

STATE OF MAINE

KENNEBEC COUNTY, ss.

SUPERIOR COURT

CIVIL ACTION

DOCKET NO. AUGSC-CV-2020-00095

APPEAL NO. KEN-20-262

ALLIANCE FOR RETIRED
AMERICANS, ET ALS,

Plaintiffs

VS.

MATTHEW DUNLAP, ET ALS,

Defendants

**MOTION FOR PRELIMINARY
INJUNCTION - DAY 2**

SEPTEMBER 22, 2020

AUGUSTA, MAINE

VOLUME II OF II

BEFORE:

THE HONORABLE WILLIAM R. STOKES

APPEARANCES:

ON BEHALF OF THE PLAINTIFFS:

MATTHEW S. WARNER, ESQ.

SEVERIN M. BELIVEAU, ESQ.

ON BEHALF OF THE DEFENDANTS:

PHYLLIS GARDINER, ESQ.

ALSO PRESENT:

PATRICK STRAWBRIDGE, INTERVENOR

ZACHARY HEIDEN, ACLU MAINE

THOMAS KNOWLTON, ESQ.

ALEXIS BALTES, ESQ.

JOHN DEVANEY, ESQ.

TRANSCRIBED BY:

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1 (This matter came for hearing before The Honorable
2 William R. Stokes of the Kennebec County Superior Court,
3 Augusta, Maine, on September 22, 2020 at 11:09 a.m.)

4 THE COURT: We're on the record now in the matter of
5 Alliance for Retired Americans, et al., v. Matthew Dunlap,
6 docket number CV-20-95. And we are gathering today to
7 complete closing arguments on the Plaintiffs' motion for
8 preliminary injunction.

9 What I indicated, Ms. Gardiner, is what I do in terms of
10 the lineup would be John will go first, I would then have Zach
11 argue, and then turn it over to Tom -- I'm sorry, to you, and
12 Alexa (sic). And then I would give John and Zach a brief
13 reply time as well. I'm not going to cut anybody off,
14 obviously. It's just not in my nature to do things that way.
15 So I'm going to give everyone an opportunity to have their
16 full say. As I said, I'm still shooting to get something
17 written and published to you by the beginning of next week. I
18 think I know what my weekend is going to -- what my weekend is
19 going to look like and it's not going to be raking leaves.

20 So with that, I think we -- anything we need to address?
21 And I will put on the record that I did receive, this morning,
22 Mr. Knowlton's correspondence with the decision in the
23 Washington District Court case involving the Post Office. I
24 also received from you, Mr. Devaney, a copy of the decision in
25 Wisconsin. So I haven't read either one of them, but I will

1 read them by the end of today.

2 And so with that, anything we need to address, Mr.
3 Devaney, before we begin with arguments?

4 MR. DEVANEY: Not from my perspective, Your Honor.

5 THE COURT: Ms. Gardiner, anything from your perspective?

6 MS. GARDINER: (No audible response.)

7 THE COURT: Okay. And Zach and Alexa, are you ready to
8 go? All right. Well, let's do that. And Mr. Devaney, I'd be
9 happy to hear from you.

10 And by the way, just to let you know my style and I think
11 we mentioned this the other day when we chatted about
12 argument, my tendency is to ask questions, and I don't mean to
13 interrupt your flow of thought or to interrupt your
14 presentation. But I find that if I can ask the question when
15 I'm thinking about it, I can -- I won't forget it, number one,
16 but also it's helpful for me to actually engage in a
17 conversation with you to see if I can understand your
18 position, and you can see what's -- what may be troubling me.
19 So if that's all right with everyone, that's generally my
20 style.

21 MR. DEVANEY: Sounds great, Your Honor.

22 THE COURT: All right. So with that, Mr. Devaney, I'm
23 happy to hear from you.

24 PLAINTIFFS' CLOSING STATEMENT

25 MR. DEVANEY: Thank you, Your Honor. Your Honor, in



1 light of your comments, your helpful comments, toward the end
2 of the day yesterday, I'm going to focus my closing remarks
3 less on the facts of the case, which I think Your Honor has a
4 pretty good grasp of, hopefully, based on the presentations
5 the parties have put forth, and focus more on the Anderson
6 verdict framework. And then also your question yesterday
7 about what authority you have to entertain a remedy for the
8 constitutional violations that we are alleging.

9 Obviously, Your Honor, if you have questions about the
10 facts, I'm happy to entertain them, but I just wanted you to
11 know that, given your comments, it seemed appropriate to focus
12 on those two points that I just articulated.

13 And with respect to the Anderson verdict framework, Your
14 Honor, I think it's worth -- it's in our papers, it's in the
15 defendants' papers, but I do think it's worth just repeating
16 what that standard is so we have it in mind as we all conduct
17 these closing arguments. And I think there is general
18 agreement among the parties that the Anderson verdict
19 framework is the governing standard. And that standard
20 requires weighing the character and magnitude of the injury to
21 the rights the plaintiff seeks vindicate against the precise
22 interest put forward by the state. It's justifications for
23 the burdens opposed by the voting law. Considering the extent
24 to which the state interests make it necessary to burden the
25 plaintiffs' rights.



1 And of course, this balancing test uses a sliding scale
2 where the rigorousness of the scrutiny depends upon the extent
3 to which the challenge law burdens voting rights. And laws
4 that impose severe burdens and the right to vote must be
5 narrowly drawn to advance the state interest that is of
6 compelling importance. But even less severe burdens must be
7 justified by relevant and legitimate state interests
8 sufficiently waiting to justify the burdens on voting.

9 And Your Honor, our position, of course, and we think the
10 evidence supports this, is that here the intrusions on voting
11 rights, particularly with respect to the election day receipt
12 deadline and the cure issues we discussed yesterday are severe
13 and substantial. And that the purported state interests do
14 not justify those burdens.

15 THE COURT: So let me ask you. It wasn't going to take
16 long before I jumped in, as you probably suspected. When
17 you -- you brought up the business about the right to cure;
18 notice and the right to cure. And let me throw this out to
19 you right from the get-go. The secretary of the State has
20 proposed instructions and guidance to municipal officials,
21 election officials that essentially creates a notice and
22 opportunity to cure process. They use the challenge process
23 as part of that, but they've come up with a cure, a notice and
24 a cure procedure. Doesn't that sort of solve your problem?
25 Why do I need to -- why do I need to enjoin anybody to do what

1 the secretary of state has created on his own?

2 MR. DEVANEY: Your Honor, a couple of responses to that.
3 First of all, when we -- when we were going to get to the
4 remedy portion of my discussion, one of the requests I was
5 going to make of the Court -- and I will answer your question
6 in a moment -- is that that guidance seemingly is just
7 guidance. It's non-binding. Is it a positive step forward?
8 Absolutely, it's a positive step forward. And one of the
9 requests that I will ask of Your Honor is that, at a minimum,
10 that guidance be ordered by the Court so that it is binding on
11 election officials.

12 And would that be a positive step forward? Yes, it
13 would. Does it solve the burden issues that we have raised in
14 our case? No, it does not. It goes part way, but there's
15 a -- there are a couple of critical missing pieces to what
16 that guidance purports to do, Your Honor.

17 And the most critical one, in my view, is the lack of a
18 period to cure after election day. And we know from the data
19 that is before the Court, we know from the information about
20 the Postal Service and the fact that voters can request
21 ballots up to five days before election day, that there are
22 going to be a large number of ballots that come in the day
23 before election day, on election day, and also after election
24 day. And those ballots, Your Honor, should have an
25 opportunity to be cured.



1 And if you look at other states, and there are many other
2 states around the country, that have cure periods that are
3 close to election day cures. You know, as Dr. -- or Prof.
4 Herron testified yesterday, the range is somewhere between
5 three days and fourteen days, if you look around at other
6 states for close-to-election-day cure periods. And so we
7 think it's essential that, in addition to what the secretary
8 has put forward in guidance, that there be an opportunity for
9 curing after election day.

10 And Your Honor, the number of days is important, but
11 what's most important is the concept and the opportunity to
12 have some cure period, whether it be three days, whether it be
13 one week. You know, we think one week is better than three.
14 It's going to enfranchise more people, but even three days is
15 going to cause probably hundreds of voters to not be
16 disenfranchised and have an opportunity to cure their ballots.

17 So that is the critical missing piece of secretary's
18 guidance that we would really emphasize and ask Your Honor to
19 consider as supplement to what the secretary has put forth in
20 the guidance.

21 There is another piece too, which we talked about
22 yesterday in Prof. Herron's testimony. And that's the
23 opportunity to cure through an affidavit, through electronic
24 means. And the dilemma that voters are going to face who need
25 to cure is, particularly as we get closer to election day,

1 let's say a voter gets notice, you know, three or four days
2 before election day, that there's a problem with her ballot
3 that has to be cured. That can't be done through the mail at
4 that point. We know that any opportunity to -- you know, to
5 submit a new ballot isn't going to be feasible that close to
6 the election.

7 And for many voters in Maine, because of the pandemic,
8 they -- they're not able to come into a polling place and put
9 themselves at risk, and to cure through that method. And so a
10 solution to this is to have an affidavit that can be submitted
11 electronically in which the voter cures through the affidavit.
12 This is a procedure that's been followed in other states and
13 it's one that -- and again, the circumstances of the
14 pandemic -- and Your Honor asked yesterday, how -- how
15 relevant is the pandemic to the burdens we're alleging, and
16 it's highly relevant. And that burden supports this affidavit
17 solution to curing as well.

18 And then the final piece of my response to Your Honor's
19 question goes to the -- the signature matching part of curing.
20 And Your Honor, the guidance that the secretary issued doesn't
21 include any standards for signature matching. And in our
22 expert testimony by Dr. Mohammad, we set forth and established
23 the fact signature matching is a science, you know, it really
24 is. And to have election officials who aren't trained in
25 matching signatures, without standards, is a serious due



1 process --

2 THE COURT: Well, but Mr. Devaney, the guidelines
3 basically says you call them up on the phone, you ask them if
4 that's their -- did they actually sign it, they say yes. They
5 verify that they signed it. And as I understand it, that's
6 the end of that. It's counted. Tell me, how easier can it
7 get?

8 MR. DEVANEY: If that becomes binding -- well, I guess,
9 Your Honor, if there's -- there are a couple -- if that
10 becomes binding, first of all, absolutely positive step
11 forward and significantly advances the ball on that issue.
12 But it's also possible that it will -- that some voters won't
13 be reached and that, you know, you're not -- they won't have
14 the opportunity to do that. So -- and is it -- how hard is it
15 to --

16 THE COURT: But what matters is that if they can't reach
17 them, then they treat it as a challenged ballot, they count
18 the ballot and then it never really gets the -- you know,
19 addressed again until there's a recount, if there's a recount,
20 and the margin is close enough that it's actually going to
21 make a difference.

22 MR. DEVANEY: But I would argue that a challenged
23 ballot -- ballot has less potency and it's dilutes the right
24 to vote because it's only counted, it has to be --

25 THE COURT: Well, listen, I -- as I understand the



1 challenge, it's counted. My understanding is it actually is
2 counted. And then what happens is if there's a recount and
3 it's within the -- you know, and you're close and the -- and
4 the number of challenged ballots would make a difference to
5 the outcome, at that point, you then look at the challenge and
6 see whether or not there's a ballot basis for the challenge.

7 But I understood it -- and maybe I -- I may stand
8 corrected, I understood that they actually counted the ballot.

9 MR. DEVANEY: Your Honor, you may be right. I have to
10 admit, I don't have 100 percent grasp of the new guidance that
11 was just issued, but that may be correct.

12 But you know, going back to the -- the issue of this
13 post-election cure period that I articulated in the affidavit,
14 there just isn't a -- a -- first of all, it's
15 disenfranchising. And so under the Anderson verdict analysis,
16 there has to be a compelling state interest to support not
17 having that post-election cure period.

18 THE COURT: Well -- well, let me ask you this. Is it --
19 I told you what my -- my style was, was to ask questions, so.

20 MR. DEVANEY: Sure.

21 THE COURT: But let me ask you this. Because last night,
22 I was reading the decision by the -- the justice from the
23 Michigan Court of Claims. I don't know the name of the -- I
24 can't remember the name of the case. And of course, in that
25 case, Michigan has a constitutional amendment that provides

1 for the right to vote by absentee. It specifically says that
2 the voter has the right to vote in person or by mail --t
3 specifically references mail -- and absentee voting in the
4 Constitution of Michigan. We don't have that. There's
5 nothing like that in the Federal Constitution.

6 And so one question that sort of jumps out at you is,
7 well, I understand you have a fundamental right to vote, but
8 is there such a thing as a fundamental right to vote absentee?

9 MR. DEVANEY: Yeah, Your Honor, that's -- that's an issue
10 that has been litigated extensively. And -- and the courts
11 are very consistent in saying that once a state offers
12 absentee voting, it must do so in a way that is
13 constitutional. And if it would be helpful, Your Honor, we
14 can provide the Court with case law establishing that point.
15 But once that is offered, it becomes a constitutional
16 obligation of the state to comply with Anderson verdict and to
17 ensure that the right to vote absentee is not unduly burdened.

18 THE COURT: Thank you, Mr. Devaney.

19 MR. DEVANEY: And then going back to what is the state
20 interest in not having a post-election cure period? And Your
21 Honor, I would submit there just isn't one, much less a
22 compelling one. You know, let's do the -- just the
23 conservative approach to this, which would be, you would give
24 us three days for voters to cure. The election certification
25 used to take place by, if I recall correctly, November 25th.



1 The state is still counting ballots after November 3rd. If
2 they're -- even to November 6th, if voters have an opportunity
3 to cure, it's not going to prejudice the state in canvassing
4 and finalizing election results.

5 Particularly, since we know the number of ballots, while
6 it will be war and it will be significant in the -- this
7 general election, a large turnout, it's not going to be an
8 overwhelming number, that -- that state officials would be
9 able to -- to handle. The number that needs to be cured would
10 not be such a number that it would be -- that burdens for the
11 state to handle. So even a conservative approach of three
12 days --

13 THE COURT: But what do you think -- what do you say, Mr.
14 Devaney, to the -- to the argument, you know, your argument
15 is, you know, one vote that's rejected and not counted is
16 disenfranchised -- is too much. But what about a vote that's not
17 supposed to be counted? And in your -- and I note that in
18 the -- what the secretary of state has done with its -- the
19 cure sort of proposal is it treats mismatched signatures
20 slightly differently than it treats no signature or some
21 problem with, you know, some third party who may have provided
22 assistance in completing the ballot. Mismatched signatures --
23 and I -- and I'm -- I'm inferring that the reason the
24 secretary of state did that was because when you're talking
25 about mismatched signatures -- I -- I'm familiar with, you

1 know, forensic document examination, and I understand it is
2 a -- it's a science. And -- and it takes a -- a lot of
3 training and a lot of experience to be able to do it well.

4 So I understand where the secretary of state would say,
5 look, we've made some subjective judgment that this signature
6 doesn't appear to have been made by the same person. That's a
7 totally subjective judgment by an election clerk who's just
8 looking, you know, at -- at signatures that appear to be
9 different. And so, you know, the easy way to cure that is
10 someone pick up the phone, talk to the voter, and say, by the
11 way, is that your signature? Yes, it is. Well, thank you
12 very much, and end of -- end of discussion.

13 And then because it has a signature and because it's on
14 time, you know, it should be presumed to be a valid vote. I
15 mean, I don't know whether the statute actually says that, but
16 I mean, it's got a signature, it's timely, and so the
17 secretary's proposal seems to, you know, say, well, we're
18 going to presume that's a valid vote, you know, we'll use the
19 challenge procedure if we can't get ahold of the voter.

20 However, when you have a ballot absentee that's not
21 signed, or you have a situation where some third party, not
22 the voter, has done something to the ballot, you know,
23 assisted the voter in doing something on the ballot.

