

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. KEN 20-262

**ALLIANCE FOR RETIRED AMERICANS; DOUG BORN; DON BERRY;
and VOTE.ORG,**
Appellants/Plaintiffs,

v.

MATTHEW DUNLAP, in his official capacity as the Maine Secretary of State;
and **AARON FREY**, in his official capacity as the Maine Attorney General,
Appellees/Defendants,

AND

**DONALD J. TRUMP FOR PRESIDENT, INC.; REPUBLICAN NATIONAL
COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE;**
and **REPUBLICAN PARTY OF MAINE,**
Appellees/Intervenor-Defendants.

ON APPEAL FROM THE KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF THE APPELLANTS

Matthew S. Warner, Bar No. 4823
PRETI FLAHERTY BELIVEAU &
PACHIOS, LLP
P.O. Box 9546
Portland, ME 04112-9546
(207) 791-3000
mwarner@preti.com

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INTRODUCTION

Appellants (the “Voters”) do not dispute that, in most years, the state’s elections run smoothly. But this is not most years. The pandemic has affected all aspects of life, and the democratic process is no exception. In November, an unprecedented number of Mainers—indeed, a majority of voters—will cast an absentee ballot. These voters are subject to disenfranchisement if their ballot arrives late (that is, after 8:00 P.M. on Election Day), even if they mail it well in advance of Election Day. Similarly, these voters—many of whom are voting absentee for the first time—also risk disenfranchisement if they make a mistake in completing their absentee ballot and are not able to cure that ballot by 8:00 P.M. on Election Day. Despite experiencing an unprecedented number of rejected absentee ballots in the July primary, the State has not taken sufficient measures to help prevent thousands of voters from being unnecessarily disenfranchised in November.

The specific remedies the Voters seek on appeal are modest. Ballots that arrive up to two days after Election Day should be counted if they are postmarked on or before Election Day. Voters should have the opportunity to correct issues with their absentee ballot envelope—such as a signature deemed not to match the voter’s signature on file, or the inadvertent omission of a signature—during the two days after Election Day. And voters should be able to correct those issues by submitting a simple form affidavit, rather than having to request and wait for a replacement

ballot to arrive or having to travel to the clerk's office to interact with the clerk in-person. Finally, voters whose absentee ballots are included in the initial count but are deemed "challenged" should be able to validate their challenged ballot before the deadline to request a recount. Each of these remedies would help prevent disenfranchisement while imposing minimal administrative inconvenience on clerks or the Secretary.

The Voters urge this Court to reverse the Superior Court and enter an injunction that will prevent constitutional violations, protect public health, and ensure all eligible Mainers will have their ballots counted in the November election.

STATEMENT OF FACTS

I. The COVID-19 pandemic has caused an ongoing public health crisis, pushing Mainers to vote absentee at unprecedented rates.

Maine has not been spared from the effects of the COVID-19 pandemic. Early in the pandemic, citing the risk that "voters, poll workers, and elections officials would be exposed to COVID-19," the Governor postponed the state's primary until July. (Pl.'s Ex. 5.) Shortly thereafter, the Secretary encouraged voters to vote absentee, explaining that, while in-person voting would be technically available, he recommended voting absentee given the fluidity of the pandemic and the importance of social distancing. *See* Pl.'s Ex. 6. As the Secretary also explained, voters could "drop [their ballot] off with your town clerk, but the safest option is to affix postage and mail it back to your town clerk." *Id.*

In the July primary, Mainers took the Secretary’s message to heart. While no more than 7% of Mainers had voted absentee in a prior primary, in the July primary almost 55% voted absentee. *See* Pl.’s Ex. 32 ¶ 8. What’s more, 35% of all the ballots cast in the July primary were returned by mail—a remarkable fourteen-fold increase in voting by mail compared to the 2016 and 2018 summer primaries. *See id.* This spike in absentee voting is not surprising: voters across the country have been turning to absentee voting at unprecedented rates to stay safe during the pandemic. *See* Pl.’s Ex. 1 ¶ 52; 9/21 Tr. at 42:1-13.

Since the July primary, there has been no indication that either the pandemic or Mainers’ enthusiasm for voting absentee has waned. In September, the Governor extended the state of emergency for the sixth time. *See* Pl.’s Ex. 37. By mid-September, Maine’s coronavirus cases were trending upwards. *See* Pl.’s Ex. 41. As Dr. Nirav Shah, Maine’s CDC Director, explained just a few weeks ago, “COVID, right now, is not on the other side of the fence. It is in our yards.” (Pl.’s Ex. 38.)

As recently as late August, the State continued to recognize that voting by mail remained “the safest method for all voters.” (Pl.’s Ex. 34 ¶ 207.) As the State explained to a federal court, “an effective vote-by-mail option is critical in Maine”:

While mail-in ballots are a convenience for some voters, they are a *necessity* for others. For voters with disabilities or those who are unable to get to the polls, casting a mail-in ballot may be the *only realistic* means of voting. Furthermore, given the strong likelihood that the COVID-19 pandemic will not have abated by November, in-person voting will present an increased risk of infection The need for an

effective vote-by-mail option is *critical* in Maine because the electorate includes relatively high levels of individuals unable to vote in person and individuals at risk of severe illness from COVID-19, particularly disabled and elderly voters.

Id. ¶¶ 9, 79 (emphases added). For that reason, many Mainers, including the Voters in this suit, reasonably see voting in person as an unnecessary health risk to themselves or their family. *See* Pl.’s Ex. 8 ¶ 6-7 (Appellant Voter Berry, with pre-existing conditions and extensive lung damage, wishes to avoid voting in-person); Pl.’s Ex. 7 ¶ 5 (Appellant Voter Born, who lives with his 98-year-father, wishes to avoid voting in-person to keep his family safe).

