd. of Envtl. Prot., 2010 ME 18, ¶¶ 13-14, 989 A.2d 1128(internal citations omitted). When an agency concludes that the party with the burden of proof failed to meet that burden, the reviewing court will reverse that conclusion only if the record compels a contrary conclusion to the exclusion of any other inference. *Kelley v. Me. Pub. Employees. Ret. Sys.*, 2009 ME 27, ¶16, 967 A.2d 676; *see also Concerned Citizens to Save Roxbury v. Bd. Of Envtl. Prot.*, 2011 ME 39, ¶ 24, 15 A.3d 1263. On appeal, it is the Petitioner's burden to show that there is insufficient evidence for the Secretary to make its determination. *Town of Jay v. Androscoggin Energy, LLC*, 2003 ME 64, ¶ 10, 822 A.2d 1114.

The right to the "people's veto" is provided by the Maine Constitution. ME Const., Art. IV, Part 3d, § 17. The Constitution provides that a proponent of the referendum must obtain the signatures of ten percent of the number voting in the last gubernatorial election. *Id.* The Maine Constitution also imposes requirements on the conduct of a petition drive that are designed to maintain the integrity of the process. *Id.* §20. These limits govern those who circulate the petitions, known as "circulators," the notaries who take the circulator's oath upon completion of the petitions, and the municipal officials who certify the petitions. *Id.* Once this process is completed, the petitions are then sent to the Secretary so that he may determine if they are valid.

Relevant to this case, the Constitution requires that petitions be deposited with the town officials "by the hour of 5:00 p.m., on the 5th day before the petition must be filed in the office of the Secretary of State, or, if such 5th day is a Saturday, a Sunday or a legal holiday, by 5:00 p.m., on the next day which is not a Saturday, a Sunday or a legal holiday." *Id.* § 20. In this case, the petitions needed to be submitted by 5 P.M. on June

10. The Maine Constitution also requires that a "Circulator must appear on the voting list of the city, town or plantation of the circulator's residence as qualified to vote for Governor. . ." *Id.*

In addition to the Constitution, the Legislature has issued a set of statutory guidelines that overly the constitutional framework outlined above. Again, relevant to this case, the statute states that a notary must take the circulator's oath and sign the petition. 21-A M.R.S. § 902. "*After* the petition is signed and verified in this manner. the petition must be submitted to the registrar for certification." *Id.*(emphasis supplied). In addition, any notary providing the circulator's oath must not have a conflict of interest. A conflict of interest would include "providing any other services, regardless of compensation, to initiate the direct initiative or people's veto referendum .... or ...providing services other than notarial acts, regardless of compensation, to promote the direct initiative or people's veto referendum for which the petition is being circulated." 21-A M.R.S.A. § 903-E.

A failure to comply with the rules on the part of a circulator or notary can lead to disqualification of an entire petition. *Maine Taxpayer's Action Network* v. *Sec'y of State,* 2002 ME 64, ¶ 13, 795 A.2d 75, 80. Although there are not enough decisions from the Law Court arising from the initiative and peoples veto process to fully flesh out the contours of the Secretary's discretion when validating or disqualifying petitions or signatures, there are a few decisions that shed some light. In *Reed v. Secretary of State,* the Secretary validated a sufficient number of signatures to allow an initiative regarding the CMP power line to go forward. *Reed,* 2020 ME 24, ¶ 10, ___ A.3d ___. The Law Court deferred to the Secretary's decision to distinguish between those petitions where the oath was administered when the notary did not have a conflict and those when it did have a conflict. *Reed,* 2020 ME 57, ¶¶ 20-22, ___ A.3d ___. In *Maine Taxpayer's Action Network,*

the Law Court upheld the Secretary's decision to invalidate the petitions on the grounds that the circulator was not a resident of Maine and that he falsely stated his identity. *Me. Tapayers Action Network*, 2002 ME 64, ¶ 6, 795 A.2d 75. In *McGee v. Secretary of State*, the Law Court found that the Secretary had no discretion to accept applications three days after the statutory deadline. 2006 ME 50 ¶16, 896 A.2d 933.[2] In *Palesky v. Secretary of State*, the Court found the Secretary could disqualify petitions when the oath was not taken from the circulator, when signatures were not on the approved petition form, and when the signatures had not been approved by the registrar. 1998 ME 103, 711 A.2d 129. The Law Court has not decided whether the Secretary has the discretion to qualify petitions or signatures after determining that any violations are *de minimus*. *Reed*, ¶ 13, n. 12, ___ A.3d ___.