24 And I understand, we're going to probably into
25 discussions about voter fraud as we continue on this argument,



1 but doesn't the state have a pretty powerful interest in
2 saying, wait a minute, we've got a blind ballot. We got a
3 ballot here that's not signed by a voter, or we've got a
4 ballot that has been -- something has been done to it, or
5 something -- you know, by a person other than the voter. We
6 need to -- you know, we need a higher standard here to be --
7 to be sure that this ballot is a valid ballot and should be
8 counted.

9 Isn't it rational to make that distinction? Because if a
10 vote is either -- if a ballot is not signed, a particular
11 absentee ballot is not signed, or there's some indication that
12 some third party has done something to the ballot -- I'm not
13 saying, you know, in any improper way, but the help has not
14 been documented as required by the statute, isn't it important
15 for the state -- if we can't get ahold of the voter to cure,
16 isn't it reasonable for the state to say, you know, under
17 these circumstances, we can reject this because we shouldn't
18 be counting votes that aren't validly cast. Just as we
19 shouldn't be discounting votes that had been validly cast.

20 MR. DEVANEY: Your Honor, I'm certainly not making the
21 argument that the state should be obligated to, you know,
22 count -- count votes that either were not validly cast in the
23 first place, like for example, we're missing a signature, and
24 then later on the opportunity to affix a signature is not
25 taken advantage of. And so I'm not minimizing that state

1 interest and confirming the validity of ballots.

2 And in a situation, which is the most often situation,
3 where somebody just forgets to sign the ballot, and we're
4 just -- I can even have it in front of a clerk, in that
5 situation, all we're asking, does the state have a procedure
6 that allows somebody to fix that mistake by signing the
7 ballot. Sometimes it could be in person, sometimes it could
8 be -- this ratifying could be done electronically. And I
9 would submit that that act of signing the ballot and curing it
10 should remove any concern that the ballot is someone invalid.
11 And all we're asking is for that opportunity to demonstrate
12 the validity by allowing the voter to sign it, and to do so
13 post-election for all the reasons I articulated.

14 So I -- Your Honor, I recognize your concerns you
15 identified and they are legitimate, but I think we can
16 accommodate that interest and the interest in enfranchising
17 voters by just giving them this -- this few day opportunity
18 post-election to cure.

19 THE COURT: Thank you, Mr. Devaney. Sorry I got you -- I
20 may have gotten you off track. I know you were also focusing
21 on the -- well, and this -- and this is sort of related. I
22 mean, your whole argument about post-cure -- post-election day
23 cure really goes hand-in-hand with your argument about the
24 deadline in the first place, a receipt deadline in the first
25 place.

1 MR. DEVANEY: It does, Your Honor. And I was going to --
2 before I got to that, I wanted to address, if Your Honor is
3 interested, just a couple of more points about the Anderson
4 verdict test --

5 THE COURT: Sure.

6 MR. DEVANEY: -- framework that came up yesterday.

7 THE COURT: Yeah, certainly.

8 MR. DEVANEY: And -- and I thought you and Mr. Herron had
9 a terrific exchange. And you know, you asked him whether --
10 and I'm paraphrasing for sure, whether a law is constitutional
11 so long as it doesn't disenfranchise most people. And I'm
12 definitely paraphrasing here.

13 THE COURT: Uh-huh.

14 MR. DEVANEY: And you know, you talked about, you know,
15 this is --

16 THE COURT: Yeah, I don't think I said it quite that
17 much.

18 MR. DEVANEY: I guess I'll put it his way, is -- is the
19 state required to find, you know, the perfect fail-proof
20 electoral system --

21 THE COURT: Right.

22 MR. DEVANEY: -- is maybe how you put it.

23 THE COURT: Yeah.

24 MR. DEVANEY: And -- and Dr. Herron gave an answer that,
25 as it turns out, he's not a lawyer, actually tracks the law.



1 And what he said, which I -- I found compelling, I'm biased,
2 he's my witness, but he said that in evaluating voting laws,
3 it's important to analyze how the law burdens the most
4 vulnerable to our society; the disabled, the elderly, those
5 who are particularly vulnerable to COVID, and the poor. And
6 if a majority of people aren't significantly burdened by a
7 law, the people in those categories are, the law makes it
8 clear that the law should fail unless it's supported by some
9 compelling or other state interests that justifies the
10 burdens.

11 And this issue, Your Honor, has been litigated
12 extensively within the Anderson verdict framework, and the
13 case law is clear that the balancing test of the Anderson
14 verdict requires the Court to look at voters who are burdened
15 by the laws at issue, not the voters who could successfully
16 overcome those burdens. For example, in the Crawford case
17 that I believe Mr. Strawbridge cited yesterday, the court
18 stated there, and this is U.S. supreme court, "The burdens
19 that are relevant are those who pose in persons who are
20 eligible to vote that did not possess" -- in that case -- "a
21 photo ID. And that most voters -- and the fact that most
22 voters already possess the ID would not save the statute.

23 Whereas the Second -- the Seventh Circuit held in the
24 Frank v. Walker case, they said the right to vote is personal.
25 It is not defeated by the fact that 99 percent of other people



1 could secure the necessary credentials easily. And Your
2 Honor, this is, again, something that if you're interested, we
3 can provide some -- some briefing, some short briefing, after
4 today, but the point is that courts throughout the country
5 recognize that disenfranchisement, even for a comparably small
6 number of people, can oppose severe burdens for the Anderson
7 verdict analysis.

8 THE COURT: Let me -- let me try to engage you in some
9 conversations, Mr. Devaney, on that point because I'm -- I've
10 been thinking about this for the last couple of weeks as I've
11 read the submissions by the parties in amicus. Because I'm
12 trying to wrap my head around the idea of burden. And let's
13 just take your -- your scenario where, you know, the vast
14 majority of people aren't going to have a problem with certain
15 restrictions in the law. But there may be some who, for
16 whatever reason, health, age, you know, social isolation,
17 whatever, it's more burdensome to them just because of their
18 particular situation. No one singled them out to discriminate
19 them, but because of the confluence of events, things are more
20 burdensome today for all of us, frankly.

21 So when I looked at burden, what I'm looking at -- okay,
22 I'm -- I have the statute, I have this regulation or I have
23 this proposal, it does create a -- it's a -- it's a minor
24 inconvenience to most people, but to some people, it is more
25 burdensome. When I evaluate what the burden is or I look at

1 the -- or I look at it from the stand -- the fact that it's a
2 burden to so few people, is that relevant? See what I'm
3 trying to say? I'm trying to figure out when I assess burden,
4 because as I said to Dr. Herron yesterday, and I was trying to
5 articulate this, that you can always conjure up, you can
6 always imagine -- and frankly, you don't have to -- you don't
7 have to work very hard at it. I know people that you're
8 talking about.

9 MR. DEVANEY: Yeah.

10 THE COURT: You know, so I understand what you're saying.
11 People -- I know someone who, if it were not for my wife or
12 me, would not have left their apartment and has not left their
13 apartment since March.

14 MR. DEVANEY: Yeah.

15 THE COURT: So I know what you're talking about, they
16 don't want to go out, they're afraid to go out, and we may
17 sort of pooh-pooh that and say, well, you're overreacting, but
18 the reality is, they feel it. And so when I look at that --
19 so I'm not demeaning that at all, in any way at all, Mr.
20 Devaney, because I realize that that's -- that actually is
21 true, that there are people who -- who are in that
22 predicament.

23 But when I look at burden, do I look at as well, is it an
24 insurmountable burden for that particular person, it's severe
25 for that person? Is that how I judge the statute? I mean,

1 because if that's true, then every statute I've got to look
2 at, no matter what it is, if it involves some sort of
3 significant interest, I don't think the legislature is ever
4 going to devise a statute that would -- that would meet
5 constitutional muster that they had to draft it in such a way
6 that didn't burden anybody.

7 And so what I'm trying to do when I -- when I look at the
8 burden, I'm trying to figure out -- and you said it in your
9 briefs, and so that -- you know, these regulations probably
10 would be considered modest at worst, under normal times. Now
11 we've got the COVID and now we have, you know, a situation
12 with the Postal Service where it is -- at the very least, I
13 guess Mr. Stroman said, at the very least, there's a problem
14 with communication. But let's assume we've got those -- and
15 I'm struggling with is, I can look at them and say, well, you
16 know -- you know, most of these regulations seem pretty
17 benign. I think that was your word or maybe Dr. Herron's
18 word. But you know, to my friend, it creates a scary burden
19 for her.

20 And I'm trying to assess, do I put a statute under the
21 microscope of her personal situation, or must I look at it
22 from the standpoint of how it affects, you know -- how it's
23 applied across the board to everybody. And that's where I'm
24 struggling because I get your point. I actually have
25 somebody, you know, who lives in that situation. I personally

1 know this person. And when she says I don't want to go out
2 and hasn't been out, except you know, to be taken to the
3 doctor's appointment, you know, she's -- she's right. That's
4 what -- that's how she feels. She's the person you're talking
5 about.

6 And so what I'm trying to do is understand her situation,
7 which I accept, I agree with, and I sympathize with, but at
8 the same time say, well, you know, can that be the test? Can
9 that be the test for burden?

10 MR. DEVANEY: Your Honor, you know, it's -- not to get
11 too academic, but it's a fascinating question and it really
12 kind of cuts to the core of, you know, what is -- what is the
13 purpose of our constitution in a way? And what are -- what is
14 the purpose of the protections afforded by the constitution?
15 And you know, I would submit that the -- a fundamental purpose
16 of the constitution, of course, is to protect the rights of
17 the minority, the rights of those who are opposed or have
18 unique circumstances that make it harder for them to
19 participate in our democratic process, and that it's
20 fundamental to the constitution and to the right to vote to
21 protect the rights of those who need the protection most. And
22 I think that's the starting premise in response to your
23 question.

24 And then -- then you drill down from there. Does that
25 mean that you have to protect that single voter who might be

1 burdened by a voting law? And you know, the case law is -- is
2 pretty disciplined on that point that, indeed, you really do
3 have to get down to a granular level and focus on the
4 individual voters who are affected by a voting law. And it's
5 particularly true in the context of voting laws because of the
6 fundamental nature of the right to vote.

7 And there is a decision, Your Honor, that came out this
8 past summer, out of the Second Circuit, called the Luft
9 decision that was authored by Judge Easterbrook, who is
10 certainly one of the more conservative jurists in the country.
11 And I just jotted down the quote from Judge Easterbrook in
12 that decision on this exact issue. And he said, "Voting
13 rights are personal -- are personal, requiring, quote, that
14 each eligible person must have a path to cast a vote." And
15 that's from one of the more conservative jurists in the
16 country.

17 And yesterday, the Wisconsin decision that we provided to
18 Your Honor, Judge Conley, a federal district court judge in
19 Wisconsin, you know, cited the Luft decision for exactly that
20 point on exactly the issue you and I are discussing right now.
21 And so you do have to get into the individual voter's
22 opportunity and the burdens on individual voters.

23 I will pull back, though, Your Honor, and talk about the
24 two issues I really want to emphasize in my closing here
25 because the burdens are particularly severe with respect --



1 and the disenfranchising effects are particularly severe for
2 both of them, and that's the receipt deadline and the cure
3 period. And on those issues, Your Honor, the effect of them
4 is broad enough that it's a systemic problem.

5 And so I think we're in territory with those two issues
6 where we're not talking about, you know, a hand full of people
7 who are burdened and may not be able to vote because of those
8 provisions. We're talking about significant numbers, very
9 significant numbers of voters who are at high risk of being
10 disenfranchised by those provisions.

11 And so I don't -- I don't -- with the debate we're
12 having, you don't have to get down to that granular level.
13 It's more systemic with those two particular issues.

14 THE COURT: Well --

15 MR. DEVANEY: I will --

16 THE COURT: -- go ahead.

17 MR. DEVANEY: I will -- I will concede on postage, for
18 example. You know, I'm of a generation, Your Honor, where the
19 idea of not having stamps in my wallet or my house is sort of
20 unfathomable. And I -- I admit that, you know, postage, how
21 hard is it to get postage? For some people, it's really hard
22 and that's the truth. I've learned that as I've litigated
23 these cases. And I've overcome my skepticism about how hard
24 it is to get a stamp.

25 But I will concede that that's very different from



1 putting your ballot in the mail a week before the election and
2 trusting that the Postal Service is going to get it there for
3 you, and it's out of your hands, it's out of your control, and
4 they don't come through, and your vote is not counted.

5 THE COURT: Well -- yeah.

6 MR. DEVANEY: Those are different types of fishes, Your
7 Honor.

8 THE COURT: I agree. But let me ask you, I got two
9 issues that I saw when I get into the receipt deadline issue,
10 because that I think is the centerpiece of your -- your
11 complaint for the various reasons you discussed, because of
12 the risk that people -- people's ballots may be received late.
13 I have two questions for you. The first one is, doesn't a
14 voter have some responsibility? If it's so personal, and I
15 don't disagree with that, the right to vote is so personal,
16 don't -- doesn't the vote have some personal responsibility to
17 make sure that their vote is cast in a proper manner and in a
18 proper time? That's the first question I have.

19 The second one, which I sort of forecast to you yesterday
20 was, I'm not an Article 3 judge. I'm not -- I'm not a
21 constitutional court. By what authority do I rewrite what the
22 legislature has already written? Because basically, the law
23 is clear, there's no ambiguity. I don't think anyone is
24 questioning that I have a right to interpret what 8 p.m. on
25 election day means. I mean, we all know what it means. And

1 we all know what received means, and the legislature chose
2 that word, I assume, deliberately. Didn't say postmark and
3 received, you know, three days later, five days later. Where
4 do I get the authority to act as -- as, you know, the
5 legislature and the executive branch? And not only, you know,
6 to write legislation, but apparently, you know, approve it and
7 enact it. Where do I get that authority?

8 So those are the two questions I have is, what about the
9 responsibility part of the voter who it's -- you know, if
10 people are not aware of the COVID-19, they -- you know, they
11 have no communication with the outside world. They may not be
12 totally aware of the Postal Service, but it's hard for me to
13 believe, you know, that they haven't heard something about it.
14 Isn't there some responsibility on the part of the voter to
15 say, look, I've got all these challenges. In order for me to
16 vote, make my vote count, I've got to do a little bit more
17 than I typically would do and -- but I, you know -- and that
18 falls on me. Why does it fall on the state? Or why does it
19 fall on the Postal Service?

20 I mean, I understand the dilemma they're facing, but you
21 know, the counter to that is, well, it's your vote, you've got
22 to take some steps to make it -- you know, make sure that
23 you -- you do it right and you cast it in the proper way. You
24 know, you can't show up at 8:10 on election night and say I
25 want to vote. You know, it's 8 p.m., it's 8 p.m.



1 MR. DEVANEY: Your Honor, with respect to the first
2 question, is there responsibility on the part of the voter?
3 And I think that the answer to that question is, there is
4 responsibility on the part of the voter to comply with the
5 law. And -- and that really -- and the voter has a right to
6 rely on the law. I don't think any of us dispute that.

7 THE COURT: But the law says received.

8 MR. DEVANEY: I'm sorry?

9 MR. DEVANEY: The law says received.

10 MR. DEVANEY: Correct. But Your Honor, the law also
11 says, as we discussed yesterday, that voters have until five
12 days before election day to request an absentee ballot. And
13 if -- particularly, since this election is going to have so
14 many first-time voters, we know that the proclivities of human
15 beings are sometimes wait until the last moment that they have
16 to wait, and that the law allows them to wait. And so we're
17 going to see, no doubt, that there will be thousands of people
18 who will be requesting their ballots the last few weeks before
19 the election, which they are lawfully entitled to do. And I
20 would argue that that's not irresponsible behavior.

21 THE COURT: Well, I agree with your -- I agree with you,
22 it's not because that's what I do. So my definition, it can't
23 be irresponsible.

24 MR. DEVANEY: So do I, Your Honor. And so -- and so they
25 do that. And I argue that that's responsible. It's



1 compliance with the law, but what's unique about this --
2 election day received deadline is that once they comply with
3 the law, all of a sudden they're faced with circumstances that
4 are out of their control. Things like they request a ballot.
5 There's no provision in Maine law that requires clerks to
6 turnaround that request within a certain number of days, as
7 far as I know.