Mainers are requesting absentee ballots for the November General Election at a record-shattering pace. As of mid-September, nearly 200,000 Mainers had already requested absentee ballots. *See* Pl.’s Ex. 39. Many more are expected to request absentee ballots between now and Thursday, October 29, 2020—the deadline to do so. *See* 21-A M.R.S. § 753-A(2).

This sweeping transition from in-person voting to absentee voting matters. While ballots cast in person are rarely (if ever) rejected, an absentee ballot can be rejected if it arrives in the mail after 8:00 P.M. on Election Day, or if the ballot envelope has a missing or “mismatched” signature or an incomplete witness or aide certificate. *See* Pl.’s Ex. 1 ¶ 65; 9/21 Tr. at 43:4-45:1. In the past two General Elections, the most common reason for absentee ballot rejection was a missing signature on the envelope; the second most common reason was late arrival. *See*

Pl.’s Ex. 1 ¶ 65; 9/21 Tr. 56:11-19. Crucially, new absentee voters, as compared to experienced ones, are much more likely to submit an absentee ballot that is rejected because it is late or has a signature-related error. 9/21 Tr. at 45:2-16.

II. The Election Day Receipt Deadline is likely to disenfranchise an unprecedented number of Mainers in the November General Election.

Under state law, all mail-in absentee ballots which arrive after 8:00 P.M. on Election Day are rejected (the “Election Day Receipt Deadline”). *See* 21-A M.R.S. § 755. This means that regardless of when a voter mails their ballot, it will not be counted if it arrives after 8:00 P.M., even if it is postmarked by Election Day, and even if its late arrival is beyond the voter’s control.

Even before the pandemic and strain on USPS, the Election Day Receipt Deadline disenfranchised a substantial number of Mainers. In the 2018 General Election, for example, when a relatively small percentage of Mainers voted by mail, *see* Pl.’s Ex. 1 ¶ 65, over 500 Mainers were disenfranchised because their absentee ballots arrived after 8:00 P.M. on Election Day. *See id.* ¶ 200. Notably, in 2018, USPS’s Southern Maine processing center was one of the best-performing processing centers in the country, delivering 99.5% of election mail on-time. *See* 9/21 Tr. at 207:22-25. Even still, over 500 Mainers’ ballots arrived too late to count.

The number of Mainers disenfranchised by the Election Day Receipt Deadline threatens to be far higher this year. If a third of voters cast their ballots by mail in November—the same rate Mainers voted by mail in the July primary—several

hundred thousand ballots will be cast by mail in November. This will necessarily result in more late ballots than ever before. *See* Pl.’s Ex. 1 ¶ 233. In the July 2020 Primary, for example, more than twice as many absentee ballots were rejected for arriving late than were rejected for that reason in the 2018, 2016, 2014, and 2012 summer primaries *combined*. *See* Pl.’s Ex. 32 ¶ 16.

This increase in voting by mail comes as USPS is experiencing severe budgetary shortfalls, staffing shortages, and reduced capacity, all of which have contributed to widespread mail delays in the past two months. *See* A. 128-130. At the evidentiary hearing below, Ronald Stroman, who served as the Deputy Postmaster General of the United States until June 2020, testified to the unprecedented strain on USPS—a result of staffing shortages caused by the pandemic and new operating policies under Postmaster General DeJoy which took effect in late July. *See* 9/21 Tr. at 176-183. Both disruptions have had a measurable impact on USPS’s ability to deliver mail on time. Before the pandemic, USPS delivered 96 percent of first-class mail within 2-5 days. *See* 9/21 Tr. at 184:16-21. In the first week of September 2020, however, USPS delivered just 82 to 87 percent of first class-mail within that timeframe. *See* 9/21 Tr. at 5-14.

The State has not disputed these mail delays. Indeed, one month after the July primary, the State itself sued USPS, arguing that the agency’s new changes “may disenfranchise voters because their ballots will not be sent or received in time.” (Pl.’s

Ex. 34 ¶¶ 1, 206.) In that suit, the State described how officials had received “thousands of calls about delayed mail,” and how residents “across southern Maine have experienced delays on as many as 65,000 pieces of mail.” (*Id.* ¶¶ 185, 188.)

While a coalition of states recently won preliminary relief enjoining USPS from implementing some of DeJoy’s operational changes, there is little evidence that USPS can return to its normal processing speed in four short weeks. On the contrary, just a few days after a federal judge issued a preliminary injunction against DeJoy’s new policies, the agency explained that it could not implement all of those changes. *See State of Washington et al. v. Trump et al.*, No. 1:20-cv-03127-SAB, ECF No. 83 (E.D. Wash. Sept. 23, 2020). While USPS could restore machines that were “disconnected,” for example, it could not restore machines that were already “dismantled,” and thus it was “not possible to return such machines to service.” *Id.* at 16-17. Nor can any court order replace the missing USPS workers who are out due to COVID-19. *See* 9/21 Tr. at 176:1-20, 178:13-179:19 (Mr. Stroman describing the “dramatic” decline in USPS employee availability due to COVID-19 and corresponding delay in mail).

Perhaps most concerningly, no court order can compel USPS to align its traditional delivery standards with the state’s statutory deadline for requesting and sending absentee ballots. In May 2020, well before DeJoy’s changes took effect, USPS advised elections officials to assume one-week delivery to transmit ballots to

voters, and one-week delivery to return those ballots to elections officials. *See* Pl.’s Ex. 22. This means that voters must request absentee ballots a minimum of two weeks before Election Day to ensure that ballots will be received in time to be counted. (9/21 Tr. at 49:14-50:16.) The deadline for requesting an absentee ballot, however, is just five days before Election Day. *See* 21-A M.R.S. § 753-A (2).