I. PETITIONERS OBJECTIONS

The Petitioners make five categories of objections to the Secretary's Amended Determination.

A. Disqualification based on the circulators who were not registered to vote until after they collected their signatures.

The Secretary disqualified several signatures because the circulators were not registered voters at the time they collected the signatures. Amended Determination, pp. 1-2. In their brief, the Petitioners only raise the 988 signatures collected by Monica Paul and Michelle Riordan. Petitioner's Brief, pp. 6-7,13-16. Although the Amended Determination, p. 8, identifies 1175 signatures in this category, the court cannot rule on the remaining signatures by other circulators. The other parties have assumed they were abandoned have had no reason to address petitions submitted by any other circulator.

[2] In *McGee*, the court then found the statutory deadline inconsistent with the Maine Constitution and ultimately confirmed the Secretary's decision. ¶ 39.

them. The total number of signatures considered after clarification by the Secretary is 988.

In *Hart v. Secretary of State,* the Law Court addressed the constitutionality of the residence requirement that is confirmed in the same provision in the Maine Constitution that requires the circulators to be registered voters. 1998 ME 189, ¶ 13, 715 A.2d 165. The Court "acknowledged that the initiative petition process involves political discourse that is protected by the first amendment of the federal constitution." *Id.* ¶ 9. The Court found, however, that the Maine Constitution's requirements that the circulators be residents served a compelling state interest in the regulation of initiative process. *Id.* The court noted, but did not address, the voter registration requirement at issue here and observed that voter registration issue was on its way to the U.S. Supreme Court. *Id.* ¶ 8. The issue with respect to a circulator's voter registration arose again in *Maine Taxpayers Action Network,* but was not addressed by the majority. 2002 ME 64, ¶¶ 22-29, 795 A.2d 75.

The United States Supreme Court did address the voter registration requirement and ruled that Colorado's requirement that circulators to be registered to vote is unjustified and infringes on the first amendment rights of the circulators to conduct core political speech. *Buckley v. American Const. Law Found.,* 525 U.S. 182, 197 (1999). The Court did not find that the state interest of fraud detection or administrative efficiency justified the requirement. *Id.* at 192. The Court determined that requiring circulators to be registered would eliminate a large pool of registered voters. *Id.* at 194-95. The Court's other reason is that some voter eligible adults have a politically based objection to registering to vote. *Id.* at 195.

In *Initiative & Referendum Institute v. Secretary of State,* the Magistrate for the US District Court for the District of Maine applied *Buckley* to the issue of whether the requirement that circulators be registered voters was constitutional. 1999 U.S. Dist. Lexis

22071 (D. Me. April 23, 1999). The *IRI* court noted that the *Buckley* decision was largely based on the numbers of eligible voters in Colorado who were not registered, thus reducing the number of available circulators. *Id.* at **43-46. Evidence in *IRI*, on the other hand, suggested that the percentage of unregistered voters in Maine is low. *Id.* at *45. The court concluded that the State had a compelling interest in locating circulators when investigating the validity of petitions and that requiring voter registration advanced that goal. *Id.* at *46. The *IRI* court noted, however that the State's interest in requiring voter registration was modest, but that the plaintiffs in that case had offered nothing in response. *Id.* at *48. Justice Dana makes similar arguments in his concurrence in *Maine Taxpayers Action Network*, 2002 ME 64, ¶¶ 27-29, 795 A.2d 75.

Both *IRI* and Justice Dana's concurrence are distinguishable from the case at hand. Here, the State disqualified the petitions because the circulators collected signatures prior to registering to vote. The circulators were registered to vote at the time the petitions were submitted to the Secretary of State, satisfying the State's interest to the extent voter registration makes it easier to locate circulators in the event an investigation is necessary. The Secretary has not persuaded the court that the temporal voter registration requirements, which do not appear either in the Maine Constitution or in statute, "are justified by a compelling state interest and are narrowly tailored to serve that interest." *Wyman v. Secretary of State*, 625 A.2d 307, 311 (Me. 1993). Therefore, the court would reverse the Secretary's disqualification of the 988 signatures collected by circulators Riordan and Paul, and challenged by the Petitioner in his Brief, on the grounds those circulators were not registered to vote at the time they collected the signatures. 5 M.R.S.A. § 11007(C)(1).