8 And you heard from Dr. Herron, sometimes it takes as much
9 as ten days, and that's an outlier. It's more like three days
10 is the average, but it can take five, six, seven, eight, nine
11 days for the clerk to turnaround that ballot. That's outside
12 the voter's control.

13 Now, once the voter gets it, I mean, it may take a week
14 as we heard from Mr. Stroman and others in the mail, they take
15 a day or two to fill it out, which is very reasonable, right?
16 I think that's responsible. They drop it back in the mail and
17 it takes another week by the Postal Service to get there, and
18 it might not even get there in that week. And so all of a
19 sudden, you're in a situation where the voter is acting
20 according to law, but then is faced with circumstances beyond
21 his or her control, circumstances relating to the pandemic,
22 relating to the Postal Service issues that you heard about.
23 And that voter shouldn't be disenfranchised for events that
24 are outside his or her control.

25 THE COURT: Well, let me turn it around on you, Mr.



1 Devaney. Not those events within their control, I mean, if
2 you wait until the five days, and so, you know, the Thursday
3 before November 3rd, I guess, would be the five days, and you
4 know it's Thursday, you know the election is coming up on
5 Tuesday, I suppose you haven't studied the election code like
6 the bunch of us have in preparation for this case, but you
7 know, you're getting to the point where you -- you are now
8 relying upon something other than your showing up on election
9 day. That's the sure way that you can make sure that you
10 have -- your ballot is going to be counted because you -- you
11 go there, you get your ballot, you go into the booth, you mark
12 your ballot, you come out, and you personally put it in
13 whatever hopper, you know, the machine or however it's
14 tabulated, but not what you're doing is you are -- you're
15 waiting, which you have the right to do. You're getting a
16 ballot, you're taking it home with you.

17 And you, in many ways, are now sort of tempting fate when
18 you either put it in the mail so close to the election and on
19 a weekend, no less. As Mr. Stroman said, you know, if you
20 mail it on a Saturday, it's not going to even be touched until
21 Monday, and so it's not going to get there. You know, it's
22 very unlikely it's going to get there on Tuesday. It probably
23 won't get there until Wednesday or Thursday.

24 So I guess that's my point is that, you know, they do
25 have some control over this. They can drop it off, you know,



1 at a lockbox. They can turn it -- you know, go down there,
2 hand it to the clerk. But you know, just because -- that may
3 have happened -- forget U.S. Postal Service in the year 2020,
4 that type of risk would -- would have existed if you were able
5 to get a ballot five days before the election and you mailed
6 it, you're still sort of tempting fate.

7 I mean, you know, before COVID happened and before the
8 year 2020 happened, it was not uncommon for any of us to say,
9 so do you trust the mail? Are you going to -- you know, do
10 you trust that it's going to get there? That -- you know,
11 that the -- you know, that was always a risk, that you know,
12 it might two days, it might take five days. I mean, their
13 range is two to five days. Well, you know, two to five days
14 is a good gap in time.

15 So we always had that issue, you know, that was -- that's
16 not new this year. We always had that risk. And doesn't a
17 voter have some, again, responsibility to say, well, I can't
18 just sort of go blindly and blithely through this and expect
19 everyone to tell me, you know, what to do and hold my hand.
20 Once I've gotten to the point where I have the ballot in my
21 hand and I'm not physically there to vote, you know, you
22 are -- you are putting into play things that you don't have
23 control over because you have allowed yourself not to have
24 control over them at that point. So --

25 MR. DEVANEY: Your Honor, I have multiple responses to that



1 question. And you know, I'll begin with circumstances a
2 little different. You're articulate. I'll come back to your
3 hypothetical in a moment. But here in the pandemic, let's say
4 you've got a voter who decides not five days before the
5 election but two weeks before the election that she's going to
6 request an absentee ballot, and she makes her mail-in request.
7 I would argue that certainly two weeks is very responsible,
8 reasonable behavior. But we know from the testimony we've
9 heard, there's a very high risk that ballot's ever going to be
10 returned in time, unless that voter -- any maybe that voter is
11 someone who's immunocompromised or has reasons for not going
12 to a poll in person. If she's going to rely on the mail, her
13 ballot's probably not going to get there.

14 Now, so I begin with that. And then let's move up to
15 your -- where somebody waits till the fifth or sixth day
16 before Election Day and requests a ballot, which, again, is
17 permitted by law, and voters should be allowed to rely on the
18 law and not expect that their vote is going to be
19 disenfranchised.

20 THE COURT: Yes, but the law doesn't say you get to -- it
21 says absentee ballot. It doesn't say by the way, if you get
22 this by the fifth day, we guarantee delivery.

23 MR. DEVANEY: But wouldn't you think that the law should
24 be -- that the State should make it clear that in this
25 circumstance that there is -- if you wait till the fifth day,

1 that you're going to be disenfranchised, without that notice
2 to --

3 THE COURT: Well, you're saying that the law has to say
4 oh, by the way, if you get this one on the fifth day, we're
5 encouraging you not to mail it.

6 MR. DEVANEY: And it doesn't say that.

7 THE COURT: Well, I mean, yes. I mean, the law doesn't
8 say a lot of things about what people ought to be doing with
9 their time, but, I mean --

10 MR. DEVANEY: Your Honor.

11 THE COURT: Does that make it unconstitutional because
12 the statute doesn't say by the way, you get a ballot this
13 close to Election Day, you better not mail it. You're taking
14 an unnecessary risk.

15 MR. DEVANEY: Well, Your Honor, I take it in the context
16 of the pandemic, unusual circumstances that there's a
17 heightened burden on the State to ensure that voters are not
18 disenfranchised. So I don't think it's unreasonable to impose
19 that sort of obligation.

20 But here, we're not asking you to impose that obligation.
21 We're asking you, of course, to do something that will ensure
22 that those voters are not disenfranchised by extending the
23 receipt deadline by some number of days and using a postmark.

24 And then the question becomes, what is the State interest
25 in not doing that, all right? If you've set the premise that

1 under Anderson-Burdick that the burden of this deadline is
2 severe because it's outright disenfranchisement, then the case
3 law in Anderson and Burdick is very clear, that the burden on
4 the State is to show that the receipt deadline is supported by
5 compelling interest and is narrowly tailored.

6 THE COURT: Well, how about this? How about this? I
7 mean, you have -- at some point an election comes to an end.
8 It can't go on indefinitely.

9 MR. DEVANEY: Right.

10 THE COURT: Go ahead, okay? Because or else nobody has
11 any confidence in it if it just keeps going on ad infinitum,
12 you know, we'd never have an end to it.

13 But doesn't the State have a compelling interest, because
14 they want -- we have an Election Day. The votes are cast on
15 Election Day, and they're not cast at 8:02 in the evening.
16 They're not cast at 9, you know, two days later, and they're
17 not counted yet.

18 Here's the deadline. You got to meet the deadline. A
19 deadline is, in fact, a deadline, and whether I set it at, you
20 know, postmarked and three days later, I mean, there's a
21 deadline. So that's arbitrary. I mean, I can pick three
22 days, five days, seven days, but I'm being just as arbitrary
23 as 8 p.m. Election Day. And so why can't the State pick a
24 time, and that's the end of it? And if you don't meet it, you
25 don't meet it.

1 MR. DEVANEY: Your Honor, the reason -- the reason why,
2 in this circumstance with the pandemic and the postal service
3 issues, is that the 8 p.m. deadline the State has selected is
4 going to disenfranchise probably thousands of voters, and the
5 Constitution and the Anderson-Burdick analysis, prohibits
6 that. And that's why the State just can't hit that date and
7 say we're not budging from this. You have to look at the
8 circumstances that are present today.

9 And does the State have an interest in finalizing
10 election results? Absolutely. And right now the statutory
11 obligation in the State is to finalize its election results by
12 November 25th. And we're not asking for, you know, an
13 extension of this deadline of two weeks or anything like that.
14 We're asking for a modest extension of the deadline that will
15 capture a significant percentage of those folks that come in
16 after 8 p.m. on Election Day, often through no fault of the
17 voter.

18 And Your Honor, we're not wedded to eight days, seven
19 days. We want a reasonable period of time that is going to
20 enfranchise voters and not prejudice the State's ability to
21 finalize election results. And the Anderson-Burdick analysis,
22 I believe, requires that kind of solution to this problem.

23 THE COURT: So that, sort of, gets me -- so that gets --
24 sort of, gets me, you propose the solution, and you know
25 what's on my mind. I'm a Superior Court justice, okay? And I

1 don't have extraordinary powers or jurisdiction, as far as I
2 can tell. And so what I'm struggling with, Mr. Devaney, is
3 where do I get the authority to do this? And I understand
4 that, you know, there's a heavy burden to declare a statute
5 unconstitutional, but what you're really asking me to do is to
6 say you know, just this election. Just this election because
7 of what's going on in our world, I'm going to carve out to
8 selectively decide well, that's unconstitutional for the
9 moment. And, you know, this thing may be unconstitutional for
10 the moment, but otherwise constitution -- otherwise perfectly
11 fine, but you know, right now it's not fine. Yeah, it's
12 unconstitutional.

13 Do I have that authority to do something like that? As
14 you can imagine, I'm struggling with where do I -- where do I
15 have the authority to do this?

16 MR. DEVANEY: Well, Your Honor, if you can imagine, when
17 you posed that question yesterday, we spent a little time last
18 night looking into the issue. And again, this is one that we
19 would be happy to provide a discussion, a written discussion
20 order if you were interested, but the short answer to the
21 question is that there is first of all, extensive case law in
22 Maine establishing that State Courts, including this Court,
23 have authority, and in fact, the obligation to uphold the
24 Federal Constitution and to implement remedies to protect
25 against or to redress constitutional violations.



1 And the case law also establishes that courts -- state
2 courts here can enforce the Constitution through Section 1983
3 actions, such as the one that we have brought before the
4 Court. There is a decision -- I'm probably mispronouncing
5 this -- but *Thiboutot v. State*, 405 A.2d 230, which we
6 actually cite in our complaint in this case, where the Maine
7 Supreme Court expressly recognized that the Superior Court has
8 jurisdiction to enforce the Federal Constitution through
9 Section 1983 claims.

10 And Your Honor, the ability to enforce the Constitution
11 and the obligation to enforce the Constitution comes with it
12 complicitly the authority to grant relief to protect against
13 or to redress constitutional violations.

14 THE COURT: Yeah. I appreciate that, Mr. Devaney. I
15 guess where more -- I have a little bit more heartburn, or --
16 and maybe my thread -- my request, but where do I get the
17 authority? I mean, I understand I have the authority to
18 redress constitutional violations. I guess I understand that.
19 But this is a little bit unique, because we're talking about a
20 challenge that is particular to this particular time. I think
21 we're all operating under the assumption that if we were in
22 the year 2022 -- well, I better not go into the future. Who
23 knows what the future brings? But under normal circumstances,
24 we wouldn't be spending as much time debating, you know,
25 burdens and state interest and so forth. But we're dealing

1 with a situation where a pandemic has hit all of us and the
2 postal service.

3 What I think I'm driving at is regulating elections is
4 specifically assigned to the State legislature, and in this
5 particular time period the legislature and the governor has
6 declared a civil state of emergency, at least I'm thinking of
7 March, April, May, June, July. And are we in the sixth or
8 seventh declaration of the civil emergency? And through that
9 declaration of civil emergency, the governor has certain
10 emergency powers, and she has exercised them. She's exercised
11 them, in fact, in connection with the Election Code.

12 And so I think where I'm getting the heartburn is I'm a
13 member of the other branch of government. And in Maine,
14 unlike the Federal Government, I think, at least my assessment
15 of their separation of powers, separation of powers in Maine
16 is pretty strong, and it's considered to be more -- more
17 robust, I guess, is the best word I can describe it, that it
18 is on the Federal side of things.

19 And so I'm having some issues with why all the arguments
20 which make, you know, make great policy arguments? As I said,
21 I've got friends that you're talking about in terms of the
22 difficulties that the COVID has posed for them in moving
23 about, doing their business. Why aren't these arguments
24 better made to the executive and legislative branches of
25 government, rather than the Court, which, you know, I don't



1 have authority to enact an election code. That belongs to the
2 legislature.

3 And so that's where I'm getting my heartburn, is that a
4 lot of the things I'm being asked to do are things that other
5 branches of government are supposed to, are assigned that
6 responsibility, and that's where I'm getting some indigestion
7 over the fact that I'm basically, in many respects, being
8 asked to rewrite the Election Code to deal with the COVID and
9 to deal with the postal service, and I'm sort of wondering, do
10 I really have that extensive? I understand I have some
11 authority to redress constitutional wrongs, but this almost
12 strikes me as being a rewrite of the Election Code in large
13 part, and I'm nervous about that, because we have a very
14 healthy separation of powers jurisprudence in the State of
15 Maine. So that's where I'm coming -- that's where I'm
16 being -- I find myself wondering why am I doing this? Not me
17 personally, but why is -- why is the judicial branch doing
18 this, when it really is a decision that properly belongs to
19 the legislative and executive branches of government.

20 MR. DEVANEY: Your Honor, a few responses. Of course,
21 the time, place, and manner of elections is a -- fundamentally
22 a legislative function. There's no debating that.

23 That said, it's the judiciary's job to ensure that that
24 function is carried out, of course, in a constitutional
25 manner. And we can look at decades of judicial decisions



1 interpreting voting statutes enacted by state legislators that
2 have been struck down, found unconstitutional, and have been
3 redressed by federal and state courts' remedies that they have
4 fashioned. And so there is a -- this constitution -- is there
5 a deference that's required for time, place, and manner
6 legislation? Yes, there is. But at the same time, there's an
7 obligation to uphold the Constitution and to redress
8 violations by fashioning remedies consistent with redressing
9 those violations.

10 And so Your Honor, that's -- my first point is that there
11 are decades of case law establishing that fundamental point.

12 My second point is that the Anderson-Burdick framework,
13 that I think we all agree applies, is unusual, and it requires
14 the judiciary to get into the policy issues underlying
15 election laws. You know, the -- you're required to look at
16 the State interest and assess whether the policy underlying
17 the State interest is sufficient to justify the burdens.

18 And so the way the framework is set up, it's required of
19 the judiciary to get into these policy questions, to weigh
20 that, to evaluate that as part of its analysis of whether a
21 law is constitutional. Is that unusual? Yeah, it is. It is
22 a bit unusual, but it is one that it's required by the
23 framework that's established here. So it's territory in
24 which, you know, judges are required to venture, and if it's
25 just a new venture under the Anderson-Burdick framework.

1 And then my last point, Your Honor, and of course I
2 recognize that the Maine constitution is different from -- is
3 not necessarily consistent with the constitutions of other
4 states, but they're -- in the context of this pandemic, as
5 Your Honor is aware, there are multiple state courts that are
6 faced probably with very similar questions you're facing right
7 now, have found that they have the authority to step in,
8 declare this very law, this same Election Day receipt
9 deadline, unconstitutional. Places like Michigan and
10 Pennsylvania.

11 And they have fashioned a remedy that is a postmark
12 deadline has extended the time to receive ballots because of
13 the overriding concern about not disenfranchising voters and
14 the lack of state interest in not allowing for a modest
15 extension of that law.

16 And Your Honor, the federal courts face the same issue.
17 You know, federal courts are also -- and I know, having argued
18 in front of quite a few of them with Patrick and others --
19 these judges are asking the same question. Isn't this a time,
20 place, and manner function? It's best left to the
21 legislature. And they've wrestled with that, and as you can
22 tell from the decisions, quite a few of them have concluded
23 that, you know, they need to step in and protect the
24 constitution and fashion a remedy, as Judge Conley did in
25 Wisconsin yesterday. Some have been more reluctant to do

1 that, admittedly, but we're increasingly seeing in the context
2 of this pandemic that both State and Federal Court judges
3 recognize these highly unusual circumstances, a high risk of
4 thousands of voters being disenfranchised, of the fact that
5 the legislature is not going to step in and remedy the
6 situation, and it falls to the judiciary to ensure that those
7 who need protection, those who are most vulnerable, are
8 protected through a remedy as modest as the one we're
9 proposing, which is a few days' extension of the receipt
10 deadline.