In July 2020, the General Counsel of USPS warned the Secretary that the state’s election laws—including specifically the statutory deadline to request an absentee ballot—created a “significant risk that, at least in certain circumstances, ballots may be requested in manner that is consistent with your election rules and returned promptly, and yet not be returned in time to be counted.” (A. 133.) USPS further explained that this “risk is exacerbated by the fact that [Maine] does not appear to impose a time period by which election officials must transmit a ballot to the voter in response to a request.” (*Id.*) Indeed, state law does not require election clerks to respond to requests for absentee ballots within any particular timeframe. In the July 2020 Primary, for example, clerks who were under a deluge of absentee ballot requests were not always able to get the ballots in the mail promptly. *See* Pl.’s Ex. 32 ¶ 71. In the few weeks leading up to the July primary, there was at least a three-day delay in sending out over 10,000 absentee ballots, and a *ten-day delay* in sending out several hundred more. *See id.*; 9/21 Tr. at 48:5-21.

At the evidentiary hearing, Mr. Stroman agreed that voters who requested their ballots on the statutory deadline, or even several days before, would be at high risk of disenfranchisement. *See* 9/21 Tr. at 186:5-189:7. To demonstrate, Mr. Stroman gave the example of a voter who requested their ballot on October 27th—that is, two days before the statutory deadline to request one:

So I request a ballot a week before, on the 27th, before the general election. And let's say that in Maine, the clerks move very quickly and get that ballot in the mail the next day, on the 28th. . . . [Under first class mailing standards], [i]t will take a minimum of -- a minimum of two days to get to the voter. So here, we're talking about the 30th, that Friday before an election, sometime on Friday getting to - getting to the voter. So then let's just say the voter gets it . . . fills out the ballot either that day or the next day, you know, kind of knows who they want, fills it out. Then goes and say, drops it in [] a blue collection box. After the, you know -- it's in the afternoon, so it's a good chance that the carrier has gone. So the carrier is not going to pick that up until Monday. So if you pick it up on Monday, the earliest it could get to an elections board is the Wednesday -- is Wednesday, the day after the election. And that's almost assuming everything works, you know, perfectly.

(9/21 Tr. at 187:3-188:1.) Thus, even in a best-case scenario—that is, without widespread mail delays, and under traditional USPS delivery standards—voters requesting absentee ballots close to Maine's deadline to do so are unlikely to be able to return their ballots by mail in time to be counted by Election Day. *See id.*

III. Current absentee ballot cure procedures are likely to result in an unprecedented number of rejected and challenged ballots for the November General Election.

Even if an absentee ballot arrives by 8:00 P.M. on Election Day, it will not be counted as a normal ballot would if the absentee ballot envelope (1) is missing a

signature, (2) is deemed to have a “mismatched” signature—that is, a signature appearing not to match the voter’s signature on file—or (3) has an incomplete witness or aide certificate. *See* Pl.’s Ex. 1 ¶ 165. In the 2016 and 2018 General Elections, when absentee ballots were a relatively small share of ballots cast, over a thousand absentee ballots cast by Mainers were not counted due to one of these errors or omissions. *See id.* ¶¶ 165, 175.

As the Voters’ expert showed, voters who are relatively inexperienced at voting absentee are particularly likely to have a missing signature on their ballot, *see id.* ¶ 222, but even “experienced” absentee voters can forget to sign a ballot, *see id.* ¶¶ 217, 223. In the 2018 General Election, for example, nearly 1% of absentee voters who had previously cast an absentee ballot in Maine forgot to sign the envelope. *See id.* ¶¶ 217, 223. With the expected surge in absentee voting, the Voters’ expert estimates that at least 2,300 Mainers will submit an absentee ballot with a missing signature in the November 2020 General Election. *See* 9/21 Tr. at 58:7-16.

In addition, absentee voters are at risk of disenfranchisement if an election clerk or warden believes the voter’s signature on an absentee ballot does not “match” the voter’s signature on file with the elections’ office. *See* 21-A M.R.S. §§ 756(2), 759. Notably, state law provides no standards to judge whether two signatures were “made by the same person,” nor does state law require election clerks to undergo any training on signature comparison. (Pl.’s Ex. 3 ¶¶ 3, 10.) As the Voters’ forensic

document expert showed, determining whether a signature is genuine is a difficult task, even for trained professionals. *See id.* ¶ 30. Concerningly, signature matching is particularly likely to disenfranchise voters whose signatures are more likely to feature variations, such as the elderly, individuals with disabilities, and young voters. *See id.* ¶ 6. Even trained forensic document examiners would be likely to erroneously reject legitimate ballots under Maine’s signature matching procedures. *See id.* ¶¶ 29-33. As a result, it is inevitable that clerks will—in good faith—do the same. *See id.* ¶ 3. The State has never contested these findings.

Given the risk of disenfranchisement, affording voters an opportunity to fix any perceived problems with absentee ballots is critical. But at the time the Voters filed this suit, state law did not require clerks to notify voters of potential errors, nor did it require that voters be given an opportunity to cure their ballot before it is discarded. *See* 9/21 Tr. at 56:2-10. Five days after the Voters filed the complaint, the Secretary issued new cure guidance for the July primary, asking elections clerks to make a good faith effort to notify voters if their absentee ballot contained a perceived error which would lead to rejection. *See* A. 143. Even with that guidance in place, the Secretary reported that over 1,000 absentee ballots were rejected for signature- and certificate-related errors or omissions in the July primary. *See* A. 145.¹

¹ There were an additional 543 absentee ballots for which clerks did not record the reason for rejection. *See* A. 155.

Then, three days before the evidentiary hearing, the Secretary released new absentee ballot cure guidance for November. *See* A. 157. Under this new guidance, clerks are instructed to make a “good faith effort” to contact the voter and alert the voter that their ballot “may be rejected or challenged unless the defect is cured.” *Id.* Ballots with “mismatched signatures” can be fully cured if the voter confirms, over the phone, that they personally signed their ballot. *Id.* Ballots with missing signatures or incomplete certificates, however, can be fully cured only if the voter or witness comes to the clerk’s office to provide a signature in person, or if the voter requests, receives and returns a replacement absentee ballot. *See* A. 158.

