STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER KEN-20-262

ALLIANCE FOR RETIRED AMERICANS; DOUG BORN; DON BERRY; and VOTE.ORG,
PLAINTIFFS/APPELLANTS

v.

MATTHEW DUNLAP, in his official capacity as Maine Secretary of State; and AARON FREY, in his official capacity as Maine Attorney General,
DEFENDANTS/APPELLEES

and

DONALD J. TRUMP FOR PRESIDENT, INC.; REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; and REPUBLICAN PARTY OF MAINE,
***INTERVENOR-DEFENDANTS/APPELLEES*.**

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION AND MAINE CONSERVATION VOTERS IN SUPPORT OF APPELLANTS

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INTEREST OF THE AMICI

The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure that rights guaranteed and secured by the Maine and United States Constitutions, including the right to vote, are protected.

Maine Conservation Voters ("MCV") protects Maine's environment and our democracy by influencing public policy, holding politicians accountable, and winning elections.

ACLU of Maine and MCV (collectively, "amici") participated in briefing and oral argument for this case at the Superior Court and have participated in advocacy and litigation related to protecting the fundamental right to vote, at the local, state, and federal levels. Amici believe that their perspective will assist the Court in resolving the disputed issues in this case.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amici adopt the Statement of Facts and Procedural History as set forth in the Brief of Appellants.

STATEMENT OF THE ISSUES

1. Does the Maine Constitution guarantee the right to pursue and obtain safety while exercising the fundamental right to vote?
2. Does the requirement that absentee ballots not delivered by the United States Postal Service by 8:00 pm on election day will not be counted violate the right to vote safely and the right to due process?
3. Do Maine voters whose ballots have been rejected because of perceived technical defects have a right to a mandatory notice and opportunity to fix any such defects before their ballot is rejected?

SUMMARY OF THE ARGUMENT

There is broad agreement across the political spectrum that the November 2020 general election is one of the most consequential in our recent national history.[1] Unfortunately, this most consequential election will take place amidst a global pandemic,[2] as well as massive cost-cutting and removal of mail-sorting

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[1] *See* Joseph R. Biden, Jr. (@JoeBiden), Twitter (June 2, 2020), https://twitter.com/JoeBiden/status/1267841150326636545?s=20 ("I've said from the outset of this election that we are in a battle for the soul of this nation. Who we are. What we believe. And maybe most important—who we want to be. It's all at stake."); Donald J. Trump, YouTube (August 15, 2020), https://youtu.be/rv1jYTWovOM ("If stupid people aren't elected next year, we're going to have one of the greatest years ever.").

[2] *See* Me. Exec. Order No. 56 FY 19/20 (June 3, 2020) (recognizing that COVID-19 is "highly contagious and presents a serious risk to live and health" of voters, poll workers, and election officials).

machines at the United States Postal Service ("USPS").[3] The risks associated with COVID-19 make it critical that as many people as possible can cast their vote by mail, which minimizes physical contact at polling places and local government offices. Yet USPS delays and government procedural restrictions on voting by mail—including the election-day receipt deadline, and rejection of absentee ballots for perceived defects with the signature or affidavit—burden this safe voting option. Such restrictions jeopardize the fundamental right to vote safely, especially for higher-risk voters for whom in-person exposure could be the most dangerous.

In denying the request for a preliminary injunction, the Superior Court committed three legal errors: (1) refusing to recognize the right under the Maine Constitution to vote safely; (2) upholding the election-day-receipt deadline despite the risk of disenfranchising voters; and (3) refusing to require notice and opportunity to cure perceived defects with absentee ballots. *See* Slip Op. at 16-27.

First, the Maine Constitution guarantees the right to vote, as well the right to pursue and obtain safety. *See* Me. Const. Art I, § 1. In an election taking place amidst a global pandemic, these two rights must be interpreted in harmony with

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[3] *See* Brittany Bernstein, *Postal Service warns 46 states and D.C. of Likely Mail-In Ballot Delays*, NATIONAL REVIEW (August 14, 2020), https://www.nationalreview.com/news/2020-election-mail-in-ballots-postal-service-warns-46-states-dc-of-likely-delays/; Eric Russell, *Two mail-sorting machines removed at USPS processing center in Scarborough*, KENNEBEC JOURNAL (August 19, 2020), https://www.centralmaine.com/2020/08/19/2-mail-sorting-machines-dismantled-in-maine-worker-says/.

one another, such that plaintiffs, and all voters in Maine, are protected by a constitutional right to vote safely. By declining to recognize these interlocking rights, and failing to recognize the heightened burden required by Maine's safety guarantee, *see* Slip Op. at 2 n.1, the Superior Court committed legal error.