11 THE COURT: Thank you, Mr. Devaney. Again, I don't meant
12 to interrupt your flow of thought, but as I said, these are
13 issues that obviously are important to you, and as I have
14 questions I'd like to pursue them, so --

15 By the way, one of the questions I have, so along that
16 line, I'll continue on. Let me ask you. Instead of assessing
17 this, I'm sitting in Maine. Maine has been one of the most
18 successful states in the Union in dealing with the pandemic.
19 We're seeing some of our numbers go up, trending upward in
20 York County, but, you know, this is not the -- well, I think
21 the last time I looked, we were, like, 49 in terms of
22 positivity rate, and 49th or 48th on, you know, the fatality
23 rate and the number of deaths.

24 And so you know, we're actually -- we've done very well
25 in terms of our numbers. And --



1 Hello, Mr. Stroman. Welcome.

2 And so we've done well in Maine in terms of keeping
3 the -- we're not -- we're not out of it, by any means, as Dr.
4 Shah makes clear in his affidavit. But don't I have to look
5 at the Maine experience? And as severe as the COVID-19
6 situation has been, it has not been any -- it has not hit
7 Maine anywhere near as severely as it's hit other states. And
8 don't I have to, you know, be realistic when I look at the
9 burden? Don't I have to weigh that in the balance?

10 MR. DEVANEY: Your Honor, I think sure, that you have to
11 look at what's happening in the State. What's happening in
12 Maine is on their own, and then what's happening in Georgia.

13 At the same time, Your Honor, as we know from looking
14 around the country, if things are going reasonably well with
15 COVID, it's not time to spike the football and start dancing
16 in the end zone. And start going to bars, and start going to
17 restaurants, and start going to polling places and massing
18 together and voting together. That's what causes the
19 problems. And we know that that's what causes the spread.

20 And so I think the burden in Maine -- and you know, thank
21 God that Maine is doing well, but the burden in Maine is still
22 very significant, and we know that if people think they could
23 freely go about their business and go out and socialize and go
24 out and vote in person together in large groups, that that
25 poses very significant risk.

1 And I, you know, if -- of course you have to pay
2 attention to evidence. I think you can also take judicial
3 notice of some of what I said, but we also have an
4 epidemiologist who has testimony to this effect.

5 And so sure, Maine's doing better, thankfully, than a lot
6 of states. But the burden is still very real, and for elderly
7 voters, and Maine has the highest elderly population in the
8 country, that's something you also have to take into
9 consideration. It's very prudent for them to not go out, to
10 not expose themselves and not to be, you know, concerned about
11 or subjecting themselves to cross-contamination.

12 THE COURT: Thank you, Mr. Devaney.

13 MR. DEVANEY: Your Honor, I just have two -- I've used a
14 lot of time, and --

15 THE COURT: Well, I've caused you to use a lot of time,
16 but I don't hold that against you.

17 MR. DEVANEY: I've actually enjoyed it. Just two points
18 that are slightly in the weeds that I want to make it. I
19 haven't talked about the voter assistance, the very much
20 postage issue. I'm going to rely on our papers and what
21 you've heard already with respect to the burden and the
22 Anderson-Burdick --

23 THE COURT: The only thing I want on the voter assistance
24 thing, I'm not sure I really understand what the problem is.
25 I've read some of these cases where, you know, all absentee --

1 I can't remember the case I read the other night.

2 One of the cases had a witness requirement which the
3 court invalidated for this election only, but I understood
4 that the law in that particular jurisdiction required all
5 absentee ballots to be witnessed, so everyone had to have a
6 witness.

7 Maine does not have that requirement, as I understand it.
8 I mean, if you get your absentee ballot, you know, you can
9 make it back. You put a stamp on it, and put the delays aside
10 for the time being. I understand that's a problem. But you
11 know, that's one option.

12 You can go down and drop it into a box. And by the way,
13 I'm not even sure -- how does anyone know, and this was
14 something that occurred to me the other day. Let's assume I
15 don't want -- I don't have a postal stamp, but I have my
16 neighbor, and she's going to the post office. Can I give her
17 my ballot to either drop in the mailbox or drop in the
18 lockbox? And how's anyone going to know? So I'll get to that
19 later, I guess, when I talk to Mr. Knowlton.

20 But as I understand, what you can do is you can mail it.
21 You can drive it down to the town hall and give it to the
22 clerk. You can drop it in a lockbox outside the city hall.
23 And if none of those work, you can't do any of those -- oh,
24 and you have an immediate family member, and the immediate
25 family member goes on and on and on. I mean, it's not husband

1 and wife. It's not mother and father. It's a vast, you know,
2 anyone that's got any relationship to you almost, to take it.

3 If you don't have any of those to actually pick up your
4 ballot and bring it back, then you have this other option, and
5 that includes, you know, having it done in front of a clerk,
6 having it done in front of a notary, or the two witnesses.

7 And so I sort of -- when it's argued well, you know, the
8 two-witness requirement, well, it's not a requirement at all.
9 I mean, it's an available option if all the other options
10 aren't used. And it's --

11 Am I wrong? Am I misunderstanding the argument, or do I
12 misunderstand Maine's law, but I think that's the way it
13 works?

14 MR. DEVANEY: No, Your Honor. I think you articulated
15 the law accurately. And here, you know, here's our concern
16 with the voter assistance ban. It's that, first of all, we
17 see from Dr. Herron's data that far fewer family members are
18 returning ballots for others during the pandemic.

19 And do we know the exact reason why? No. But one can
20 reasonably infer that family members do not want to be out
21 there exposing themselves to the virus. And so there's less
22 opportunity for people to rely on the ballot returners who are
23 eligible under the current law.

24 THE COURT: But we're still -- we're still speculating.
25 For all we know, people mailed their ballot long in advance,



1 and they didn't need their, you know, anybody to help them
2 with it. We really don't know why, you know, that --

3 MR. DEVANEY: Yes. We probably know is that the number
4 of family members returning ballots went down meaningfully,
5 and we have the context of the pandemic.

6 I'll concede, and I think Dr. Herron conceded, we don't
7 know exactly why. There's a correlation. It's not proven
8 causation, but there's certainly a correlation --

9 THE COURT: All right.

10 MR. DEVANEY: -- is what I would say. And then, you
11 know, with respect to -- so that tells us that there should be
12 a broader pool of people eligible to return ballots available.
13 And --

14 THE COURT: Well, the State now -- now, this is going to
15 lead us down the road of voter fraud, because part of the
16 reason the State, you know, wants -- makes this available as
17 an option is because, you know, you're not voting in person,
18 so you've got ballots out there and about, which puts absentee
19 balloting in a different posture than in-person balloting. So
20 you have ballots out there.

21 And but we do have some history of absentee ballot fraud
22 in Maine. It goes back a ways, back to -- to the 1980s, but I
23 think, as a result of that particular incident, the
24 legislature made some significant changes to the absentee
25 ballot practice because of the fact that, you know, the ballot

1 that some third person is able to get access to, and the
2 danger of, you know, of potential tampering with the ballot.

3 And I understand that it's rare. Voter fraud is rare. I
4 get that. But isn't it rare because the legislature has
5 enacted prophylactic regulations to prevent it?

6 And you know, I mean, a lot of crimes are rare, but that
7 doesn't mean they're unconstitutional if they stay on the
8 books.

9 MR. DEVANEY: Your Honor, I think the relevant inquiry in
10 response to that is do we see voter fraud with states that
11 have less restrictive ballot assistance laws? And the answer
12 is we don't. And I believe Dr. Herron testified to that. And
13 so there -- if you look around the country and survey those
14 states that are less restrictive, we don't see any issues with
15 voter fraud.

16 You know, maybe North Carolina, that absolutely the
17 exception. It has an unusual situation. That was a, you
18 know, a federal crime. But setting that aside, you just don't
19 see it. It doesn't happen.

20 THE COURT: Well --

21 MR. DEVANEY: And my interest --

22 THE COURT: Well, I think --

23 MR. DEVANEY: -- to say --

24 THE COURT: I think Secretary Dunlap, you know, probably
25 said it right, that, you know, vast concerns of, you know,



1 widespread voter fraud, you know, is a myth. It just is not
2 happening.

3 It can happen. It has happened. And that's why there
4 are regulations in place to try to prevent it from happening
5 or to regulate or to trace it, if it should happen, so you
6 have a, you know, you don't have everybody on earth able to
7 handle ballots. Isn't that the whole point of it? If you
8 don't have every Tom, Dick, and Harry with access to a ballot
9 that might be counted?

10 MR. DEVANEY: Right. The other side of the coin, though,
11 is okay, we know it happens exceedingly rarely. The other
12 side of the coin, then, is what is the burden on the voter
13 that you have to look at? And also, what is the burden on the
14 First Amendment rights of those who are engaged --

15 THE COURT: What is the burden? I mean, I ask, what's
16 the burden? I mean, you can mail it. You can drop it off in
17 a box. You can drop it off at city hall. You can have a
18 relative, you know, to the nth degree of (indiscernible)
19 validity, and I'm being facetious, but it seems that way. And
20 only if you get to the point, and I don't, you know, frankly,
21 I don't know how you police the, you know, if I gave my ballot
22 to my next door neighbor and said would you put this, you
23 know, when you go down to city hall, would you please drop
24 this in the box. I mean, is that illegal? And how is it ever
25 enforced? So I mean, I guess, let's say how restrictive

1 really is it in terms of --

2 MR. DEVANEY: Well, I guess -- I guess, Your Honor, in
3 response to that, if one sees a law on the books that says,
4 you know, if you allow your neighbor to return your ballot for
5 you, that's criminal.

6 THE COURT: Yeah.

7 MR. DEVANEY: Maybe you can get away with it, but a lot
8 of people aren't going to do it. And so it has a chilling
9 effect that reduces the people who are available to return
10 ballots.

11 And Your Honor, the data showed that on there, for better
12 or for worse, there are significant communities that rely on
13 ballot assistance. One, because they don't trust the mail, or
14 two, they don't -- they don't want to expose themselves to
15 voting in person. And they happen to be primarily communities
16 of color that rely heavily on --

17 THE COURT: All right.

18 MR. DEVANEY: -- ballot assistance.

19 THE COURT: All right. Well, let me ask you this. I
20 mean, one of the things that I think's been challenged is the
21 fact that Maine prohibits paid -- paid assistance. Assistors,
22 I guess. I know what a way -- I'm hesitant to say ballot
23 harvesters, but people who are paid to, you know, assist
24 absentee voters with their ballot. That is picking them up,
25 bringing them down, delivering them.



1 You know, that does, sort of, you can see where the
2 legislature would be a little bit nervous about allowing, you
3 know, anybody to be paid to collect ballots or have, you know,
4 have, sort of, a stake in the action, so to speak, by being
5 paid.

6 I mean, that's sort of what happened with the absentee
7 ballot tampering case. You know, the person was handling the
8 ballot, and temptation got the better of them.

9 MR. DEVANEY: Your Honor, the problem with that is that
10 it's overly broad. Let's say you have a member of a political
11 campaign. Let's just hypothetically say that Senator Collins
12 has somebody working on her staff who's engaged to get out the
13 vote activities, and that person is paid a salary for those
14 activities. Not to collect a --

15 THE COURT: Right.

16 MR. DEVANEY: -- certain number of ballots or return but
17 just go out there and get people to vote. And that person's
18 paid, you know, x-thousand dollars a month to do that
19 activity. That person's not allowed to engage in ballot
20 assistance because of the fact that he or she is salaried.
21 It's not -- and that's very different from, you know, kind of,
22 a eat what you kill type of arrangement, that your -- I think
23 you were hypothesizing.

24 THE COURT: Yeah. I even read the statute to that extent
25 that I -- I can agree or disagree with your statement that

1 that would be illegal. I don't know, to be honest with you,
2 Mr. Devaney.

3 MR. DEVANEY: Yeah. Yeah. I think that's the problem.
4 It's overly broad.

5 The last two points I wanted to make, Your Honor, one is
6 on the postage issue. You know, we heard from Mr. Stroman
7 yesterday in response to Mr. Knowlton's question that
8 recognized this fact, that the postal service will accept
9 ballots that are not postmarked, and -- I'm sorry. That
10 aren't stamped, that don't have postage affixed to them.

11 And one limited remedy here, if the Court's not inclined
12 to require the State to provide postage, at a minimum, why
13 doesn't the Secretary of State announce to voters that there
14 is this policy out there that if you don't put postage on your
15 ballot envelope, it's still going to be accepted? I don't see
16 any reason why voters shouldn't know that fact. And for some
17 people who either can't obtain postage for mobility reasons,
18 COVID reasons, financial reasons, that can make a difference
19 between whether they vote or not.

20 If they get notice that the postal service will accept
21 it, I just don't see any downside to doing that, nor do I see
22 any State interest in not doing that. So I put that out there
23 for Your Honor's consideration.

24 THE COURT: Well, according to the post office, they're
25 losing money hand over fist. You want me to announce that

1 they're going to -- they should be losing more?

2 MR. DEVANEY: But it's their policy. That is their
3 policy. But --

4 THE COURT: Why don't they announce it? Why don't they
5 announce it?

6 MR. DEVANEY: I'm sorry?

7 THE COURT: Why don't they announce the policy?

8 MR. DEVANEY: Because -- well, they could too. But
9 should the State -- I mean, it's not -- the State could say
10 the postal service has a policy of accepting ballots without
11 postage. I don't see why that's burdensome for the State to
12 do, and it will enfranchise voters.

13 Your Honor, my final point, and I suspect I may take this
14 up at rebuttal too, is we heard from Ms. Gardiner in her
15 opening statement about the Purcell Doctrine and the
16 suggestion that it's -- might be too late to make any changes
17 in election procedures. I have just a couple of points I
18 wanted to make about that.

19 First, the Purcell Doctrine is a federal doctrine. It's
20 designed to prevent federal, state -- Federal courts from
21 interfering unduly, too late in the process, in state election
22 procedures. It's not a doctrine that applies to state courts.
23 But moreover, we still have what is it? 45 days till Election
24 Day. There are many, many examples of changes being made at
25 this point in the election to ensure people are franchised and

1 examples that completely comply with Purcell.

2 And then the last point I'll make on this is that the
3 State itself is changing election laws almost as we speak.
4 You know, we got a statement on Friday that the cure
5 procedures are due. To my knowledge, they haven't been
6 formally announced. We know about them in this case. But
7 there are ongoing changes by the State right now with respect
8 to how this election is going to be conducted, which I think
9 undermines their argument that it's too late to make changes
10 such as an extension of the ballot-receipt deadline.

11 THE COURT: Thank you, Mr. Devaney, and as I said before,
12 I'm going to give you an opportunity to do a brief reply as
13 well.

14 I think, pursuant to our plan, I think what I'll do, Ms.
15 Gardiner, and Ms. Baltes, is let's go -- I want to go to Mr.
16 Heiden, and after his argument I probably will take a ten-
17 minute break, and then come back and then go to Ms. Gardiner
18 and then Ms. Baltes, and then we'll finish up with a quick
19 reply.

20 So Mr. Heiden, I'm happy to see you and happy to hear
21 from you.

22 MR. HEIDEN: Nice to see you, Justice Stokes. Can you
23 hear me okay?

24 THE COURT: I hear you fine. Yup.

25 ACLU'S CLOSING STATEMENT



1 MR. HEIDEN: All right. Great. Well, good afternoon.
2 My name is Zachary Heiden. I represent AMICI (phonetic) in
3 this case, the ACLU of Maine, and Maine Conservation Voters.
4 I wanted to actually start right where the plaintiffs left off
5 talking about timing. Then I'm going to talk a little bit
6 about your concerns about judicial authority, and then finish
7 by talking about the State constitution and the fundamental
8 rights at issue in this case. And of course, I'm happy to
9 answers questions at any time.