Crucially, ballots with mismatched or missing signatures or incomplete certificates must be cured by 8 P.M. on Election Day to be treated as a regular ballot. *See* A. 157-158. But doing so will be difficult, if not impossible, for many voters whose ballots will not be received until just before, or on, Election Day. In the July 2020 Primary, for example, over 20,000 mail-in absentee ballots did not arrive at election offices until Election Day itself or the day before. *See* Pl.’s Ex. 32 ¶ 17. If the clerk is unable to reach the voter to alert them of an error by 8:00 P.M. on Election Day, the ballot is not counted. *See* A. 157-158.²

² There is one exception to this rule: If a clerk is unable to reach a voter with a “mismatched” signature by 8:00 P.M. on Election Day, the ballot is challenged, not rejected. *See* A. 157.

Finally, if a clerk reaches a voter whose ballot was rejected for missing a signature or for an incomplete witness/aide certificate and confirms the voter's identity, but the voter is unable to obtain and return a replacement ballot or travel to the clerk's office to cure the ballot by 8:00 P.M. on Election Day, the ballot is "challenged." A. 157-158. Under state law, challenged ballots are initially included in the full count of ballots. 21-A M.R.S. § 696(1). If, however, challenged ballots will affect the result of the election, their validity must be determined. *Id.* Under current state law, there is no formal process allowing voters to validate ballots challenged for these reasons and ensure that their challenged ballots are counted.

IV. The Superior Court proceeding.

In support of their Motion for a Preliminary Injunction, the Voters submitted reports from three experts. First, Dr. Michael C. Herron, Professor of Government at Dartmouth College, submitted two expert reports describing the state's absentee voting system and the number of Mainers disenfranchised by the state's absentee voting laws. *See* Pl.'s Exs. 1, 32. Second, Dr. Peter Millard, an infectious disease epidemiologist and public health expert from Waldo County, submitted an expert report describing the impact of COVID-19 in the state and the potential health risks inherent in voting in person during the pandemic. *See* Pl.'s Ex. 2. Finally, Dr. Linton Mohammed, a forensic document examiner and Fellow of the American Academy of Forensic Sciences, submitted an expert report evaluating the adequacy of the

state's processes (or lack thereof) for comparing signatures on ballot envelopes. *See* Pl.'s Ex. 3. The Voters also submitted an affidavit from Ronald Stroman, who served as the Deputy Postmaster General of the United States, the second-highest ranking official at USPS, from 2011 to June 1, 2020. *See* A. 121. In his role at USPS, Mr. Stroman oversaw USPS's planning on Election Mail and often coordinated efforts between USPS and local election officials. 9/21 Tr. at 170:17-171:25. The Voters also filed affidavits from leaders of civic organizations and voters describing the impact of the laws at issue in this suit. *See* Pl.'s Exs. 7-8, 11-12, 31.

On September 21 and 22, 2020, the Kennebec County Superior Court held an evidentiary hearing on Plaintiffs' Motion. Plaintiffs presented live testimony from Dr. Herron, who testified to the burdens these laws impose on Maine voters, and Mr. Stroman, who testified to USPS's operational capacity and the incongruity of Maine's election laws with USPS delivery standards. At the end of the hearing, the Superior Court remarked that both witnesses were "very qualified." (9/22 Tr. at 104:1-4.) Neither the State nor the Intervenors presented any witnesses at the hearing.

On September 30, the Superior Court denied Plaintiffs' Motion for a Preliminary Injunction. Relevant to this appeal, the Superior Court held that the Election Day Receipt Deadline imposed a "modest burden" on the right to vote—a burden the Superior Court deemed to be outweighed by the State's interest in

“maintain[ing] voter confidence in the integrity and legitimacy of elections.” (A. 34, 36.) While the Superior Court generally noted that the Election Code “contains a number of time-sensitive activities that election officials must adhere to,” A. 35, it did not explain why an extension of the deadline to receive absentee ballots would jeopardize the State’s ability to certify results under those timelines. The Superior Court also held that the Secretary’s absentee ballot cure procedures provided adequate procedural due process. (A. 28-29.) The Court did not consider the Voters’ claim that the absentee ballot cure procedures imposed an undue burden on the right to vote. *See* A. 78-80 (complaint alleging cure procedures imposed undue burden on right to vote); *see also* A. 113-114 (motion addressing undue burden claim).

The Voters filed a timely notice of appeal with the Superior Court on September 30, 2020. The next day, they filed a motion to expedite the appeal, which this Court granted.

ISSUES PRESENTED FOR REVIEW

I. Whether the Superior Court erred in holding that the Election Day Receipt Deadline for absentee ballots did not impose unconstitutional burdens on voters.

II. Whether the Superior Court erred in holding that the Secretary’s absentee ballot cure procedures did not violate the fundamental right to vote and the right to procedural due process.

SUMMARY OF THE ARGUMENT

“There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot *counted*.” *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quotation marks omitted) (emphasis added). Simply put, the Superior Court gave too little weight to whether Mainers’ votes will be counted this November.

First, even if the Election Day Receipt Deadline may not impose unconstitutional burdens in other years, it does so this year when the State’s election officials are urging voters to vote by mail, when the statutory deadline to request absentee ballots encourages voters to request mail ballots that cannot be returned by mail by Election Day, when USPS is under severe strain, and when voting in person is not a safe alternative for many voters. Under these unique circumstances, numerous other courts have found that the burdens imposed by election day receipt deadlines are intolerable for the November election. This Court should find the same.