Second, the Court erred by upholding the election-day-receipt deadline for absentee ballots, despite recognizing that this deadline could disenfranchise anywhere from 600 to 2,400 voters. *See* Slip Op. at 22-23. The Court erroneously reasoned that the deadline was not the "cause" of any disenfranchisement, even though the deadline has "serious consequences if it is not met"—namely, the ballots being rejected. *Id.* at 23. Given that voting by mail represents the safest way for many voters to cast their ballots, the risk that USPS delays could invalidate otherwise valid ballots represents an unacceptable burden on the right to vote safely. Accordingly, the court should have ordered the State to accept ballots that are post-marked by election day, and received within seven days thereafter.

Finally, the Superior Court erred by rejecting the Plaintiffs' challenge to a state statute that requires wardens to reject absentee ballots for defects (or perceived defects) in the signatures or affidavits on the envelope. Slip Op. at 16-21; *see also* 21-A M.R.S. § 759(3). Contrary to the court's ruling, the State's instruction for election clerks to make a good faith effort to provide notice and an opportunity to cure does not rectify the due process problems with this law. And

even under its updated instruction, the State has proffered no justification for rejecting absentee ballots with missing signatures or affidavit defects, instead of counting these ballots as "challenged" and leaving open the possibility that any defect could be cured after election day. Accordingly, this Court should order that the State's instructions are binding, and that any defects in signature or affidavit result, at most, in a "challenged" ballot (not a rejected one).

ARGUMENT

The Superior Court's decision to deny Plaintiffs' Motion for a Preliminary Injunction is reversible only if the Superior Court's decision was "plainly wrong or based on an error of law." *Crafts v. Quinn*, 482 A.2d 825, 830 (Me. 1984). Questions of law are subject to de novo review. *Town of Frye Island v. State*, 2008 ME 27, ¶ 10, 940 A.2d 1065, 1068. The Law Court is obligated to review Maine statutes, when called upon to do so by appropriate procedure, to ensure that they are not repugnant to the requirements of the Constitution. *Portland Pipe Line Corp. v. Envtl. Imp. Comm'n*, 307 A.2d 1, 8 (Me. 1973) (*quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60).

I. THE MAINE CONSTITUTION GUARANTEES THE RIGHT TO VOTE SAFELY.

Under the Maine Constitution, the right to vote is a "fundamental right," *Opinion of the Justices*, 2017 ME 100, ¶ 49, 162 A.3d 188, 207, as well as a

"sacred privilege." *Opinion of the Justices*, 54 Me. 602, 605 (1867).[4] The Maine Constitution also guarantees the "natural, inherent, and unalienable right[] . . . of . . . pursuing and obtaining safety[.]" Me. Const. art. I, §1. Although this Court has not previously interpreted the precise contours of this right to safety, at the very least it must include a prohibition on governmental hinderance of the pursuit and attainment of safety during the exercise of fundamental rights—such as the right to vote. *See id.*

The federal Constitution also protects and secures the right to vote in numerous important ways: prohibiting discrimination in voting,[5] removing barriers to voting,[6] and requiring fair processes for the conduct of elections.[7] But these federal constitutional provisions must be read as setting the floor, not the ceiling, when it comes to the protection of individual rights in Maine. *See State v. Collins*, 297 A.2d 620, 626 (Me. 1972) (holding that States are free to "adopt a higher standard" than that set by the Federal Constitution). This is particularly true when it comes to protections in the Maine Constitution that do not appear in the Federal Constitution, like the right to safety.

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[4] *See also* Me. Exec. Order No. 56 FY 19/20 (June 3, 2020) (acknowledging "the fundamental right of the citizenry to debate and vote on budgets and public policy matters").

[5] *See* U.S. Const. amend. XVI (race); U.S. Const. amend. XIX (sex); U.S. Const. amend. XXVI (age).

[6] *See* U.S. Const. amend. XXIV (poll tax).

[7] *See* U.S. Const. amend. V (due process); U.S. Const. amend. XIV (same).