10 I had not heard Ms. Gardiner reference Purcell yesterday,
11 but I did hear the intervenors reference it, and I suspect
12 that they will want to bring up the Purcell principle in their
13 argument. It does sometimes seem in these election law cases
14 that the response is either that the claims are premature or
15 that it's too late, and that is, somehow, Purcell Doctrine, it
16 seems in that there's a saying that the best time to plant a
17 tree is 20 years ago, and the second best time is now, you
18 know. And I think from the perspective of amici, really, the
19 time to enter an injunction in this case is now in order to
20 ensure that the upcoming election can be administered in a
21 fair way.

22 But there is a point in the Pennsylvania decision from
23 last week, the Boockvar, I'm sure I'm mispronouncing, the
24 Boockvar decision, at page 36 and 37, where they said,

25 "We additionally conclude that voters' rights are better



1 protected by addressing the impending crisis at this point in
2 the election cycle on a statewide basis rather than allowing
3 the chaos to brew, creating voter confusion regarding whether
4 extensions will be granted, or for how long, in what counties.
5 Instead, we act now to allow the Secretary, the county
6 election boards, and most importantly, the voters to have
7 clarity."

8 And I think that really went to the point. I know that
9 the Court is very mindful of timing, and you've referenced
10 already that you're going to strive to get a decision out
11 quickly, but I think that's, you know, before the Purcell
12 principle or any concerns about administrability arise, I
13 think that's important for this to be taken up.

14 I next wanted to talk about the Court's authority, trying
15 to alleviate some of your heartburn, if I might. We agree
16 with the plaintiffs' point that the Court has broad authority
17 to enforce federal constitutional considerations. The
18 Thiboutot case stands for that proposition. So does Mowles v.
19 Commission on Governmental Ethics, which is 2008 ME 160, which
20 was enforcing the First Amendment against a statute by Maine
21 courts.

22 But the concerns that you expressed in regard to
23 authority are --

24 THE COURT: Don't look at the one above you, Zach.

25 MR. HEIDEN: Good. You know, about the Court's authority

1 vis-a-vis the other branches of government are certainly
2 significant, but they're not unique, obviously, to voting.
3 Other branches of government are entrusted with running
4 schools, with managing prisons, with regulating property use.
5 But in extraordinary times, when concerns related to those
6 considerations reach a constitutional level, the judicial
7 branch is called upon to insert itself into those affairs.
8 And I think it's right that you do so with some trepidation
9 and some humility, but nonetheless, that is what the judicial
10 branch, as a coequal branch of government, is entrusted to do.

11 Well, you know, more about (indiscernible) question about
12 your authority vis-a-vis the state constitutional issues that
13 we've raised in our amicus brief, the plaintiff has sought
14 relief in this case under the declaratory judgment side, as
15 well as the Maine Administrative Procedures Act. That's at
16 paragraph 9 of their complaint.

17 And in a case from -- the Superior Court case of Mabel
18 Wadsworth Health Center v. Hamilton, then Superior Court
19 Justice Horton held that while the declaratory judgment side
20 does not by itself create a cause of action, it, along with
21 the Administrative Procedures Act, does allow for the review
22 of the legality or constitutionality of rules or regulations
23 or regulatory guidance.

24 We never got a decision from the law court in that case.
25 I represented the runner-up in that case. But since Justice

1 Horton is now, I guess, 1/16th of that court or 16 percent of
2 that court, you know, while I think that his interpretation is
3 a sound one.

4 And I think to this, you know, apply it to this case, you
5 know, there's a -- I think we can look at this case as a
6 challenge not of the statute itself but of the interpretation
7 of a statute. And actually, a finding you made earlier, Your
8 Honor about whether there's any ambiguity in that statute, I
9 wouldn't -- I want to, sort of, stick my head in the lion's
10 mouth on that. I think there is, actually, ambiguity. The
11 statute, 21-A M.R.S.A. 755, says, "In order to be valid, an
12 absentee ballot must be delivered to the municipal clerk at
13 any time before the polls are closed."

14 What plaintiffs are challenging in this case is the
15 administrative interpretation of what it means for a ballot to
16 be delivered, and plaintiffs are urging, and amici are urging
17 as well, for the Court to say that this should be interpreted
18 like the mailbox rule, that something is delivered when it's
19 put into the mail. It's not delivered when it actually
20 arrives, which is the interpretation that's been put on that
21 statute so far.

22 And I think that, you know, interpreting that statute in
23 this way may seem a little bit like, you know, you're bending
24 over backwards, but I think that's what these times that we're
25 living in require. You know, you, and Your Honor, you express

1 some ordinary skepticism, I think, about people's concerns
2 about mail delivery and how people were skeptical of mail
3 delivery long before this crisis. But this is really a very
4 different time that we're living in, you know. This is the
5 midst of a crisis where it's no longer unusual for people to
6 fear leaving their house. It no longer seems at all unusual
7 for people to believe that, you know, going to a wedding might
8 threaten their lives or their nana's lives or their neighbors'
9 lives.

10 That's the backdrop against which this case is being
11 argued, and it does require, I think, that we all recalibrate
12 in a significant way that calculus of reasonability, and it
13 does cry out for, sort of, latitude in interpretation.

14 I next want to turn to the issue of the Maine State
15 Constitution, really the heart of our argument as amici.
16 Under the Maine State Constitution, as you're aware, the right
17 to vote is a fundamental right. See Opinion of the Justices,
18 2017 ME 100. As well as a safer privilege, which is an
19 Opinion of the Justices from back in 1867.

20 The Maine Constitution also guarantees the right to
21 safety. Right in Article 1, Section 1 of the Maine
22 Constitution, "All people are born equally free and
23 independent, and have certain natural, inherent and
24 unalienable rights". Among those are "pursuing and obtaining
25 safety and happiness. And AMICI have two related arguments,



1 related to those -- those provisions in the Maine
2 Constitution. First is that the Court ought to analyze the --
3 the Plaintiffs' claims under the Maine Constitution first
4 before proceeding to analysis under the Federal Constitution.
5 And the Maine Supreme Judicial Court held in State versus
6 Flick that that's the proper order of analysis. And the U.S.
7 Supreme Court held in Michigan vs. Long that when a State
8 Supreme Court decision rests on independent and adequate State
9 statutory or State constitutional grounds, that that's the end
10 of the story. Federal Courts or the U.S. Supreme Court are
11 not going to do further review of that. And I think that's,
12 you know, particularly appropriate for something that's so
13 state specific as election law, that this should be decided
14 under the State Constitution and our State laws.

15 The second related point, is that deciding this case,
16 under the Maine Constitution will not only result in an
17 optimal decision in this case but will contribute to the
18 growth and the vitality of our state constitution as a
19 document. The defendants in this case have pointed out,
20 accurately, that there is a -- a shortage of case law on the
21 Maine Constitution related to the safety clause, particularly
22 applying the safety clause to global pandemics and the
23 exercise of fundamental rights during global pandemics. I
24 mean, he can submit that this weighs in favor of the Court
25 deciding this case under the Maine State Constitution and



1 recognizing a right to safe voting and not against it, because
2 we have a state constitution that means something, and it's up
3 to courts to tell us what it means and to apply it. And it's
4 hard to imagine what is a circumstance where that right to
5 pursue safety implicating other fundamental rights could be
6 more apt -- more aptly interpreted.

7 We'll finish by talking about the fundamental rights at
8 stake in this case and building on a point that Mr. Devaney
9 made this morning in colloquy with you. The normal political
10 system looks after most people most of the time, right?
11 That's the fundamental principle of democracy. We can trust
12 the political branches and the democratic branches to look
13 after most of the people most of the time. But courts exist
14 and constitutional rights exist to look after the concerns and
15 the people, the majorian institution -- majoritarian
16 institutions leave -- leave behind. And as Professor Herron
17 noted yesterday, and as you have acknowledged this morning,
18 Your Honor, there are people like that here in Maine. They
19 have a right to vote. It's a fundamental right for them just
20 as much as for anybody else. And we are not here engaged in
21 an approximation of a legislative debate. This is something
22 different. We're in litigation about fundamental
23 constitutional rights, which is always going to be the people
24 that are left out or the people that left -- are left behind.
25 It's that particular issues that is implicated by so many of



1 plaintiffs' claims.

2 It's particularly germane, I think, to the prepaid
3 postage issue, which Mr. Stroman testified about today and
4 which you -- you and Mr. Devaney talked about this morning.
5 And I would agree with what, you know, plaintiffs have urged
6 that if there -- if the Court is convinced that there is no
7 burden because of the -- the post office's practice of
8 delivering mail even if it doesn't have a stamp, but it's
9 incumbent upon everybody involved to make sure that people
10 know that, and requiring the defendants in this case to alert
11 the public to that. I mean, I've heard Defendant Dunlap speak
12 about this issue, and heard postal officials speak about the
13 issue, but it's very hard to find written evidence of it
14 anywhere for reasons that Your -- Your Honor acknowledged,
15 probably, earlier, but I think if that's a --

16 THE COURT: Right.

17 MR. HEIDEN: -- you know, recognizing that, that does --

18 THE COURT: Yeah.

19 MR. HEIDEN: -- implicate the Twenty-Fourth Amendment,
20 fundamental constitutional rights, then --

21 THE COURT: Well, it's almost like the worst kept secret.

22 MR. HEIDEN: It's -- it is, but it could be even worse
23 kept, I think, and -- and people do need to know about it in
24 order for it to be meaningful for people.

25 You know, the constellation of rights that we've raised



1 in this issue, I think, are most -- most applicable to the
2 issue of the received-by deadline, and that does seem to not
3 only capsule the fundamental constitutional rights at stake,
4 the harm that it's going to visit upon people, but also the
5 court's role in granting equitable relief and protecting those
6 who, you know, maybe have the most clean hands, have done
7 everything they can to get their ballot into the mail, but
8 because of the twin crises of the COVID outbreak and the
9 mismanagement problems at the postal service, that those
10 ballots are not going to arrive. And that in normal years,
11 that might not be an unsurmountable burden, but this is not,
12 obviously, a normal year.

13 Happy to answer any questions Your Honor might have, but
14 otherwise I appreciate the opportunity to address the court.

15 THE COURT: Thank you, Mr. Heiden, I appreciate that. I
16 think what we'll do at this point -- and I'm going to give you
17 a brief reply at the end of today's session -- let's take
18 about a ten-minute break, and then we'll come back. We'll
19 resume with Ms. Gardiner, and then Ms. Baltes.

20 Am I pronouncing your name correctly? Is it Baltes?
21 Okay.

22 And then we'll finish up with replies from Mr. Devaney
23 and Mr. Heiden. Thank you very much. I'll be back in -- by
24 my watch, because you can't trust the clocks here in the
25 courthouse. It's 12:45. So let's say about -- let's do ten



1 minutes, and I'll be back on the bench by -- by 12:55, okay?

2 MR. HEIDEN: Thank you, Your Honor.

3 THE COURT: Thank you.

4 (Recess at 12:46 p.m., until 12:57 p.m.)

5 THE COURT: Hello, everyone, again. We're back on the
6 record in the matter of Reliance for Retired Americans, et
7 al., v. Matt Dunlap. It's docket number CV-20-95. And I
8 think we're all accounted for. And when we took our break, we
9 had finished with the initial closing arguments from
10 Mr. Devaney and Mr. Heiden, and we're now ready to here from
11 Ms. Gardiner followed by Ms. Baltes, and then a brief reply by
12 Mr. Devaney and Mr. Heiden.

13 So with that, Ms. Gardiner, I'd be happy to hear from
14 you.

15 MS. GARDINER: Thank you, Your Honor.

16 DEFENDANTS' CLOSING STATEMENT

17 MS. GARDINER: I'll begin more or less where Mr. Devaney
18 began, and -- and knowing that the court will jump in with
19 questions. And my main goal here is to answer your questions
20 for sure. The Anderson-Burdick test, which we do all agree is
21 the one that applies here, does start with evaluation of the
22 burden. We've had a long day of testimony yesterday, a lot of
23 exhibits presented. We still don't see any evidence of a
24 severe burden with respect to any of the laws that the
25 plaintiffs are challenging here. They simply have not



1 produced anything more than speculation about who may be
2 burdened and to what extent.

3 We don't have any evidence of voters who are unable to
4 obtain postage. We have no evidence of voters who could not
5 find someone to assist them to witness and answer the ballot.
6 We don't have any evidence of voters who have neither a family
7 member nor a friend nor a way to get postage nor a way to get
8 across town to a town office to drop off a ballot. It is
9 simply speculation that there are some citizens in Maine,
10 registered voters, who suffer from all of those limitations.

11 There is no doubt that COVID-19 has made everything in
12 life harder, and I think Your Honor acknowledged that, and
13 almost every activity outside the home is somewhat riskier.
14 Those risks, obviously, were not created by this. The State
15 has undertaken a number of initiatives to mitigate those risks
16 in order to help voters vote safely this year. And I think
17 that the plaintiffs have not -- have given some grudging
18 acknowledgment to some of those initiatives but have not fully
19 acknowledged the extent of which those reduce the -- the
20 difficulties that are imposed by COVID-19, and -- and the
21 postal service, which obviously the State is also not
22 responsible for any slow-downs in postal service.

23 Some of the -- obviously, we're presented evidence about
24 the protective measures undertaken at the -- at the polling
25 places. And as Instructor Shah testified, any risks

1 associated with attracting COVID-19 by voting in person on
2 election day is low in light of those precautions. The
3 clerk's offices have imposed the same kind of cautions at
4 their offices for those who wish to come and vote in person
5 absentee. Many clerks in the smaller offices where they don't
6 have space to perhaps have six-foot social distancing are --
7 are seeing individuals by appointment, which means that, in
8 contrast with what the plaintiffs argued yesterday, voting in
9 person at the clerk's office is not at all equivalent to
10 voting in person at the polls. You might be the only person
11 in the clerk's office being served behind a plexiglass
12 barrier. So the risk, as Dr. Shah testified, is incrementally
13 lower if you're voting in the presence of the clerk. It will
14 vary according to the circumstances when witnesses are
15 involved in assisting an absentee ballot voter. And the risk
16 is negligible if the voter is dropping of a ballot in a
17 secured drop box outside the town office.

18 And I want to mention, the secure drop box is a new
19 option that Maine has not had before, and it was only
20 beginning to be utilized in the July primary. The Governor
21 and the Secretary of State have embarked on a joint initiative
22 to make drop boxes available in every town that wishes to have
23 one across the entire state for this November election. So
24 that means that not only does the voter have the ability to go
25 drop their ballot off at the town office, they may not even

1 have to go inside the town office. They may be able to go
2 there at night, or at any time of day or weekend, to drop off
3 their ballot. And, again, we don't have any evidence of any
4 voter for whom that option would not be viable, even a voter
5 who theoretically could not obtain postage. But there may be
6 many voters who don't wish to trust their ballots to the
7 postal service for reasons that Mr. Stroman testified to
8 yesterday, and the drop box option, in addition to dropping it
9 off at the town office during business hours, reduces that
10 burden to just about nil, I would suggest.

11 The Secretary of State has also created an absentee
12 ballot tracking system so that the voters can see -- there's
13 always been a tracking system and a very tightly controlled
14 one that the local election officials use to ensure the
15 integrity of the ballot process -- absentee ballot process,
16 but this year there will now be a way for a voter to see --
17 they'll be able to go online and determine whether their
18 ballot has been received by the town office or not, whether
19 their ballot has been issued if there has been a request and
20 they haven't received it yet, if their ballot has been
21 rejected. So even if the clerk wasn't able to reach them by
22 phone, if they look online and they see that their ballot has
23 been rejected, they would have a way to address that. That is
24 a significant service to voters that will reduce and mitigate
25 any of the kinds of difficulties that the plaintiffs are

1 proposing. The plaintiffs seem to think that the only option
2 to risking contracting COVID-19 in this election is to vote by
3 mail, and that couldn't be farther from the truth as we've
4 seen from the evidence presented here.