Second, Maine’s absentee ballot cure procedures fail to provide constitutionally sufficient protections. The current procedures do not ensure that all absentee voters will be notified before their ballots are challenged or rejected, nor do they provide all absentee voters a viable path to cure their ballot. The Voters’ proposed remedies—(1) allowing voters to cure their ballots via affidavit, and (2) allowing voters to cure their ballots, including challenged ballots, for a short period

after the election—are not novel. Indeed, even before the pandemic, courts have required states to take similar actions to ensure that their absentee voting systems comply with the Constitution. The pandemic has only made this relief more necessary.

STANDARD OF REVIEW

Although this Court generally reviews a decision to deny a motion for preliminary injunction for abuse of discretion, *see Dept. of Env'tl. Protec. v. Emerson*, 563 A.2d 762, 768 (Me. 1989), it reviews “questions of law, including alleged constitutional violations . . . de novo.” *In re G.W.*, 2014 ME 30, ¶ 6, 86 A.3d 1228 (quoting *In re Robert S.*, 2009 ME 18, ¶ 12, 966 A.2d 894); *see also Dubois v. Dep’t of Agric., Conservation & Forestry*, 2018 ME 68, ¶ 8, 185 A.3d 743 (“We review due process challenges de novo.”).

Balancing tests, such as those employed to determine whether there is an undue burden on the right to vote, or whether procedural due process has been satisfied, necessarily involve both questions of fact and questions of law. While subsidiary findings of fact should be reviewed for clear error, the ultimate determination “of the resultant burden” as slight, modest, severe, or otherwise “is not a factual finding, but a legal determination subject to de novo review.” *Ohio Democratic Party v. Husted*, 834 F.3d 620, 628 (6th Cir. 2016) (collecting cases). Similarly, the final determination of whether a law’s burdens are sufficiently

outweighed by the state’s interests in those laws is a legal determination subject to de novo review. *See, e.g., State v. Kent*, 2011 ME 42, ¶ 10, 15 A.3d 1286 (conducting a de novo inquiry for constitutional balancing test); *Doe v. Dep’t of Health & Human Servs.*, 2018 ME 164, 198 A.3d 782 (conducting a de novo inquiry on procedural due process claim).

ARGUMENT

I. The Election Day Receipt Deadline violates the fundamental right to vote in the upcoming November election.

The Maine Constitution extends the right to vote to any qualified elector, Me. Const. art. II, § 1, and the state permits any voter to vote absentee, 21-A M.R.S. § 751. Having given its citizens the right to vote absentee, the State must ensure that the rules for absentee voting comply with the Maine Constitution and the U.S. Constitution. *See Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 WL 4882696, at *8 (S.D. Ind. Aug. 20, 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018); *Doe v. Walker*, 746 F. Supp. 2d 667, 681 (D. Md. 2010).

The Voters’ undue burden claims are properly analyzed under the *Anderson-Burdick* balancing test.³ This test requires courts to “weigh ‘the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate’

³ While this Court has recognized the right to vote as fundamental, *see Melanson v. Sec’y of State*, 2004 ME 127, ¶ 14, 861 A.2d 641, it has not expressly adopted its own test for evaluating an undue burden on the right to vote under the Maine Constitution. Thus, the Superior Court relied on analogous federal standards.

against ‘the *precise* interests put forward by the State as justifications for the burden imposed by its rule,’” considering “‘the extent to which those interests make it *necessary* to burden the plaintiff’s rights.’” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983) (emphasis added)). A burden on the right to vote need not be insurmountable before it can be deemed severe. *See Perez-Guzman v. Gracia*, 346 F.3d 229, 241 (1st Cir. 2003). Laws imposing severe burdens on the right to vote “must be narrowly drawn to advance a state interest of compelling importance.” *Norman v. Reed*, 502 U.S. 279, 280 (1992). But even less severe burdens remain subject to balancing: “[h]owever slight” the burden on voting rights may appear, “it must be justified by relevant and legitimate state interests ‘*sufficiently weighty* to justify the limitation.’” *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quoting *Norman*, 502 U.S. at 288-89) (emphasis added). No such interests exist here to outweigh the severe, or at least significant, burdens on the right to vote.

The Superior Court first erred as a matter of law when it suggested the Election Day Receipt Deadline was a “policy choice” reserved to the Legislature that the Superior Court had no power to alter. (A. 35.) While many electoral regulations are initially legislative policy choices, those choices can become impermissible if they unduly burden the fundamental right to vote. *See Tashjian v. Republican Party*, 479 U.S. 208, 217 (1986) (explaining “[t]he power to regulate the time, place, and

manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote”). This Court regularly reviews electoral regulations that were once “policy choices” in the Legislature. *See Jones v. Sec’y of State*, 2020 ME 113, -- A.3d. --.

A. The Election Day Receipt Deadline imposes a severe, or at least significant, burden on the right to vote.

The Superior Court erred by giving too little weight to the disenfranchising effects of the Election Day Receipt Deadline. The Superior Court’s conclusion that the Deadline imposed only “modest” or “slight” burdens on voters, A. 34-35, is impossible to square with evidence before the Court that the Deadline is on track to disenfranchise, *at best*, nearly a thousand voters, and at worst, several thousand more. *See* Pl.’s Ex. 1 ¶ 233; A. 31 (“the Plaintiffs’ expert suggests somewhere in the area of 2400 or more, while the Defendants estimate 600-700”). The Superior Court appears to have assumed that because Maine won a preliminary injunction enjoining USPS from implementing new policies contributing to mail delays, *see* A. 33, these burdens on voters will not materialize.⁴ But Voters’ evidence proves otherwise. Dr. Herron’s estimate that at least 2,400 Mainers would be disenfranchised by the Deadline expressly did not account for new mail delays as a result of DeJoy’s new

⁴ For the reasons explained *supra* at 7-8, it is also far from clear the preliminary injunctions against USPS will offer any meaningful relief before the election.

policies. *See* Pl.’s Ex. 1 ¶¶ 224-241; 9/21 Tr. at 52:1-16, 54:2-10. New mail delays would only increase the number of Mainers who are disenfranchised.