The Superior Court erred by declining to increase its scrutiny of the government's justifications for its voting restrictions, in light of the additional burden on the right to safety. *See* Slip Op. at 2 n.1. Appellants have asserted multiple violations of the Maine Constitution, including that all challenged provisions constitute an undue burden on the fundamental right to vote, and that certain provisions violate Maine's guarantee to procedural due process or the right to free speech. *See* Compl. at 37-49 (alleging violation of Me. Const. Art. 1, §§ 4, 6-A). When evaluating these claims, this Court must give weight to independent protections in the Maine Constitution, as well as Maine's public policy, to ensure that the challenged provisions do not place Maine voters in harm's way.

The question of whether the Maine Constitution imposes a stricter standard than the Federal Constitution is a threshold inquiry. This is because no further inquiry is required or appropriate if the Court invalidates the challenged restrictions under the Maine Constitution. *State v. Flick*, 495 A.2d 339, 344 (Me. 1985) (instructing courts to "examine the state constitutional claim before reaching any federal question."). And, when state courts begin and end their analysis with reference to the state constitution only, no additional federal review will lie. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (holding that the Supreme Court will refuse to decide cases where there is an adequate and independent state ground out of respect for the independence of state courts).

Although this Court has frequently stated that the Maine Constitution provides rights to due process, equal protection, and free speech that are coextensive to the parallel rights guaranteed by the Federal Constitution, *see, e.g.*, Pls' Mot. for Preliminary Inj. at 15, 17 (citing cases), it has "reject[ed] any straitjacket approach" that would keep interpretation of the state constitution in lockstep with its federal counterpart. *See, e.g.*, *State v. Bouchles*, 457 A.2d 798, 801–02 (Me. 1983). State constitutional provisions do not "*depend* on the interpretation of" parallel federal provisions. *State v. Flick*, 495 A.2d 339, 343 (Me. 1985) (emphasis in original). "[T]o construe such opinions as expressing a limitation upon the scope of" a state constitutional provision "would be to stand the state-federal relationship . . . on [its] head[]." *State v. Caouette*, 446 A.2d 1120, 1122 (Me. 1982).

Indeed, this Court has instructed that state courts should not follow federal precedent where the express public policy of the State of Maine compels a different result. *See Collins*, 297 A.2d at 626 (considering "public policy for the State of Maine" and relevant "values" in interpreting the Maine Constitution); *see also Caouette*, 446 A.2d at 1122 (relying on Maine "values" expressed in *State v. Collins* to depart from federal precedent and suppress defendant's inculpatory statements even in the absence of police conduct); *cf. Bates v. Dept. of Behavioral and Developmental Servs.*, 2004 ME 154, ¶¶ 43–46, 863 A.2d 890 (holding that

terms of consent decree required more than compliance with minimum federal constitutional standards when "Maine statutes in effect at the time the complaint was filed formed a basis for the plaintiffs' assertion of broader substantive rights than those protected by the [Fourteenth Amendment of the] United States [Constitution]").

For example, in *State v. Collins*, this Court considered the evidentiary standard that should apply to the admissibility of a confession in state courts. 297 A.2d at 625–26. This Court recognized that the U.S. Supreme Court had previously held that the prosecution bore the burden of establishing the voluntariness of a confession by preponderance of the evidence, but not beyond all reasonable doubt. *Id.* Despite the overarching similarities between the state and federal constitutional provisions at issue, this Court in *Collins* refused to adopt the U.S. Supreme Court's approach. In so doing, this Court recognized that federal decisions on this matter were merely intended to "prescribe[] a mandatory minimum standard," and that States were "free, pursuant to their own law, to adopt a higher standard." *Id.* (*quoting Lego v. Twomey*, 404 U.S. 477, 489 (1972)). Therefore, quoting dissenting opinions from the Supreme Court, this Court held that

> [i]n assessing public policy for the State of Maine and "the appropriate resolution of the values (we) find at stake," we go beyond the objective of deterrence of lawless conduct by police and prosecution. We concentrate, additionally, upon the primacy of the value . . . of safeguarding ". . . the right of an

> individual, entirely apart from his guilt or innocence, not to be compelled to condemn himself by his own utterances."