5 I would note that the -- and, obviously, we talked about
6 earlier -- and Your Honor had a lengthy exchange with
7 Mr. Devaney about the -- the notice and opportunity to cure
8 procedures. The court is correct, the challenged ballots are
9 counted. It's not like in other states where they have
10 provisional ballots that may or may not be counted until
11 certain things are proven. In Maine, a challenged ballot is
12 counted. So that resolves the issue or defects in the ballot.

13 Which I point out, those defects are not -- it's not
14 complicated to write your name on an envelope. Anyone could
15 forget to do that, and so we've got an instruction to the
16 clerks to make sure that they will contact a voter to let them
17 know that that happened. But that is a responsibility of the
18 voter. All you have to do is sign your envelope. That's
19 really it, unless you've had to have assistance. So I think
20 there's -- should be no dispute that those procedures
21 certainly cure any due process issues and should make it --
22 should make the number of ballots that could be, you know,
23 rejected down to a very small number.

24 I do want to point out that the plaintiffs in their
25 argument, Mr. Devaney, I think, greatly exaggerated the

1 possibility of ballots being rejected as late. He kept
2 referring to thousands of ballots could be late and rejected
3 for that reason. That is not what the evidence shows. In
4 fact, the evidence of their own expert, using his numbers, he
5 projected, from the actual -- from the number of ballots that
6 were actually received after the deadline in July -- which was
7 297 in his data, it was 271 in the data that we presented, not
8 significantly different, a quarter of a percent. And based on
9 his projection, using the 2016 voter turnout in the last
10 presidential election, and applying the 35 percent of voters
11 who voted by mail in July, so that assumes that every voter
12 who voted -- as many voters used the mail -- as used the mail
13 in July would use the mail in November despite all of the news
14 about problems with the mail, if you just take that
15 projection, there's a maximum of 650 to 700 ballots that might
16 be received late; not thousands. And I would submit that with
17 the secure drop box option available to voters, again, I think
18 the number of voters who rely on the mail could be
19 substantially less this year.

20 There's a curious set of asymmetry in the plaintiffs'
21 arguments that runs through the plaintiffs' arguments in that
22 they contend that the circumstances of this election with
23 COVID-19 and the postal service difficulties are so unusual
24 and unprecedented that they necessitate court-ordered changes
25 to the State's election laws. And yet the evidence they rely

1 on and their expert's projections assume no change in behavior
2 on the part of the voters. And as I said earlier, don't
3 really acknowledge much of the steps that the State has
4 implemented to mitigate the health risks and assist people in
5 voting.

6 I would point out as well that another initiative the
7 State has undertaken is to move aggressively to try to make
8 sure that the postal service meets their obligations, so the
9 voters who do choose to use the mail will get their ballots
10 delivered. And for that reason, the Attorney General joined
11 the multistate lawsuit -- one of the multistate lawsuits
12 against the postal service. And as Your Honor knows, a
13 nationwide injunction is put in place in one of the other
14 multistate cases that would -- is designed to ensure that the
15 postal services reverses the policies that are putting
16 deliver -- prompt delivery at risk and meets their obligations
17 to deliver election mail on time.

18 Again, as I mentioned in my opening, we would -- there is
19 a dizzying amount of case law, one could say a firehose of
20 cases, coming -- decisions coming down around the country. We
21 do recommend to the court the Democratic Congressional
22 Campaign Committee and Oklahoma Democratic party, the Zirrax
23 case from Oklahoma decided last Thursday, it addresses a
24 couple of the issues that are in front of the court in this
25 case and, in particular, the election deadline. And in that



1 case the court recognized that the postmark issue is a
2 significant problem. The plaintiffs are trying to gloss that
3 over in this case, but my understanding is it's not uncommon
4 for -- for mail to arrive without a postmark. And a rule on
5 existence of a postmark that may not be there would be not
6 only arbitrary, but it would cause some ballots to be counted
7 that shouldn't be, that is, they might have not been mailed in
8 time, and others potentially to be excluded because -- simply
9 because the postal service didn't place a postmark on it.

10 That was certainly a factor in the Oklahoma courts
11 analysis. But the court also found that the burden of the
12 election date deadline was minimal based on evidence in that
13 case that 2.4 percent of the total mailed-in ballots arrived
14 late. We have .24 percent of mailed-in ballots that were late
15 in July. I think -- and I don't want to take time on things
16 that --

17 THE COURT: Well, Ms. Gardiner, let me ask you if I
18 understand correctly. Let me go to the issue of the voter
19 assistance because I'm trying to wrap -- I'm trying to
20 understand that, make sure I understand the law. As I
21 understand it, for an absentee -- a person who wants to vote
22 by absentee ballot, the person makes their request, gets their
23 ballot, and then has -- as I understand it, has the following
24 ways to get the ballot back to city hall or the town office.
25 They can mail it, and if it mailed, all you need is to



1 complete the envelope, sign it, put the -- put the ballot
2 inside, sign it, drop it in the mail. The other option is to
3 sign the envelope, drive down to city hall, hand it to the
4 clerk, or you can put in the lock -- secured lockbox. Or you
5 can have members of your immediate family do any of those
6 things, I guess, take possession of the ballot and do any
7 of -- and drop it off. As I read the law, and I -- you know,
8 again, I'm open to being educated on this. The -- if none of
9 those options are used, then you have an option of doing your
10 ballot in front of a clerk, a notary, or two witnesses.

11 MS. GARDINER: Yes.

12 THE COURT: Now, as I was coming in today, I was
13 thinking -- and maybe this is -- this is off the point,
14 because I don't know if this -- I guess, other than that,
15 that's the way it's got to be returned, the ballot has to be
16 returned; although, I wonder how it's enforceable if, in my
17 example, where I -- I give my ballot to my next-door neighbor
18 and say, by the way, can you drop this off at city hall or can
19 you drop it off at the post office, or can you drop it off in
20 the lock -- the secured lockbox. I guess, that's a violation
21 of the law, from my -- as I understand it.

22 MS. GARDINER: Yeah. Technically, the voter is supposed
23 to be returning it, and I think any -- for practical reasons
24 as well, state and local officials would certainly encourage
25 that. Because as well-meaning as your neighbor might be, you

1 can't know that that ballot didn't slip behind the seat of
2 their car or get dropped as they get out of their car to go to
3 the grocery store and before they get to the town office. If
4 you want to make sure your ballot gets there, you should take
5 it yourself. But I think Your Honor is correct, that the --
6 because we haven't had the secure drop box option before,
7 there's been nothing written in the law to address that
8 specifically. I don't know that it -- I don't think it would
9 be enforceable. It wouldn't be possible for the town
10 officials to know, you know, whose hand put the envelope in
11 the box. But, technically speaking, if you were relying on
12 someone else to -- because if you rely on a third person, that
13 third person can pick up your ballot as well as return your
14 ballot. And so the concept in the law is that third person is
15 assisting you for the whole process.

16 THE COURT: Okay.

17 MS. GARDINER: What you're describing is simply someone
18 doing an errand for you and literally dropping your sealed,
19 signed envelope in the box.

20 THE COURT: Right.

21 MS. GARDINER: The danger is, they might not get it there
22 for the most innocent --

23 THE COURT: Right.

24 MS. GARDINER: -- or not so innocent reason.

25 THE COURT: Or nefarious. It could be innocent or



1 nefarious. And so my understanding is, is that the two
2 witnesses requirement only comes into play when you don't
3 choose to use the other alternatives?

4 MS. GARDINER: Yes.

5 THE COURT: Okay. I just wanted to make sure I
6 understood that.

7 MS. GARDINER: You are -- you are correct. And, again, I
8 would point out, we have zero evidence, there was some
9 speculation from Mr. Devaney that there are some communities
10 where people are more dependent upon third-person delivering
11 mechanisms, but we have no actual evidence that that is true
12 here in Maine. So I don't think that is a burden that this
13 court should attribute -- should make any finding exists.

14 THE COURT: Okay. Well, let me ask you, I know some --
15 each law -- each state's law is different. I take it the
16 ballots have not been sent to the municipalities yet. What is
17 the date -- what is the statutory date when ballots have to be
18 provided, or when they're available, I should say?

19 MS. GARDINER: Right. They're -- they're available as of
20 October 2nd. Voters have been able to request ballots through
21 the -- the secure online ballot request service that the State
22 runs for 90 days leading up to the election.

23 THE COURT: Right.

24 MS. GARDINER: So it could be every town has -- you know,
25 has requests ready to fulfill, and they are due to receive the

1 ballots from the printer -- State's printer no later than
2 October 2nd so they can begin to fulfill those requests. And
3 then --

4 THE COURT: They obviously can't -- you can't send the --
5 you can send the request -- you can process the request, but
6 you can't send the ballot --

7 MS. GARDINER: Yes, Your Honor.

8 THE COURT: -- out until you have the ballots ready?

9 MS. GARDINER: Precisely.

10 THE COURT: And -- and --

11 MS. GARDINER: Right.

12 THE COURT: -- am I -- do I understand correctly that, of
13 course, the ballots aren't quite ready yet because there's
14 still something that might change on the ballot?

15 MS. GARDINER: I think that may have been resolved this
16 morning, Your Honor.

17 THE COURT: All right. Has that been -- has that -- has
18 that matter been dealt with?

19 MS. GARDINER: I believe --

20 THE COURT: All right.

21 MS. GARDINER: I believe that the -- the law court issued
22 a decision. I've not seen it yet, but --

23 THE COURT: Right.

24 MS. GARDINER: -- I believe it vacates the Superior
25 Court's ruling and affirms the Secretary of State.



1 THE COURT: All right.

2 MS. GARDINER: So --

3 THE COURT: So the ballot will be ready to go on time,
4 presumably on the 2nd, or be available on the 2nd?

5 MS. GARDINER: Yes.

6 THE COURT: Okay. I was not --

7 MS. GARDINER: Yes.

8 THE COURT: I was not aware of the breaking news this
9 morning. I was just wondering what the status of the ballot
10 was. Okay.

11 MS. GARDINER: Right.

12 MR. STRAWBRIDGE: Your Honor, we reserve all rights.

13 THE COURT: Yeah. Okay. Well, now you know. Now --

14 MS. GARDINER: Yes, Mr. Strawbridge and I are on other
15 sides of -- of the table on that matter.

16 So I think -- I don't know if Your Honor has any
17 questions about the notice to cure -- notice and opportunity
18 to cure procedure --

19 THE COURT: Well, let me ask you. One of the things
20 Mr. Devaney sort of brought. Couple things. Number 1, he
21 wants me to declare or instruct that Secretary Dunlap's
22 instructions are, in fact, binding on municipal officials.
23 That's one point he made. And then the other one was the
24 post-cure, which I think really is part and parcel of his
25 received-deadline argument. Which is because that's a

1 problem, you should have a post-cure -- a post-receipt cure
2 availability so that, you know, it's -- even after -- you get
3 a -- you get an absentee ballot that has a problem with it,
4 particularly, no signature, and you can't reach -- you can't
5 reach the voter because the voter is gone, they're absent,
6 which is why they got the ballot in the first place. And so
7 it can't be cured by 8 p.m. on election day, and I think what
8 he is suggesting is there ought to be some period after
9 election day when that ballot can be cured. And so that would
10 be helpful if you could address those matters.

11 MS. GARDINER: Sure. Certainly. Well, the challenge
12 ballot mechanism in Maine law, I think, avoids any need for an
13 opportunity to cure after the election deadline because
14 challenged ballots are counted, and Title 21(A), section 696,
15 subsection 1, makes that crystal clear. So I don't know what
16 the purpose of having a cure process would be if the ballot is
17 going to be counted anyway.

18 THE COURT: Well, I think it would apply, for example,
19 where you have a missing signature or there's something --
20 something not quite right with the witness certificate or aide
21 certificate, I think those are the two scenarios, where you
22 can't reach --

23 MS. GARDINER: Right.

24 THE COURT: -- the voter. Okay? So it's now 6:00 on
25 election night, and you're down at, you know, the polls, and

1 you have this absentee ballot that's just been delivered, or
2 been delivered earlier that day, and you look at it and
3 there's no signature on it. And you -- the poll workers pick
4 up the phone, they call, they try to email the person, can't
5 get through -- if they get through to them, then you can use
6 the challenge process. But you can't get through to them,
7 they've gone away, all right, and they're not reachable.
8 Under that circumstance, with a missing signature, that ballot
9 would be rejected because it is not --

10 MS. GARDINER: Yes.

11 THE COURT: -- a valid ballot as of 8 p.m. on election
12 day. And the same thing would go on the aide. So I think
13 that's what he's talking about, those two scenarios. Because
14 in the other scenario, if you can't reach them and it's -- you
15 have a signature, you have a timely ballot, but the signature
16 just looks a little bit weird, then you count it and then you
17 deal with it as a challenged ballot if necessary in the
18 future. So I think it's the --

19 MS. GARDINER: Correct. I guess --

20 THE COURT: I think it's the last two scenarios, where
21 there's no signature at all or there's some issue with the
22 aide or the assistance given, you know, to a voter who needs
23 assistance, those two scenarios.

24 MS. GARDINER: Understood, Your Honor. And I think this
25 is a perfect illustration of -- or that came up in the



1 exchange you had with Mr. Devaney. A number of the measures
2 they would like to have this court impose are what I would
3 call, you know, for policy reasons that people may or may not
4 find compelling, things that they think would be improvements,
5 that would be nice to have. It would be better to have. It
6 would make -- it would it easier. It would be improvements,
7 in their view, to the election process. That may well be, and
8 those are issues that should be taken up with the legislature,
9 because it is the legislature that makes the policy
10 determinations, whether it's appropriate to have post-election
11 deadline cure period, for example. And, if so, how would that
12 be structured.

13 We are only dealing here with -- and the only thing that
14 they can ask the court to address is something that is
15 unconstitutional. And in light of the notice and opportunity
16 to cure instructions here, there is no constitutional
17 obligation, there's nothing unduly burdensome by not allowing
18 a voter who didn't sign an envelope -- that's the voter's
19 obligation. It's the same thing as the voter who goes to the
20 polling place needs to fill in an oval next to name of the
21 candidate they wish to vote for, some people don't do that.
22 I've seen ballots at recounts where somebody circles a name
23 and draws an arrow. That ballot isn't getting counted unless
24 it gets counted in a recount. That's a voter obligation.
25 You've got to know how to vote your ballot properly.

1 And so it's not an unconstitutional burden when you've --
2 when the clerk has attempted to reach you so that you have an
3 opportunity to fix it before 8 p.m., and they aren't able to,
4 that doesn't make it a constitutional burden that you don't
5 have an opportunity after the election deadline to fix that.
6 So it falls outside the realm of what this court can deal
7 with, I would submit in this -- in this challenge.

8 THE COURT: What about -- what about his suggestion that
9 I -- my injunction, or my order, or my declaration should be
10 that the Secretary of State's instructions regarding notice
11 and cure is binding on everybody, all elected officials? In
12 other words, not just guidance. Well, my experience over 40
13 years is that the Secretary of State's instructions are
14 usually taken as -- as binding by municipal officials. That's
15 been my experience in the voting -- in the election area.

16 MS. GARDINER: Indeed. Indeed, Your Honor. And the
17 Secretary's -- part of the Secretary's responsibility in a
18 statewide election, obviously, they don't do this in local
19 elections, is to both train and instruct the clerks. They
20 provide the election materials. They provide reams of
21 instructions to election clerks every election cycle. This is
22 simply a new set of instructions that's clarified and expanded
23 for what was available before. So there's nothing different
24 about this. There's nothing less import or less significance
25 or imposing less of an obligation on -- on town officials.

1 So I don't see that that's called for. We also don't
2 have -- you know, the town officials are not parties to this
3 case. So if what the plaintiffs are after is to have a court
4 order that's somehow going to, you know, put a town in
5 contempt for not complying seems entirely inappropriate since
6 they're not parties to this case. But the Secretary has
7 already undertaken this. His guidance will be going out to
8 all the towns. There's no need for a court to order any
9 constitutional officer to undertake what that constitutional
10 officer has already undertaken. And doing so would not -- is
11 simply not necessary to make it have the seriousness that it
12 needs to -- with which the local officials need -- need to
13 take that -- take these instructions and carry them out.