But more importantly, a suspension of USPS’s new policies does not change the fact that an unprecedented number of Mainers will be voting by mail this election and that many will be unable to successfully do so even if they comply with the deadline for requesting absentee ballots, which is five days before the election, *see* 21-A M.R.S. § 753-A(2). To be clear, the Voters did not argue below, and do not argue now, that the state’s Election Day Receipt Deadline is unconstitutional *solely* because the state’s deadline to request absentee ballots does not align with USPS delivery standards. But voters should be entitled to rely on state deadlines, and it would be reasonable for a voter—especially a new mail voter—to assume they will be able to vote by mail if they comply with the state’s absentee ballot request deadline. As the unrefuted evidence in this case established, however, even voters who request an absentee ballot several days before the statutory deadline to do so will be at high risk of a late-arriving ballot. (9/21 Tr. at 186:5-189:7.) As Mr. Stroman explained, “Maine voters who request absentee ballots within 7-10 days of Election Day, which they are permitted to do under Maine law, are at very high risk of not having their ballots returned in time to be counted.” (A. 125 (explaining that, “even under the best of circumstances, it will take more than a week, on average, for an absentee ballot to be mailed by an election official, delivered to the voter by the

USPS, completed by the voter, and delivered by the USPS from the voter back to an election office”)).

Other courts examining similar statutory frameworks have been deeply troubled by these circumstances. Just two weeks ago, for example, a federal court examining the interaction of Wisconsin’s election day receipt deadline with its deadline for requesting absentee ballots concluded that the framework was likely to set a trap for voters, explaining:

[G]iven the sheer volume [of absentee ballots] expected this November, there remains little doubt that tens of thousands of seemingly prudent, if unwary, would-be voters will not request an absentee ballot far enough in advance to allow them to receive it, vote, and return it for receipt by mail before the election day deadline despite acting well in advance of the deadline for requiring a ballot. While the Legislature would opt to disregard the voting rights of these so-called procrastinators, Wisconsin’s election system sets them up for failure Moreover, it is particularly unreasonable to expect undecided voters to exercise their voting franchise by absentee ballot well before the end of the presidential campaign, especially when the Wisconsin’s statutory deadline is giving them a false sense of confidence in timely receipt.

Democratic Nat’l Comm., et al. v. Bostelmann, et al., No. 3:20-cv-00249, ECF No. 538 at 49-50 (W. D. Wis., Sept. 21, 2020). Notably, Maine and Wisconsin have the same deadline to request an absentee ballot: five days before Election Day.

In a normal, non-pandemic year, this deadline might not necessarily impose as significant a burden on the right to vote, because at least some voters who run out of time to return a ballot by mail would likely have the option of voting in person on Election Day. But this year, many voters reasonably see voting in person—where

they will likely be asked to stand in line with strangers and vote in an enclosed indoor space—as a serious health risk to themselves or their family. *See supra* at 3-4. Plaintiffs’ expert epidemiologist and the State agree: voting by mail is safer than returning a ballot in person or voting in person. *See* Pl.’s Ex. 6 (the Secretary explaining voters could “drop [their ballot] off with your town clerk, but the safest option is to affix postage and mail it back to your town clerk”); Pl.’s Ex. 34 ¶ 207 (Maine recognizing voting by mail is “the safest method for all voters”); Pl.’s Ex. 2 ¶¶ 25-26 (Dr. Millard recommending voting by mail to reduce virus transmission).

Faced with nearly identical circumstances—that is, (1) a substantial surge in voting by mail due to COVID-19, (2) a statutory deadline to request absentee ballots that is likely to frustrate many voters’ ability to return their ballots by mail and have them counted, and (3) a strained postal service that may not deliver ballots by Election Day—many courts have concluded the burdens on voters from election day receipt deadlines are either significant or severe, and ultimately, untenable for this election. *See Pa. Democratic Party et al. v. Boockvar, et al.*, No. 133-MM-2020 at 36-37 (Pa. Sept. 17, 2020) (enjoining Pennsylvania’s election day receipt deadline for this election and ordering officials to accept mail ballots received within three days of Election Day, recognizing the “unprecedented numbers” of absentee ballots, the fact that “the timeline built into the Election Code cannot be met by the USPS’s current delivery standards,” and concluding, “[w]hile [those deadlines] may be

feasible under normal conditions, it will unquestionably fail under the strain of COVID-19 and the 2020 Presidential Election, resulting in the disenfranchisement of voters”); *Mich. Alliance for Retired Americans et al. v. Benson, et al.*, No. 20-000108-MM at 10-11 (Mich. Ct. Cl. Sept. 18, 2020) (enjoining Michigan’s election day receipt deadline for this election and ordering officials to accept mail ballots received within fourteen days of Election Day, recognizing USPS has identified Michigan “as a state with statutes placing voters at a ‘high risk’ of disenfranchisement” and that “returning the ballot by mail is the only realistic option” for voters with underlying health risks); *Bostelmann*, No. 3:20-cv-00249, ECF No. 538 at 47-51 (enjoining Wisconsin’s election day receipt deadline for this election and ordering officials to accept mail ballots received within six days of Election Day, recognizing the significant risk that Wisconsin voters who make a good-faith effort to comply with the state’s absentee ballot deadlines will find themselves disenfranchised); *Common Cause of Ind. et al. v. Lawson, et al.*, No. 1:20-cv-02007, ECF No. 29 at 31 (S.D. Ind. Sept. 29, 2020) (enjoining Indiana’s election day receipt deadline for this election and ordering officials to accept mail ballots received within ten days of Election Day, recognizing voters are likely to be disenfranchised “despite complying with the deadline imposed by Indiana law for requesting absentee ballots,” and finding a “very substantial” burden on the right to

vote).⁵ There is no reason to think that voters in all of these states are at great risk of being disenfranchised by their state’s election day receipt deadlines, but Mainers are not. Mainers are at risk too.