Id. (*quoting Lego*, 404 U.S. at 491 (Brennan, J., dissenting)). "Since this value has been endowed with the highest propriety by being embodied in a constitutional guarantee," this Court held "that it must be taken heavily into account in the formulation of the public policy of this State." *Id.*

Likewise here, this Court must consider Maine's values and public policies when considering whether the challenged provisions violate the Maine Constitution. As in *Collins*, this case implicates a "value [that] has been endowed with the highest propriety by being embodied in a constitutional guarantee"—specifically, the right to safety. *See Collins*, 297 A.2d at 626; Me. Const. art. I, § 1 (providing the "inherent and unalienable right[] . . . to pursu[e] and obtain[] safety"). The right to pursue and obtain safety is guaranteed by the very first section of the first article of the Constitution of the State of Maine, giving this right as good a claim as any to represent the sort of express public policy of the State of Maine that justifies protection beyond that provided by the United States Constitution. The right to safety has no federal counterpart and has never been explicitly interpreted by this Court. At a minimum, however, the right to safety must ensure the right to safely exercise the core fundamental right to vote. *See, e.g.*, *Dishon v. Me. State Ret. Sys.*, 569 A.2d 1216, 1217 (Me. 1990) (referencing

the "fundamental interest" of the "right to vote"); *Jones v. Maine State Highway Comm'n*, 238 A.2d 226, 229 (Me. 1968) (referencing the "civil right . . . to vote").

Accordingly, the right to vote *safely* must be core to this Court's inquiry under the Maine Constitution. For instance, when conducting the undue burden inquiry under Article I, section 6-A of the Maine Constitution, the question is not merely whether each of the challenged provisions burdens the right to vote, but whether it burdens the right to vote *safely*. Whenever a provision imposes "severe" burden on the right to *safely* cast a vote—in the midst of a pandemic and historic meddling within the USPS—this court ought to apply its strictest level of scrutiny. *See, e.g.*, Pls. Mot. for Prelim. Injunction at 12 (citing *Perez-Guzman*, 346 F.3d 229, 241 (1st Cir. 2003); *Norman v. Reed*, 502 U.S. 279, 280 (1992) (stating that severe burdens on the right to vote "must be narrowly drawn to advance a state interest of compelling importance"). Only if the challenged provisions are necessary to serve a compelling state interest and narrowly drawn to achieve that end should they be allowed to be enforced. *See Mowles v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 160, ¶ 20, 958 A.2d 897, 903 (explaining the strict scrutiny standard).[8]

[8] Although the Superior Court was correct that the Federal Constitution does not require every state voting regulation to survive strict scrutiny analysis (Order, 7), this Court need not be as deferential to the actions of its coequal branches of government as might be proper for federal review of state action, against the backdrop of federalism.

At the very least, when considering the "sliding scale" standard of review on the *Burdick / Anderson* line of cases under the State constitution, Slip Op. at 8, the Court must consider any additional burden on the right to vote *safely*, and must require additional government justification for any such burden. Likewise, when balancing the interests in the procedural due process analysis, "the private interest affected" is not only the burden on the right to cast a vote, but also the right to do so safely. *Id.* at 19 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). In both cases, the government's countervailing interest must, therefore, be even stronger, to merit the burdens imposed. *See id.* As discussed below, in the midst of the historic dangers of the COIVD-19 pandemic, the State has failed to proffer adequate justifications for burdening the right to vote by mail—whether through the election day receipt deadline, or the rejection of absentee ballots with perceived signature mismatches.

II. THE REQUIREMENT THAT ABSENTEE BALLOTS NOT DELIVERED BY THE UNITED STATES POSTAL SERVICE BY 8:00PM ON ELECTION DAY WILL NOT BE COUNTED VIOLATES THE RIGHT TO VOTE SAFELY AND THE RIGHT TO DUE PROCESS.