14 THE COURT: Thank you, Ms. Gardiner. I didn't mean to
15 get you off track in terms of your presentation. Please
16 resume if you'd like.

17 MS. GARDINER: That's all right. I think, you know, in
18 the interest of time, I'm going to rely on the -- on our brief
19 for much of -- much of this. I think just I want to point out
20 that the State has several interests. One that I think hasn't
21 been talked about much is the preservation of the secrecy of
22 the ballot. And this goes to the plaintiffs' proposal to
23 allow this -- you know, to extend the deadline to accept
24 absentee ballots beyond 8 p.m. on election day. That
25 implicates a number of State interests, one of which is, as

1 Your Honor noted earlier today, there is -- it preserves more
2 voter confidence in the election if you have a clear cutoff
3 point. The longer that something remains open, and there's
4 the possible for, you know, envelopes to be coming in and then
5 be getting handled, and the results not to be, you know, all
6 there and being tallied, it -- it disturbs voter confidence.
7 And I would submit that the State and the local officials need
8 to do everything possible, and the court should support doing
9 everything possible, to shore up voter confidence in our
10 election system. It's one reason why we think it is not
11 justified to be tinkering with any more of -- of the election
12 procedures.

13 But I just want to make sure that the court is aware
14 that, in addition, if you have, again, perhaps 650 to 700 late
15 ballots, based on the plaintiffs' expert's own projections,
16 spread across 500 jurisdictions in the State, it would not be
17 unexpected to have maybe one late ballot or two late ballots
18 in a given jurisdiction. The procedure set forth in statute
19 for processing absentee ballots requires that the name of the
20 voter be called out, out loud. And if you engage in that
21 process and then process the ballot, and then add that to
22 the -- to the tally, I don't know how you preserve the voter's
23 right to have their ballot remain secret. So that is just
24 another issue. It's addressed in Ms. Lynn's affidavit in
25 paragraph 49, her first affidavit. And, obviously, as Your

1 Honor already noted, the -- the State's interest in
2 preventing -- not only preventing fraud but preventing --
3 preserving voters' confidence that there isn't any opportunity
4 for voter fraud is extremely important.

5 I would just point out, briefly, again, on the -- on the
6 postal service matter that it has always been -- and I think
7 Your Honor noted this as well. There's always been a risk if
8 you're going to rely on postal service to deliver your ballot.
9 It's never been in the voter's control whether your ballot got
10 delivered on time if you rely on postal service. And we've --
11 but, now, there's a greater ability to mitigate that risk.
12 Obviously, the voter could mitigate it by sending your ballot
13 in earlier, if they choose to rely on the postal service, but
14 they can eliminate that risk entirely if they deliver the
15 ballot to the town office or to the drop box.

16 And I think I have -- I don't think I need to touch on
17 other -- others and their claims unless the court has any
18 questions. We already briefed the issue in response to the
19 amici that there is no constitutional right to vote safely in
20 the Maine Constitution. And I would note that the plaintiffs
21 aren't relying on any constitutional claim under the state
22 constitution in this case. And Mr. Heiden's clients are
23 not -- are not plaintiffs in this action. So I wouldn't add
24 anything more to that.

25 I think I would just note that the -- with the steps that

1 the State has undertaken, and the lack of evidence of any
2 burden, I think that Maine is well situated to run a safe
3 election, as we did in the primary. We do not have a history,
4 such as Wisconsin has had, of significant problems. We don't
5 have hundreds of thousands of ballots involved at all in
6 this -- in absentee ballots, and we have every reason to
7 expect, I think, that every voter who wishes to participate
8 will have many options to participate in this election and do
9 so as safely as possible in the current situation.

10 I'll leave it at that, Your Honor. Thank you very much.

11 THE COURT: Thank you, Ms. Gardiner. And as I recall, as
12 I looked at the clock, you've got a matter at 2:00. So if you
13 feel you have to leave early, please feel free to do so. I
14 certainly won't feel offended in any way. The time got past
15 me as well, so I -- I apologize for that.

16 MS. GARDINER: Thank you, Your Honor. And I'm sure that
17 if you had further questions for the defendants, Mr. Knowlton
18 would be more than capable of stepping in.

19 THE COURT: I feel the State would be in capable hands
20 with Mr. Knowlton.

21 I'm going to turn now to Ms. Baltes, and -- who's
22 representing the Intervenor. I'd be happy to hear from you
23 as well, Ms. Baltes.

24 INTERVENORS' CLOSING ARGUMENTS

25 MS. BALTES: Thank you, Your Honor. I'm mindful of the



1 fact that you've been at this a while, and that some of these
2 particular claims have been fully briefed and discussed in the
3 evidence yesterday. So I'm going to focus more on the broader
4 principles, and just touch on maybe a few of the particular
5 claims, but obviously happy to answer any questions that you
6 have about our arguments.

7 Simply put, the State's laws don't burden the opportunity
8 to vote. And they certainly don't impose the kind of undue
9 burden on the right to vote that would warrant judicial
10 intervention, even if this case were brought far in advance of
11 the November election. After all, the Anderson verdict
12 balance allows for substantial regulation of election by
13 states, even though every such regulation, inevitably, has the
14 effect of excluding some potential ballots.

15 The operative question is whether taken as a whole, the
16 state law provides a reasonable opportunity to vote. It is,
17 therefore, a nonstarter at the point as Plaintiff's view to
18 the particular characteristics of hypothetical people and
19 their potential struggles with particular avenues of voting.

20 In Dr. Herron's testimony yesterday, he acknowledge that
21 there is, at most, only a small subset of people that might
22 actually have difficulty voting in all of the various ways
23 afforded under Maine law.

24 So it's worth nothing that we've just been asked to
25 hypothesize about those groups of people. There's no evidence

1 of them in this case. Dr. Herron then posed the question to
2 the Court. Do we want rules that include all of these people?
3 In other words, is it good policy to make sure every ballot is
4 counted no matter what?

5 And there are really three answers to that question for
6 this Court's purposes. First, as I just mentioned, it's
7 impossible to make sure every ballot is counted and
8 substantially regulate elections the way Vernon (ph.) and many
9 other cases say that states should.

10 As the Seventh Circuit explained in Griffith (ph.) and
11 the recent Oklahoma case explained, as many others have, some
12 people de jure de facto will be excluded. The second response
13 to his policy question is that if you can't get everybody in,
14 where do you draw the line, and who draws it? Inevitably,
15 decisions about how to regulate elections entail weighing many
16 competing considerations. Not only the good desire for broad
17 accessibility, but also other important considerations like
18 the integrity of elections, security of elections,
19 administrability, timeliness.

20 And as a matter of Constitutional law, the power to make
21 those decisions is reserved to state legislatures, and
22 sometimes in emergencies, we see the executive branch stepping
23 in for more efficient policy responses.

24 It becomes a legal question only when, as Crawford (ph.)
25 says, the broad application of regulation to all voters



1 imposes a burden on the opportunity to vote. You had a
2 discussion with Mr. Devaney about what you should do about
3 particular people who might have a problem voting. And he
4 turned to Crawford as authority, but in Crawford, it says, and
5 I quote, "A facial challenge must fail where the state has a
6 plainly legitimate" -- I'm sorry -- "where the statute has a
7 plainly legitimate sweep."

8 He also cited Judge Easterbrook for a similar proposition
9 that we should be looking at the granular level for each
10 individual who might have a problem with this. But Judge
11 Easterbrook also said, in referring to -- it followed that the
12 burden some voters faced would not prevent the state from
13 applying the law generally.

14 If a particular voter can't vote with reasonable effort,
15 they might be entitled to as applied relief, but not the
16 statewide relief that the plaintiffs seek. The right to vote
17 has to be viewed as a singular (indiscernible).

18 In May, voters are given incredibly flexibility on
19 choosing how to exercise that right. As you've discussed they
20 can, you know, vote in person on or before election day by
21 mail, by hand delivery of themselves, a family member, a third
22 party. So it is backwards that is contrary to the quest for
23 accessible voting to say that hypothetical burden is presented
24 by any one of those additional avenues somehow makes the
25 opportunity to vote diminished in any way.

1 And just responding to Mr. Devaney's point that once a
2 state creates a particular avenue for voting, they must
3 administer it fairly. That's, of course, true, but that's not
4 responsive to the question here, which is how do you measure
5 burden? And what is the burden you're looking for? It's the
6 burden on the right to vote, which is all the ways you can
7 vote. An Oklahoma case touches on that at page 18.

8 It's also worth noting that, you know, while the state
9 has a responsibility to make sure that the election is
10 accessible for everybody, all the state action in this case in
11 response to COVID-19 has been to make it more accessible; to
12 make it safer; to make it easier to vote absentee; to make it
13 easier to track your ballot to know whether it's been
14 processed or not. And it would be difficult to say that the
15 reason that someone couldn't vote was because the state's
16 policy or practice.

17 As for particular issues, COVID-19 has changed some
18 things, but it hasn't changed everything. As Ms. Gardiner
19 discussed, as you've mentioned, mail-in absentee voters have
20 always had the burden of planning ahead and anticipating
21 possible mail delays and assuming the risk that some
22 late-breaking news might have changed their vote. And
23 frankly, they always will no matter where that deadline is
24 drawn.

25 But just a couple points to note on the receipt deadline

1 issue, Plaintiff suggests that the burden is somehow different
2 than usual because the mail is slow. But in his expert
3 testimony on mail deliver, Mr. Showman could not point to any
4 Maine-specific evidence of delay or problems with Postal
5 Service. Indeed, there is no such evidence in this case.

6 And in his testimony regarding national trends on mail
7 delivery, Mr. Stroman said over and over again both that
8 people have always had to account for roughly that seven- to
9 ten-day period and that some people always fail to do so. In
10 his words, it happens, it has happened, and it continues to
11 happen. But he says he's talked about this for years, so this
12 is the usual burden of voting.

13 Finally on that point, the July primary is a good
14 example. It is a minimal burden at best that affects not many
15 people at all. .2 percent of ballots were late. So the idea
16 that the mail is causing this incredible new problem is
17 refuted by the mid-pandemic July primary.

18 Just one point on fraud. It's been mentioned, and I
19 think you mentioned that, you know, one reason there isn't
20 fraud is because of these integrity policing measures. And
21 there's been some dispute about how much fraud there is in
22 Maine. And one point to make is that it doesn't really
23 matter. Crawford could not have been more clear that no
24 evidence is required. In that case, the Court said the record
25 contains no evidence of any such fraud actually occurring in

1 Indiana at any time in its history.

2 Crawford then looked to other parts of the country; it
3 looked to past examples; it looked to logic and said it was,
4 "Perfectly clear on a justifiable basis for integrity
5 regulations."

6 Lastly, Your Honor, I'll just note the Purcell Doctrine
7 that has come up a few times. Maine law provides voters a
8 reasonable opportunity to vote. But even if there were any
9 doubt, the Purcell Principle, which is just an
10 election-specific application of normal equitable principles
11 concerning public interest, counsel's against judicial
12 interference so close to an election.

13 Judicial interference upset policy decisions by the
14 political branches. And late judicial interference tends to
15 confuse voters. As the election draws closer, Purcell says
16 that risk increase. It is both of those effects, especially
17 combined, that tend to undermine faith in the system and that
18 are to be avoided.

19 The Plaintiffs argue that Purcell doesn't apply here
20 because according to them, it's a federal doctrine. It keeps
21 federal courts from interfering with state elections at the
22 11th hour. But the federal-state distinction doesn't really
23 hold up because Purcell itself is just a model of how to weigh
24 election-specific equitable considerations in this context,
25 and it gives us a model for how it should come out.



1 Purcell itself talks about "court orders" affecting
2 elections. And when the Supreme Court discussed Purcell in
3 the Wisconsin election case, it boiled down what it called the
4 wisdom of the Purcell principle to judicially-created
5 confusion. And we've cited many examples of states taking
6 these same Purcell precautions and taking them seriously on
7 page 20 of our brief. It's also worth noting that the
8 Oklahoma decision referenced Purcell, as well.

9 Plaintiffs' failure to engage the Purcell principles at
10 all and then just say it doesn't apply is telling here because
11 we find ourselves in this close-to-election situation because
12 of their delay. They have moved much more quickly both in
13 filing the case and in filing a motion for preliminary
14 injunction in several other cases, and could have avoided the
15 situation we are in now where the election is already
16 meaningfully underway.

17 They didn't file their preliminary injunction motion
18 until after voters could already start requesting absentee
19 ballots, and the state had already figured out what it was
20 going to do for the November election.

21 Your Honor, if you don't have any questions, I won't
22 continue. But if there's anything I can help with, I'm happy
23 to do so.

24 THE COURT: Thank you, Ms. Baltes. I think I'm fine.
25 Thank you very much.



1 I'm going to turn it over to Mr. Devaney. Mr. Devaney, I
2 want to give you an opportunity for a brief reply. And I'll
3 do the same thing with Mr. Heiden, and then we'll conclude.

4 MR. DEVANEY: Thank you, Your Honor. I will try to be
5 brief. And I was just taking notes as I was going here, so I
6 apologize if this is a little bit -- sorry, Your Honor.
7 didn't realize I was on mute. I will be brief.

8 THE COURT: I heard everything you said.

9 MR. DEVANEY: Oh, I guess I just went on mute. I'm back.
10 But Your Honor, I'll be -- I've been taking notes. I'll be
11 slightly random in my responses, but I first want to address a
12 couple points made with respect to the election day receipt
13 deadline.

14 Ms. Gardiner said there's no evidence of severe burden.
15 And Your Honor, contrary to her suggestion, Dr. Herron
16 actually does project 2,400 late-received ballots for the
17 November election. He uses a 1 percent rejection rate, which
18 his consistent with the objection rate in the last general
19 election, which was slightly above 1 percent.

20 And so I just want to be very clear that he did not
21 project 6 or 700 late ballots; he projected 2,400. In any
22 event, it's a significant number of voters who would be
23 disenfranchised by this law. The justification --

24 THE COURT: I think there's some dispute -- or I
25 shouldn't say dispute. There was some cross-examination I

1 believe of Mr. Knowlton about why Professor Herron chose to
2 use the 1 percent figure as opposed to some other figure. But
3 I get your point.

4 MR. DEVANEY: And Your Honor, the justifications for the
5 receipt deadline and sticking to it that Ms. Gardiner put
6 forth are: one, there needs to be confidence in the election.
7 And having a clear cutoff gives confidence in the election.
8 And I would submit, Your Honor, that you can still have that
9 confidence by allowing three or four days for ballots to be
10 received after the election. And you get the benefit of not
11 disenfranchising hundreds or potentially a few thousand
12 voters.

13 And so you can achieve both goals; have that certainty,
14 but still enfranchise a significant number of voters. The
15 other state interest she put forward was the situation where
16 you may have a very small number of late-receipt ballots in
17 small jurisdictions and the secrecy issue that she described
18 about calling out a voter's name. And I would submit that
19 there have to be ways for clerks to address that issue to
20 preserve secrecy.

21 And including, Your Honor, Your Honor could actually
22 instruct that secrecy be respected in those very rare
23 circumstances. And I would submit that that issue should not
24 trump the possibility of protecting hundreds or more voters
25 from being disenfranchised. That's one that should be

1 navigable. And there was also a suggestion that perhaps it
2 would be confusing to voters to have -- I think to have a
3 different deadline, a postmark deadline.

4 But the status quo right now is that -- well, there would
5 be no harm to voters to do that because they still would have
6 a deadline. And their -- more voter's votes would be counted.
7 So there's no harm to voters in extending the ballot receipt
8 deadline. On the contrary, there's benefit to voters.

9 And then last, with respect to this issue, to the
10 postmark issue, Ms. Gardiner said that the lack of postmarks
11 on some ballots is a real concern. And the only evidence in
12 the record on that, Your Honor, is from Mr. Stroman. And
13 Mr. Stroman made it very clear that the policy of the Postal
14 Service is to postmark all mail. And then when that does not
15 happen because ballots stick together or something like that,
16 there are remedies for that.