The Superior Court also erred as a matter of law when it concluded that “Maine’s Delivery Deadline was not the cause of any increased burden on the right to vote,” attributing the increased burden to COVID-19 and postal delays for which the State bears no responsibility. (A. 34.) While the State certainly bears no responsibility for either COVID-19 or the crisis at USPS, states are in fact responsible for ensuring that voters can access the franchise during this pandemic without unnecessary hardship. Indeed, even before the pandemic, courts recognized that when unexpected events (such as natural disasters) impede voters’ ability to access the franchise, state election laws must be adjusted accordingly, even though states do not cause hurricanes or floods. *See Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1259 (N.D. Fla. 2016) (enjoining Florida’s voter registration deadline after Hurricane Matthew made it more difficult for voters to register); *Ga. Coal. for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344 (S.D. Ga. 2016) (similar); *In re Gen. Election 1985*, 109 Pa. Commw. 604 (1987) (similar). Courts have applied the same reasoning since the pandemic began. *See, e.g., Bostelmann*,

⁵ Minnesota has also entered into a consent decree extending the deadline for November to avoid the disenfranchising effects of an Election Day deadline. *See LaRose v. Simon*, 62-CV-20-3149 (Minn. Dist. Ct. Aug. 3, 2020).

2020 WL 1638374, at *12 n.14 (“quickly dismiss[ing]” state’s argument that “the additional burdens placed on voters [were] due not to state action, but the COVID-19 pandemic itself,” and explaining that the state “cannot enforce laws that, even due to circumstances out of its control, impose unconstitutional burdens on voters”). The same is true here—it is the *enforcement* of the state law that is the legal cause of the Voters’ injuries, not the pandemic or postal delays.

The Superior Court’s insistence that “the Delivery Deadline has been in existence for many years and [] has never been viewed as imposing an unreasonable burden on the right to vote” is similarly misguided. (A. 34.) Laws imposing relatively modest burdens in normal circumstances do not necessarily impose the same burdens today. As the Massachusetts Supreme Judicial Court explained this year in considering a challenge to electoral regulations, “requirements that in ordinary times impose only modest burdens on [the electoral process] may significantly interfere with the fundamental right [to participate in the electoral process] in a time of pandemic.” *Goldstein v. Sec’y of Commonwealth*, 142 N.E.3d 560, 570 (Mass. 2020). Similarly, as other courts have said specifically in the context of election day receipt deadlines, “[w]hile this deadline has worked for the most part during a normal election cycle, the same statutory deadline is likely to disenfranchise a significant number of voters in the November election.” *Bostelmann*, No. 3:20-cv-00249 at 48.

B. The Election Day Receipt Deadline is not justified by any sufficiently weighty state interest.

While the Superior Court held that the state's interest in the "need to secure and maintain voter confidence in the integrity and legitimacy of elections" outweighed these burdens, *see* A. 36, those generalized, abstract interests are insufficient as a matter of law to justify the severe, or at least significant, burden the Deadline imposes on voters. *See Gracia*, 346 F.3d at 243-44 (accepting the legitimacy of a state interest, but explaining "we must nonetheless mull the extent to which that interest renders it *necessary* to burden [the Appellants'] rights so severely") (emphasis added).

Notably, the Superior Court did not make a factual finding that the State would be unable to meet its certification timelines if the ballot receipt deadline was extended by any amount of time. *See* A. 36 (failing to articulate any statutory deadlines that would be jeopardized by a modest extension of the ballot receipt deadline). In contrast, other courts that have denied relief on these claims have identified concrete obstacles under state law to granting relief. *See DCCC et al. v. Ziriox et al.*, No. 20-CV-211-JED-JFJ, ECF No. 56 at 19 (N.D. Ok. Sept. 17, 2020) (explaining that granting an extension of the deadline would "leave only 24 hours before new [elected officials] are seated").

While the Voters originally proposed a seven-day extension to receive absentee ballots based on USPS guidance regarding ballot transit times, *see* Pl.'s Ex.

22, the Voters also urge this Court to consider a shorter extension—such as two business days—if the Court finds that a shorter extension is necessary to permit the State to finish its post-election activities. A two-day extension fits neatly within the State’s existing post-election timelines, which contemplate that clerks will file their election returns with the Secretary by the end of the second day after the election.⁶

Even a modest two-day extension would enfranchise many more voters than the status quo. In the 2018 General Election, for example, a two-day extension would have captured 86% of ballots arriving after Election Day; in the July 2020 Primary, a two-day extension would have captured 72% of the ballots arriving after Election Day. *See* Pl.’s Ex. 1 ¶ 203; Pl.’s Ex. 32 ¶ 73.

Contrary to the Superior Court’s concerns, this Court would not be arbitrarily “imposing a deadline of its choosing” if it permitted ballots postmarked by Election Day to be counted if received within two days of Election Day. (A. 35.) Rather, this Court would be weighing what deadline is “necessary” to prevent an unconstitutional burden on the right to vote, as the *Anderson-Burdick* balancing test demands, *see Anderson*, 460 U.S. at 788-89, while affording due consideration to

⁶ The Secretary need not certify election results until 20 days after the election, *see* 21-A M.R.S. § 722, leaving more than three weeks after Election Day for the State to finish any count and run the ranked-choice voting process where applicable. Even if processing the ballots received during a modest two-day extension somehow unexpectedly caused clerks to file their election returns with the Secretary on the third day after the election, the State has not explained why such a slight delay would prevent it from meeting its certification timeline.

the State’s existing post-election timelines—which contemplate that clerks need not finalize ballot counts until two days after Election Day.