The Secretary objects to this argument, stating that the constitutionality of these provisions was not properly raised. The Court finds it was adequately pled. *See* Petition

at ¶ 34. The Secretary notes correctly that the issue of constitutionality was not originally briefed. However, the court raised the issue with the parties at its August 21 conference and the parties had time to brief it. Therefore, the court has chosen to address it.

B. Disqualifications based on petitions filed with the Town of Turner

The Secretary originally disqualified petitions from the Town of Turner because they were not submitted before the deadline imposed by the Maine Constitution. On remand, the Secretary had four days to review a large volume of material. Secretary's Brief, p. 4. An investigator unsuccessfully attempted to call the Turner Clerk. Although the Secretary felt as though confirming the Clerk's affidavit by phone was an important part of the investigation, time constraints prevented it from happening. Choosing to rely on the date stamps on the petitions, the Secretary chose not to accept the Clerk's affidavit when making the Amended Determination.

Upon further review of the Secretary's Amended Determination, the court was concerned that potential mistakes of a municipal official, as opposed to a notary or circulator selected by the proponents, had disqualified the petitions. The Secretary had insufficient time to complete tasks it determined ware necessary to investigate these signatures. Therefore, the court determined it was necessary to remand the case a second time so that the Secretary could make additional findings towards a determination of whether the Turner petitions were submitted on time. 5 MRSA § 11007(4)(B).[3] The court

[3] The court would have preferred to wait until the briefing was completed and then remanded. Unfortunately, it was impossible. The parties treat the statutory August 24 deadline as a hard deadline. 21-A MRSA § 905(2). By late Wednesday, August 19, all the parties had submitted an initial brief. Although the court had not yet decided any of the issues raised, at that point, the court was concerned that the Turner signatures *might* decide the case. Given that the reply briefs were not due to the end of the day on Friday August 21 and a decision due on August 24, the court decided on the remand after a discussion with the parties on Friday morning and after the Secretary indicated a willingness to follow up with the Turner town clerk.

notes that the Secretary and the Petitioners agreed to the remand, but the Committee did object.

After the second remand, the Secretary has determined that the 809 signatures found on petitions certified by the Town of Turner were submitted on time. As such, the Secretary has Supplemented its Amended Determination, concluding that only 10,490 signatures are invalid, rather than the previous number of 11,299.

The Court finds, for the reasons stated in the Supplemental Amended Declaration, that the evidence supports the Secretary's decision.

C. **The Secretary's decision not to disqualify the petition from the Town of Freeport was not an abuse of discretion.**

The Secretary disqualified four petitions from the Town of Freeport on the grounds the town's registrar notarized the petitions the day after they were certified. Amended Determination p. 3. The Secretary determined it ran afoul of the of the requirement in 21-A MRSA § 902 that the circulator's oath be completed before the Town certifies the petitions. A properly administered circulator's oath has been described as a critical step to prevent fraud in the petition process. *Maine Taxpayers Action Network,* 2002 ME 64, ¶ 13, 795 A.2d 75.

The court defers to the Secretary's interpretation of the statute with respect to the timeliness requirement. The Secretary's disqualification of the petition was a reasonable choice and the court is not permitted by law to second guess that. The Freeport petitions are distinguishable from the other Towns at issue in that the late circulator's oath came on a different day. The Secretary's use of that distinction in disqualifying the Freeport petitions instead of the petitions where the town clerk completed the oath on the same day as accepting the petitions was within the Secretary's discretion and was not arbitrary or capricious.

The Petitioner argues that she was not actually done her certification on March 5 and should have dated the certification on March 5 instead of March 4. That would be a second date change since the petition was certified. The court notes that the burden of selecting a notary both to complete the oath who does not have a conflict and to get the oath properly completed before the submission of petitions rests on the proponent of the referendum. The Petitioners cannot blame the Town for accepting petitions that have not had the oath completed. The Secretary does not have to accept shifting date changes, particularly after submission the notary's an incorrect affidavit as part of this litigation.