The Superior Court committed legal error when it employed the *Anderson-Burdick* balancing test, rather than strict scrutiny, to analyze the constitutionality of Maine's requirement that absentee ballots must be received by election day in order to be counted. Slip Op. at 24-26. As Appellants note in their Complaint,

Maine's requirement that an absentee ballot must be received by 8:00pm on election day, *see* 21-A M.R.S. §755, "means that, regardless of the date a ballot is postmarked, and regardless of how responsible a voter was in timely mailing their absentee ballots," voters are at risk of having their votes ignored through no fault of their own. *See* Complaint, ¶133. In light of this threat, the appropriate question is not whether the state has some justifications that balances out the "modest" burden imposed. Slip Op., 25. Rather, the appropriate question, whenever the government interferes with a fundamental right guaranteed by our state constitution, is whether the government has a compelling justification, which can be satisfied in no other way, in order to justify the deprivation for even one person.[9]

As the Superior Court acknowledged, based on the uncontroverted evidence presented by Plaintiffs' expert witnesses, the upcoming election is likely to see an enormous "surge" in absentee voting (based at least in part on the encouragement of Defendants). Slip Op. at 22. More Maine voters than ever before are likely to vote by absentee ballot in the November election, in order to avoid crowded polling places or government offices that might present a risk to their health and

[9] The Superior Court acknowledged that the parties do not agree on the number of voters who will be disenfranchised by the "received by" rule. Plaintiffs presented evidence that it would be at least 2,400, while Defendants presented evidence that it would be 600-700. (Order, 22).

safety.[10] But, just as more and more voters are planning to take advantage of absentee voting (which heavily relies on mail delivery to get blank ballots into the hands of voters and completed ballots into the hands of election administrators), the USPS has dramatically reduced its services, with rural states (like Maine) among the hardest hit.[11] The USPS has itself acknowledged, in a letter to Maine's Secretary of State, that the received-by ballot deadline is unworkable and will likely lead to mass disenfranchisement of Maine voters.[12]

These issues ought to materially impact the court's analysis of the constitutionality of Maine's deadline for counting ballots. As a result of administrative problems at the USPS—which are well beyond the influence of any Maine voter who does not also hold high federal office—there will be wildly

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[10] AP, *This November will be a big test for absentee voting in Maine*, BANGOR DAILY NEWS (July 20, 2020), https://bangordailynews.com/2020/07/20/politics/this-november-will-be-a-big-test-for-absentee-voting-in-maine/ (quoting Maine's Secretary of State observing that "November's going to be a different game. With social distancing and a much, much heavier turnout, we'll probably strongly push absentee balloting again."); Scott Thistle, *Flurry of absentee voting continues right up to Maine's unusual July primary*, PORTLAND PRESS HERALD (July 13, 2020), https://www.pressherald.com/?p=5542238 (reporting that more than 190,000 voters requested absentee ballots for Maine's July 2020 primary election).

[11] Jack Healy, *The Chick's in the Mail? Rural America Faces New Worries With Postal Crisis*, NEW YORK TIMES (August 21, 2020), https://nyti.ms/3aJ1aKg (reporting that rural residents across America have been affected in several ways by the crisis at the USPS, and that "[o]n Native American reservations, among the country's most remote places, families are driving five hours to get medicine and worry about being disenfranchised in November.").

[12] *See* Scott Thistle, *Mills considers safeguards for absentee voting, after warning letter from postal service*, PORTLAND PRESS HERALD (August 14, 2020) https://www.centralmaine.com/2020/08/14/mills-considers-safeguards-for-absentee-voting-after-warning-letter-from-usps/ (quoting the Governor's spokeswoman as indicating that the Governor is deeply concerned about the risk of "ballots delayed, ballots lost in the mail, ballots not counted.").

disparate treatment of similarly situated voters based on the vicissitudes of mail service and operations. Even groups of voters who all mail their ballots back to their town clerks on the same day may find that some of their ballots are received on time, some late, and some not all.

The Superior Court's reasoning in upholding this deadline is not persuasive. *See* Slip Op. at 23. According to the court, any disenfranchisement would not be "caused" by the election day receipt deadline. *Id.* But there is no doubt that it is the deadline itself that "causes" ballots received after the deadline to be rejected. In any event, even assuming the "received by" deadline was constitutional when it was enacted, the standard for what constitutes equal treatment under the law changes as circumstances change. *See Doe v. Rowe*, 156 F. Supp. 2d 35, 51 (D. Me. 2001) (noting that present day understanding, rather than historical perspective, govern in constitutional analysis). Current circumstances include the COVID-19 pandemic and the crisis at the USPS. These circumstances made it more likely that voters will vote by mail, and that their ballots may be received late due to USPS delays outside the voters' control.