17 You can go back and look at the photo of the ballot. You
18 can look at the barcode on the ballot. And so that is an
19 issue that is addressable. The evidence in this case
20 establishes that in those few instances where there may not be
21 a postmark, one can determine when the Postal Service received
22 custody of the ballot.

23 Your Honor, with respect to the issue of cure and if you
24 give me one moment, I just want to open up some notes. It was
25 suggested that where there is an error with a ballot that

1 because of Maine's challenge procedure that it really doesn't
2 matter because the ballot is going to be counted. But what's
3 not disclosed in that discussion is that if the results of the
4 race are close, then those challenge ballots may not be
5 counted.

6 And so there really is a different status for those
7 ballots than there is for a regular ballot. So I don't think
8 that saying the challenge ballots are counted is fully
9 accurate because those ballots just don't have the same power
10 as a ballot that is not challenged. And that's another reason
11 to allow for this modest cure period so they have the same
12 status as a regular ballot.

13 And with respect to the statement that all voters have to
14 do is sign their ballot and it's not that big of a deal, the
15 truth is we see from the evidence that lots of voters make the
16 mistake of not doing that. And even Secretary of State Dunlap
17 has said it's easy for particularly new absentee voters to not
18 realize they need to sign their ballots. We cite that in our
19 PI motion.

20 And then -- sorry, Your Honor. Let me just take a look
21 at my other points here. My last point, Your Honor, goes to
22 the cure issue. And it's described by Ms. Gardiner. She said
23 that the cure period would be one that would be nice to have,
24 but it's not necessary. And the question really, it's an
25 Anderson (ph.) verdict analysis. And we know that the absence

1 of cure, for reasons we have discussed, compromises those who
2 submit ballots that lack signatures or have other errors.

3 And the question then becomes what is the state interest
4 in not allowing for a cure period? And I didn't hear one. I
5 did not hear Ms. Gardiner articulate any reason why the state
6 couldn't have a several day cure period to address that
7 situation so that those who make the error of not signing
8 their ballots or having another issue with their ballot have
9 the opportunity to have their ballot count as much as
10 everybody else.

11 THE COURT: But let me ask you this, Mr. Devaney. Is it
12 enough -- when you say the State did not articulate an
13 interest, I mean, isn't the State's interest in the actual end
14 of the election? There is a defined end to election day. The
15 votes are in. There is no, you know, overtime. There's no
16 extra innings. I mean, the votes are in, and they're going to
17 be counted.

18 And that, in and of itself, is a very powerful interest
19 to be able to have a defined time when these are the ballots
20 that qualify to be counted. And the reason I bring that up is
21 because well, anything can be changed. You know, there's
22 little in the law that can't be changed. You know, who has
23 the authority to do it is a question, but anything can be
24 changed.

25 And if the State's going to show that it's going to be

1 harmed if we're changing this, then its interests don't --
2 never mean anything because they always have well, what's the
3 harm to the State by having a post-deadline cure procedure.
4 And the State's answer is, well, you know, the ballot wasn't
5 cast on time, and it's not a valid ballot, and it shouldn't be
6 counted because it's not a valid ballot.

7 You can always have, you know -- you can always say,
8 well, we'll just extend the time and then we'll make that --
9 everything will be good again. But is that really an answer?
10 I mean, that you can always change things, and therefore, the
11 State isn't harmed?

12 MR. DEVANEY: Well, Your Honor, the question I think with
13 the cure issue is when does the State need to certify its
14 election results? And if the state required the State to
15 certify election results on the Thursday after election day,
16 two days after election day, you know, maybe there's an
17 argument that you can't have time for a cure period. But
18 here, the date is November 25th.

19 And when you revert back to the Anderson verdict
20 analysis, and we know there are going to be voters who are --
21 whose votes are disenfranchised or diluted or whatever term
22 you want to use by the lack of a cure period. You then have
23 to look at the State interest. That is a burden
24 (indiscernible). And then you have to look at the State
25 interest. And the State interest --

1 THE COURT: Is it really much of a burden? What's the
2 burden? I mean, the burden is you got to sign your ballot.
3 And that's not a very terribly, you know, heavy burden.

4 MR. DEVANEY: Well, the burden of not having the cure
5 period is your ballot is rejected or it's not -- it has a
6 lesser status.

7 THE COURT: Yeah. Well, there's a deadline. There's a
8 deadline. Whenever there's a deadline, there's a burden. You
9 got to get it in on or before the deadline. Just like all of
10 us that are on this screen, we live by deadlines, you know?

11 MR. DEVANEY: Right.

12 THE COURT: And some of us are more flexible with not
13 paying too much attention with deadlines. There are some
14 people who take them very seriously. You know, a deadline is
15 a deadline, so --

16 MR. DEVANEY: Well, Your Honor, a significant majority of
17 states have cure periods, and they recognize that voters are
18 going to make mistakes. And that not allowing a cure period
19 for mistakes is a burden on voters.

20 THE COURT: Okay.

21 MR. DEVANEY: And then you have to ask what is the State
22 interest in not allowing for a cure period? And I'm repeating
23 myself, but here --

24 THE COURT: No, I understand what you're saying. And I
25 just -- my problem is well, that's like saying the State can



1 always change its laws. So you know, that deadline really
2 doesn't matter, we'll just extend it. And you know, if that's
3 the test, then no interest of the State is ever good enough
4 because you can always be -- you know, it can be extended.
5 That's the only point I was making is it sort of trivializes
6 the State's interest in having finality to an election day.
7 And that's why they call it election day. It's the day when
8 what we have been through for the last eight months of
9 campaigning will, at long last, come to an end.

10 MR. DEVANEY: But Your Honor, I guess my point would be
11 that finality, by law, in Maine, isn't required until November
12 25th. That is when the election ends for all purposes.

13 THE COURT: Yeah. I see what you're saying.

14 MR. DEVANEY: (Indiscernible).

15 THE COURT: Now, there is the complication, and we really
16 don't have any idea how it's going to play out that, you know,
17 we are the only state, as far as I know, that has ranked
18 choice voting for certain elections in, you know, statewide.
19 So that could complicate timing. I don't know whether that's
20 been factored in.

21 But I understand what you're saying. The time for
22 certification is not the day after the election or two days
23 after, it's you know, a substantial period of time, a couple
24 of weeks, I guess, after the election day.

25 MR. DEVANEY: Right.



1 THE COURT: So I know what you're saying. Now, as I
2 said, I don't know how that plays out. I don't know how
3 rank-choice voting is going to impact the work of the
4 Secretary of State and election officials in trying to certify
5 the results and get them in on time. That I don't know. I
6 mean, that's a mystery to me. It's a mystery probably to all
7 Mainers at this point. We just don't know. We don't have
8 enough experience with it to be honest with you.

9 MR. DEVANEY: And Your Honor, my last point is in
10 response to Counsel's argument, Ms. Baltes' argument relating
11 to the Purcell Doctrine. We cite about a half-page worth of
12 cases in our briefs that show Court's granting relief in time
13 periods meaningfully closer to the election at best. And I'll
14 repeat what I said earlier. Here we have the Secretary of
15 State who is changing the law now.

16 And so I think it's not entirely consistent to be
17 changing the law with respect to the cure period, for example,
18 and to argue that it's too late to change the law.

19 THE COURT: Well, the cure period change, apparently, was
20 welcome.

21 MR. DEVANEY: Oh, absolutely. But it is a change in the
22 law. So I'm just going to the Purcell argument, Your Honor.

23 THE COURT: Yeah.

24 MR. DEVANEY: It's not too late.

25 THE COURT: Right.



1 MR. DEVANEY: If we're too late, State presumably
2 (indiscernible).

3 THE COURT: Yeah. I don't think there would be too much
4 voter confusion. If you try to explain the cure process,
5 you'd probably generate confusion. Just leave it alone as it
6 is. Don't talk about it to the public because you'll be
7 generating more confusion. Thank you, Mr. Devaney.

8 Mr. Heiden, I'd like to hear from you in a brief reply.

9 MR. HEIDEN: Very briefly, Your Honor. In response to
10 what Ms. Gardiner said about how these are matters that are
11 left to the legislature, this is also a concern that you
12 raised throughout these arguments. Note that in ordinary
13 times, yes, the separation of powers is a strong, important
14 principle in our Maine Constitution, but this is an emergency.

15 The legislature went home a number of months ago and they
16 have not reconvened because of that emergency, because of the
17 health crisis that undergirds this entire litigation. So I
18 think that, you know, has to be sort of inform the way that
19 the Court looks at those traditional separation of powers
20 principles.

21 Ms. Gardiner also noted the secure drop boxes, the ballot
22 trace process, the cure process that the Secretary of State
23 and the Governor's office have worked to develop. And I want
24 to make sure that that gets acknowledged; that those are all
25 important, significant worthwhile undertakings, and they will

1 make this a safer, healthier election for the people of Maine
2 and the Defendants and the Governors deserve enormous praise
3 and credit for doing that.

4 But they also illustrate that this is a, you know, some
5 of the problems associated with this election are for all the
6 branches of government to deal with. The legislature didn't
7 pass laws saying that towns should get drop boxes or that
8 there should be a ballot trace system.

9 That was something the executive branch and the
10 constitutional officers took on because this is an emergency.
11 And similarly, the judicial branch has responsibilities
12 because this is an emergency. And then the second point I
13 wanted to make, which you sort of hinted at a moment ago, it
14 is not -- election day is not here in Maine when we know, you
15 know, all the cards get counted and we're going to know what
16 happened.

17 Thanks, in part, to the advocacy of Ms. Gardner. You
18 know, there will be the rank-choice voting process and that
19 will have to run. And it's not like it's all, you know, close
20 of election day, everything is all shut down. It's a little
21 bit of an office border on both sides. Leading up to the
22 election --

23 THE COURT: Well, I certainly agree with that,
24 Mr. Heiden. But isn't the point that the intervenors and the
25 secretaries are raising is you know, when the deadline doesn't

1 mean anything, you know, or it doesn't mean that it's a real
2 deadline, and votes keep trickling -- depending on, as you
3 say, you know, you're not sticky about the number of days or
4 Mr. Devaney is not. It could be three; it could be five; it
5 could be seven; it could be ten, you know, take my -- you
6 know, pick my poison.

7 But isn't there a danger that as the public hears that
8 well, you know, we're still counting votes, and it's two or
9 three, five, seven days after the election, you know, well,
10 we're counting them because, you know, they didn't arrive on
11 time, but we're counting them anyways because -- isn't there a
12 danger where the public says, well, what's going on here?
13 What's going on here?

14 Where are these ballots coming from? And isn't that a
15 legitimate interest for the State to be concerned about that,
16 you know, everyone gets to play by the same rules, and
17 everyone's subject to the same deadline?

18 MR. HEIDEN: There is undoubtedly a danger that there
19 could be some concerns raised about ballots that come in and
20 they're being counted. There's also a danger that people if
21 they find out that they, you know, they read your decision, it
22 says that -- I'm sure it's going to say that these -- there's
23 going to be -- ballots are going to be counted and they say,
24 oh, well, normally, I would be very scrupulous about this, but
25 now I'm not going to be as careful about this deadline.

1 I don't disagree that those aren't real considerations.
2 But when we're weighing against those is the life-threatening
3 danger represented by this pandemic combined with the crisis
4 of mismanagement of the U.S. Postal Service, and that comes
5 out, you know, for this election, in this year, and let's all
6 hope, I think -- you know, we all disagree about a lot of
7 things on this call, but we all agree that we're never
8 hopefully going to have circumstances like this again.

9 And then there won't be -- you know, this won't be the
10 rule for any circumstances again in the future. But for this
11 election particularly, it is -- that weigh those ballots out,
12 those dangers are not as significant as the dangers of
13 discarding those votes.

14 THE COURT: Thank you, Mr. Heiden.

15 Let me just tell you, all of you, and I don't -- I assume
16 Phyllis has left, but I want to thank each and every one of
17 you for the outstanding presentation yesterday. The really
18 outstanding written submissions that you made. I know
19 Mr. Devaney, you've offered to write more. I think I'm done.
20 I got to catch up with what you've already sent me. I've got
21 plenty.

22 So I'm not going to take you up on your offer to write me
23 more because frankly, I think it would, you know, delay things
24 for me. And I think I got to get something out rather than,
25 you know, put this off any longer. But I want to thank all of

1 you very sincerely for the presentations, the witnesses that
2 were put on were very qualified. And I enjoyed hearing their
3 testimony and conversing with them, both Professor Herron and
4 Mr. Stroman. And then your advocacy today.

5 You know, it's -- many of us have been in the practice
6 for many, many, many decades, and you know, I miss seeing you
7 all in person. I really would enjoy -- I love the give and
8 take of this type of an argument. I would have enjoyed it
9 even more if you were right in front of me and we could banter
10 back and forth in person, but unfortunately, that's not
11 possible for the reasons -- sort of circle around, for the
12 reasons why you brought the suit in the first place.

13 But I do want to acknowledge the outstanding lawyering
14 that has occurred in this case and the challenging issues that
15 you presented to me. I'll do the best I can to address them
16 as promptly as I can. So I just wanted to express my
17 appreciation to all of you.

18 And with that, is there anything further we need to
19 attend to, Mr. Devaney?

20 MR. DEVANEY: No, and thank you, Your Honor.

21 THE COURT: Thank you.

22 And Mr. Heiden, anything you think I need to address?

23 MR. HEIDEN: Nothing, Your Honor. Thank you, though.

24 THE COURT: Ms. Gardiner, I think she's probably gone,
25 but Mr. Knowlton, any --



1 MR. KNOWLTON: No. We're all set, Your Honor, but thank
2 you.

3 THE COURT: And Jason Anton, I didn't mean to overlook
4 you. You've been there and also, responded to the amici brief
5 that Mr. Heiden wrote. And then, Mr. Strawbridge, awful good
6 to see you again. And Ms. Baltes, nice to meet you for the
7 first time, and then you so much for your involvement in this
8 case. So anything you think I need to address, Ms. Baltes?

9 MS. BALTUS: No, Your Honor.

10 THE COURT: All right. Thank you so much. Please be
11 safe. And as I said, I'm going to be diving into -- once I
12 get the grocery cart to lug all this stuff out of the
13 courtroom and up to my office, I'm going to be working on this
14 this weekend. I'm going to try to get something out next
15 week. Again, I sort of explained to you, I'm not going to do
16 a very lengthy procedural history of the case. I don't think
17 you need that.

18 I probably, you know, will outline the legal standards,
19 and I'll probably get right to the issues and address them one
20 by one and statute by statute. I just don't want to spend a
21 lot of time with the procedural stuff. That might be
22 interesting, but I just don't have the time to do it. Okay.
23 Probably not interesting to be quite honest with you. Only to
24 a lawyer, appellate lawyer, is the procedural history of much
25 interest at all.



1 So I'm going to shoot to get something out by the early
2 part of next week. Again, stay safe and thank you very much
3 for your hard work on this case. I'll see you later.

4

5 (Proceedings concluded at 2:06 p.m.)

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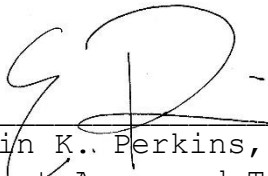
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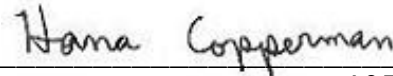
CERTIFICATION

We HEREBY CERTIFY, that the foregoing, pages 1 through 106, is a true transcript of a CD recorded on Tuesday, September 22, 2020, at the Kennebec County Superior Court located at Augusta, Maine, of the case entitled, ALLIANCE FOR RETIRED AMERICANS, ET ALS VS. MATTHEW DUNLAP, ET ALS, to the best of our professional skills and abilities.

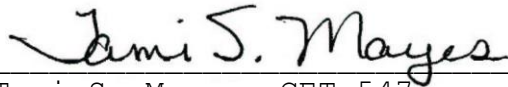
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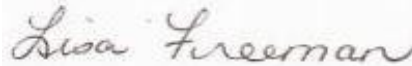
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