The court's decision is also based on Secretary's obligation and right to manage the petition process. *Maine Taxpayer's Action Network*, 2002 ME 64, ¶ 12, n.8, 795 A.2d 75 (Secretary has "plenary power to investigate and determine the validity of petitions"). The Secretary had to review over 9000 petitions bearing over 70,000 signatures. As part of the management of the process, which is necessary to assure the correct number of qualified signatures are counted, the Secretary has to rely on contemporaneous dates and correctly dated petitions. The burden is on the proponents to manage their end of the process so that the initial submissions are correct. Although the Secretary does listen to efforts to correct errors on remand, it is in the Secretary's discretion to rely on the document in its original form instead of as purportedly corrected. In this case, the notary submitted an affidavit that was incorrect and the Petitioners have asked the Secretary to consider changing first the date of notarization from March 5th to March 4th and then the date of certification from March 4th to March 5th. It is well within the Secretary's discretion to rely on the original dates and the law does not allow the court to weigh competing evidence to overturn the Secretary's position.

D. **The Secretary's disqualification of 24 signatures where notary Kim Pettingill failed to date her notarization.**

The same principle applies here. Here, a notary left dates off of petitions totaling 24 signatures. The obligation is on the proponents to get it right the first time. On the original remand the Petitioners provided an affidavit where the notary averred she could reproduce the dates using her log. The Secretary has the discretion to rely on the petitions themselves rather than the subsequent explanation.

After the Amended Declaration was completed, the Petitioners provided a log that they argued supported the notary's position. The Petitioners point out that they had limited time to put together their evidence. Everyone, including the court, is operating under strict time limits. That is why the burden is on the proponents to get the petitions notarized correctly. It also provides less chance to open the process up to outside interpretation or ad hoc interpretation by the courts.

To rule otherwise could endlessly extend the process. That cuts both ways. For example, the Committee has objected to the Secretary's decision to accept the explanation of notaries who also work for the Republican Party. The Committee argued that the petitions should be excluded. The Committee would likely want further investigation into the statements in those affidavits. In managing the investigation, however, it is the Secretary who determines when the evidence is sufficient for the Secretary to choose between two competing versions. The court could not, and sees no reason to, disturb the Secretary's decision on this issue either.

E. The Secretary's invalidation of 12 signatures as materially altered was within its discretion.

The Secretary invalidated 12 signatures were the dates had been changed. The Secretary points out that he invalidates those signatures only if the obliterated date is undetectable or clearly invalid. The modifications were initialed by the voters to confirm that it is the voter who made the change. The Secretary's concern is fraud and the

Secretary is uniquely positioned to determine which alterations pose a risk of fraud and which do not. The invalidations were within the Secretary's discretion.

II. THE INTERVENORS' OBJECTIONS TO PETITIONS VALIDATED BY THE SECRETARY

The Intervenors object to several categories of signatures that the Secretary qualified.

A. The Secretary had the discretion to validate the signatures found on petitions that were certified the same day in which the circulator's oath was administered.

The Secretary validated the signatures on certain petitions that were certified by the registrars in the towns of Boothbay, Sidney, Dexter, and Warrant, even though the circulator's oath was or may have been administered prior to the submission of the petition. On remand, the Secretary determined that the circulator's oath on these petitions were administered on the same day that the petitions were submitted. Amended Determination at pg. 2-4.

Title 21-A section 902 governs the verification and certification of petitions. Generally, a circulator must "sign the petition and verify by oath or affirmation before a notary public" that the signatures on the petition are legitimate. Then, "after the petition is signed and verified in this manner, the petition must be submitted to the registrar for certification . . ." If a petition submitted to the registrar "[is] not signed and verified in accordance with [section 902], the registrar may not certify the petition[] and is required only to return the petitions." The Intervenor argues that section 902 requires that the circulator's oath be administered prior to the submission of the petition as a matter of law. However, if the language of a statue is ambiguous, the court must defer to the Secretary's interpretation if that interpretation is reasonable. *Knutson*, 2008 ME 124, ¶ 9, 954 A.2d 1054.