In light of these circumstances, rejecting ballots received after 8:00pm on Election Day—even if they are postmarked before then—significantly interferes with the fundamental right to vote safely, and this interference does not satisfy strict scrutiny. Although the "received by" requirement serves an undeniable

government interest in facilitating a reasonably prompt determination of the result of the November election, this interest must give way in order to ensure that the fundamental right of voters to vote absentee and to have their votes counted is not needlessly undermined. Maine voters are accustomed to not knowing the results of an election on Election Day, as a result of Maine's ranked choice voting system.[13] Counting ballots that are postmarked by Election Day will not pose a sufficiently significant burden on election operation to outweigh the right of a voter to cast a vote and have it counted.

Finally, even if the Court does not apply strict scrutiny, it must require some additional level of scrutiny in the *Anderson-Burdick* balancing test to account for the additional burden on the right to safety. As the Appellants explain, the election day receipt deadline cannot satisfy the *Anderson-Burdick* test at all, given the burden on the right to vote and the feasibility of a workable alternative. The additional risk that burdening mail-in ballots could lead to more in-person contact in polling places or government offices (and related risk of COVID-19 exposure), simply confirms that the government lacks a sufficient interest for imposing these

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[13] *See* Sean Stackhouse, *Ranked-choice voting results in six races expected Tuesday*, NEWS CENTER MAINE (July 21, 2020) https://www.newscentermaine.com/article/news/politics/maine-politics/ranked-choice-voting-results-in-six-races-expected-tuesday/97-997d3526-a4e1-41c5-a34d-c82a37683e5c (reporting that election results from the July 2020 primary election would be available one week after the election).

burdens in the 2020 election. Accordingly, the Court should require the State to accept ballots postmarked by election day, and received within seven days thereafter.

III. MAINE VOTERS WHOSE BALLOTS HAVE BEEN REJECTED BECAUSE OF PERCEIVED SIGNATURE MISMATCHES OR OTHER DEFECTS HAVE A RIGHT TO A MANDATORY OPPORTUNITY TO FIX ANY PERCEIVED INACCURACIES BEFORE THEIR BALLOT IS REJECTED.

Finally, the Superior Court erred by rejecting the Plaintiffs' challenge to a state statute that requires wardens to reject absentee ballots for defects (or perceived defects) in the signatures or affidavits on the envelope. Slip Op. at 16-21; *see also* 21-A M.R.S. § 759(3). This Court should order that any defects in signature or affidavit result, at most, in a "challenged" ballot (not a rejected one), and that the State's instructions on notice and opportunity to cure are binding.

First, the court erred by allowing the State to reject absentee ballots submitted without a signature, or with an affidavit defect, when filing them as challenged or provisional ballots would satisfy any legitimate state interest. The statute at issue requires rejection of absentee ballots that the warden finds to present mismatched signatures, to be missing a signature, or to have another defect in the affidavit. 21-A M.R.S. § 759(3). In an attempt to cure the due process problems with this statute, the Secretary of State has instructed clerks to "make a

good faith effort to notify the voter" of any of these defects. *See* Ex. 17.[14] However, if notice is not provided, or the ballots are not cured before the 8 PM deadline on election day, the Secretary of State's guidance treats ballots with mismatched signatures differently than ballots with missing signatures or another affidavit defect—with the former counted as challenged ballots, and the latter rejected. *See* Ex. 17.[15]

The State has no legitimate basis for requiring wholesale rejection of absentee ballots without a signature or with an error in the affidavit, instead of counting them as challenged ballots. The Superior Court erroneously accepted the claim that rejecting the ballots was necessary in light of the State's "strong interest in its election day deadline." Slip Op. at 20. But counting ballots without a signature or another affidavit defect as challenged (instead of rejected) is entirely consistent with the election day deadline—as illustrated by the State's treatment of

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[14] Available at https://www.maine.gov/sos/cec/elec/temp/2020/InstructionsCuringAbsenteeBallotDefects.pdf.

[15] Ballots that are cast as "challenged" or "provisional" ballots are counted, unless there is a recount and the number of challenged ballots could affect the outcome of the election, in which case the voter is entitled to a determination as to the basis for each challenge. *See* 21-A M.R.S. § 673(1). According to the Secretary of State, "[a]ll challenged ballots are initially counted in the same manner as regular ballots" and "[n]o further determination is made on the challenge unless a recount occurs and it is determined that the challenged ballot could affect the outcome of the election." Voter Information, Maine Sec'y of State, Corporations, Elections & Commissions, available at https://www.maine.gov/sos/cec/elec/voter-info/index.html (last visited Oct. 5, 2020). "If one of the candidates in an election or one side of a referendum question, requests a recount and there are enough challenged ballots to affect the outcome of the election, then the challenged ballots in that district will be segregated, and the basis for each challenge may be determined by the appropriate authority designated by statute or by state or federal constitution." *Id.*

ballots with signature mismatches. And using the "challenging" process would ensure that legitimate votes are counted, while allowing any potentially outcome-determinative procedural hurdles to be resolved after the election. *See supra* n.15.