Here, the language of 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. In response to this, the Secretary has taken the position that a petition's signatures are valid so long as the circulator's oath is administered on the same day that the petition is submitted to the registrar. As such, there is no explicit language in section 902 that makes the Secretary's interpretation is unreasonable. The Secretary is also in the best position to determine whether the same day oath administration is sufficient to prevent fraud. The Secretary also has the discretion to determine the scope of its investigation. Therefore, the decision to validate the signatures certified by the towns of Boothbay, Sidney, Dexter, and Warren was well within the Secretary's broad discretion.

B. The Secretary had the discretion to validate the signatures found on the petitions notarized by Kim Pettengill.

The Secretary validated the signatures on petitions that Kim Pettengill notarized even though Pettengill had been reimbursed for certain tasks completed on behalf of the petition campaign. Although the Secretary found that Pettengill had in fact performed these tasks, those tasks were "de minimis" and did not disqualify Pettengill from administering the circulator's oath. Amended Determination at pg. 6. The Secretary's factual findings must be affirmed if "they are supported by substantial evidence in the record, even if the record contains inconsistent evidence or evidence contrary to the result reached by the agency." *Concerned Citizens to Save Roxbury v. Bd. Of Envtl. Prot.*, 2011 ME 39, ¶ 24, 15 A.3d 1263. Nevertheless, the Intervenor's argue that the Secretary's finding of de minimis impact are contrary to law and therefore does not fall within the Secretary's discretion to resolve factual disputes.

Here, there is ample evidence to support the de minimis determination made by the Secretary. The Secretary, after considering evidence submitted by Petitioners, agreed with the Petitioners that the expenses reimbursed to Pettengill were mere "errands of convenience" and therefore did not give rise to any concerns regarding bias or impropriety. This factual determination is well within the Secretary's discretion. The Secretary must be able to determine, as an evidentiary matter, whether or not certain actions are in fact de minimus if he is to carry out his duties effectively. To hold otherwise would strip the Secretary of his fact-finding power. This result is simply inconsistent with the broad discretion afforded to the Secretary. Therefore, the Secretary's decision to validate the signatures on petitions notarized by Pettengill was well within his discretion.

C. The Secretary had the discretion to validate signatures on petitions notarized by members of the Maine Republican Party State Committee.

The Secretary validated signatures found on petitions that were notarized by members of the Maine Republican Party State Committee. Affidavits submitted by the Petitioners showed that the Republican Party State Committee made no expenditures to notarizes who are registered with the State Committee and made no official action with regard to this particular citizen initiative. Similar to the conclusion reached above, such a factual and evidentiary determination is squarely within the Secretary's broad discretion. Therefore, the Secretary had the discretion to validate the signatures found on the petitions notarized by members of the Maine Republican Party State Committee. While the court recognizes that this issue is of concern, the court defers to the Secretary's conclusion, which is supported by substantial evidence in the record.

D. The Secretary had the discretion to validate signatures on petitions that were notarized and certified by the same town registrar.

The Intervenor argues that the Secretary should have invalidated the petitions that were both notarized and certified by the same town registrar. This argument does not appear to raise any ambiguity in the law. Therefore, given the Secretary's broad discretion in the citizen initiative process, the Secretary had the discretion to validate the petitions that were notarized and certified by the same town registrar and the court sees no need to second guess that decision. It makes sense that a circulator, looking for a notary unlikely to have a conflict of interest, would go to the local town office.

CONCLUSION

In order for the court to overturn the Secretary's decision, the court must require the Secretary to validate 966 signatures that had been disqualified (after the Secretary reversed it's decision on the Town of Turner petitions). After the Secretary revised the number of signatures invalidated in relation to Monica Paul, the total that are at issue in respect to the voter registration issue is 988. With the Court's decision with respect to those signatures, the Petitioners now have enough signatures. Therefore, the Secretary's decision that the proponents failed to provide the required number of signatures is REVERSED. 5 M.R.S.A. § 11007(C).

This Order is incorporated on the docket by reference pursuant to M.R.Civ.P. 79(a).

DATE: Aug 24, 2020

Thomas R. McKeon
Justice, Maine Superior Court