The Superior Court's explanation for treating missing signatures or other affidavit defects differently than signature mismatches (or other bases for filing a challenged ballot) is unpersuasive. The court suggested that "[p]resumably, the Secretary's procedure treats mismatched signatures differently because the voter has complied with the law by delivering a completed absentee envelope and ballot before the close of the polls on election day and it contains a signature." Slip Op. at 20. "In those circumstances, there is a greatly reduced risk of an 'erroneous' deprivation because the defects that remained uncured are not the result of a clerk's subjective opinion that signatures do not match."

To the contrary, the risk of erroneous deprivation is that of rejecting a ballot cast by an eligible voter. This risk is so serious that Maine voters may generally cast challenged ballots even if they are unregistered before election day, and show up to register without the necessary ID or proof of address.[16] To reject a vote cast

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[16] According to the Secretary of State's website on "Your Right to Vote in Maine"

> If I am not registered to vote, I can register on Election Day and vote. (I must register in person and must show ID and proof of where I live.) 21-A MRSA §121.

by an eligible voter, simply because the voter forgot to sign the envelope, or because the clerk perceives some defect in the affidavit, would be an erroneous deprivation—one that is very likely under the Secretary's current instructions. Such a wrongful deprivation is made even more likely by allowing rejection for some unstated "defect" in the affidavit—a subjective and vague standard that uniquely burdens voters who are elderly, disabled, or otherwise require assistance in casting a ballot.

This deprivation is especially injurious during the current public health crisis. The Maine Constitution's guarantee of the right to pursue and obtain safety (by, for example, voting by absentee ballot) imposes a heightened requirement on the state to justify any interference with absentee voting. No signature is required for voters to vote in person on election day, but for many voters in Maine, for this particular election, voting in person is not consistent with pursuing or obtaining safety. In short, the State has no legitimate justification for rejecting absentee ballots without a signature or with some other "defect" in the affidavit, and this

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> I cannot be turned away from my voting place. I must be allowed to vote a challenged ballot. (If I don't have ID or proof of where I live, I will cast a challenged ballot. I may be asked to show ID after the election.) 21-A MRSA §§121, 161 and 673.

See Your Right to Vote in Maine, Sec'y of State, Corporations, Elections, & Commissions, available at https://www.maine.gov/sos/cec/elec/voter-info/right.html (last visited Oct. 5, 2020).

Court should immediately require the Secretary of State to accept and count them as challenged ballots.

Second, the State's instruction for election clerks to "make a good faith effort" to provide notice and an opportunity to cure does not rectify the due process problems with this law. Accepting the State's nonbinding instruction, in lieu of a binding order, contravenes the basic principle that "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 54–55 (1st Cir. 2013) (citing *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1 (2001)); *cf. LeGrand v. York Cty. Judge of Prob.*, 2017 ME 167, 168 A.3d 783, 792 n.10 (citing *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012)) (explaining that an issue is not moot when it is "evanescent due to a party's voluntary cessation of—and ability to resume—the challenged conduct"). The State's willingness to amend its procedures demonstrates that incorporating necessary due process protections would be feasible and non-burdensome. Accordingly, the Court ought to mandate notice and opportunity to cure, instead of simply accepting the State's representations that they will use best efforts to do so.

CONCLUSION

For the forgoing reasons, Amici respectfully requests that the Court vacate the decision of the Superior Court.

Respectfully submitted,

October 5, 2020,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on October 5, 2020, he caused to be sent by email and regular U.S. mail a copy of the above Consent Motion of American Civil Liberties Union Foundation and Maine Conservation Voters for Leave to File an Amici Curiae Brief by emailing a pdf copy of said brief to counsel for Plaintiffs, Defendants, and Intervenors, and by depositing two copies of said brief to them by U.S. mail, first class, at their respective mailing and email addresses:

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