II. The Secretary has still not offered qualified voters a constitutionally adequate opportunity to fix problems with their absentee ballots before they are disenfranchised.

Despite the commendable strides the Secretary has made in response to this litigation to implement cure procedures for rejected ballots, the procedures still fall short—particularly for voters whose ballots arrive in the last days of the election, and for voters whose well-founded concerns with COVID exposure makes in-person visits to clerks’ offices unnecessarily risky. These procedures impose undue burdens on the rights to vote and to due process, particularly during an election featuring an unprecedented level of absentee voting in the midst of a pandemic.

Fortunately, several simple, modest additional procedural protections would ensure that eligible voters’ ballots are counted: giving voters an opportunity to cure their ballots for two days after Election Day, and permitting voters to cure a ballot by completing and submitting a simple cure affidavit. While the Secretary asserts justifications for the current cure procedures and for his failure to provide these additional procedural protections, those justifications are weak at best.

The Superior Court’s opinion—which improperly balances the factors considered in the procedural due process analysis and makes no mention at all of Plaintiffs’ claims based on the fundamental right to vote—is at odds with both the

largely undisputed record in this case and with the weight of relevant authority. Indeed, in just the last few months, courts across the country have required additional procedural protections, such as a post-election cure period, to remedy violations of the right to vote and the right to due process arising from inadequate cure procedures.⁷

A. Current absentee ballot cure procedures still significantly burden the right to vote and are not justified by any sufficiently weighty state interest.

The State's current cure procedures significantly burden the right to vote—particularly in an unprecedented election during a pandemic, in which tens of thousands of voters (if not hundreds of thousands of voters) will be navigating unfamiliar absentee voting procedures for the very first time.

The burdens of complying with the State's current cure procedures falls particularly heavily on voters whose ballots arrive on or near Election Day. Under the Secretary's latest guidance, voters are only given until 8:00 P.M. on Election

⁷ See, e.g., *Ariz. Democratic Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898 (D. Ariz. Sept. 10, 2020) (ordering election officials to provide voters with seven days after Election Day to cure absentee ballots with missing signatures); *League of Women Voters of N.J. et al. v. Tahesha Way*, No. 20-cv-05990, ECF No. 34 (E.D.N.J. June 17, 2020) (ordering election officials to allow voters to cure absentee ballots with missing or mismatched signatures for sixteen days after Election Day); *Self Advocacy Sols. N.D. v. Jaeger*, No. 3:20-CV-00071, 2020 WL 3068160 (D.N.D. June 5, 2020) (holding North Dakota's cure procedures violated due process and ordering election officials to allow voters six days after Election Day to cure their absentee ballot); *Frederick v. Lawson*, No. 1:19-cv-0959-SEB-MJD, 2020 WL 4882696 (S.D. Ind. Aug. 20, 2020) (permanently enjoining election officials from rejecting any absentee ballot because of perceived signature mismatch absent adequate notice and cure procedures to the affected voter); *League of Women Voters of the United States et al. v. Kosinski, et al.*, No. 1:20-cv-05238, ECF No. 37 (S.D.N.Y. Sept. 17, 2020) (consent decree requiring election officials to provide five days for voters to cure absentee ballot after voter is notified of the need to cure the ballot).

Day to cure their ballot. The Secretary imposes this requirement even though it is entirely foreseeable that certain voters whose ballots are rejected will not receive notice of the rejection until after the deadline has passed and that others who do receive notice will have limited time—in some cases, only a few hours—to cure their ballot. As the evidence demonstrates, tens of thousands of absentee ballots will not be received until the day before Election Day or on Election Day itself. *See* Pl.’s Ex. 32 ¶ 17 (showing clerks received over 20,000 mail ballots in the last two days of the July primary).

In practical terms, this means that voters whose ballots arrive on or near Election Day are at high risk of disenfranchisement. Election clerks—during what are likely to be the two busiest days of the year—must process incoming absentee ballots, determine which ballots are deficient, and then attempt to contact those voters before the polls close. Just a few days ago, the Secretary’s spokeswoman stated that this was yet “another reason that election officials are encouraging voters to complete and file their absentee ballots quickly, because depending on local staffing demands closer to Election Day, officials may not have time to contact absentee voters about errors.”⁸ Even assuming that a clerk successfully makes contact with the voter, these voters many only have hours to spring into action to

⁸ Scott Thistle, *Election Clerks will Process Absentee Ballots Early, but Won’t Count Votes until Polls Close*, LEWISTON SUN JOURNAL (Sept. 29, 2020), <https://www.sunjournal.com/2020/09/29/election-clerks-will-process-absentee-ballots-early-but-wont-count-votes-until-polls-close/>.

cure their ballot. These procedures—which will fail to give many voters a realistic chance to cure their ballots—impose a severe, or at least significant, burden on the right to vote. *See, e.g., Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (finding at least a serious burden on the right to vote when voters whose signatures were deemed a mismatch might not learn that their vote would be rejected until it was too late to cure).

The burdens of complying with the State’s current cure procedures also fall particularly heavily on voters who—despite pressing work, childcare, or family obligations, or a need to avoid indoor, in-person interactions during the pandemic—can only realistically cure their ballots by traveling in person to the clerk’s office during business hours. Under the Secretary’s guidance, voters whose ballots envelopes have missing signatures or have incomplete witness/aide certificates can cure their ballot only if (1) the voter or witness comes into the town office to sign the ballot in person, or (2) the voter requests a duplicate mail ballot, receives the ballot, completes it, and returns it by 8 P.M. on Election Day. *See supra* at 12-13. For all the reasons that absentee voters are voting absentee this year, including the pandemic, curing ballots in person will not be a realistic option for countless Mainers. *See, e.g., Kemp*, 341 F. Supp. at 1339 (explaining, even pre-pandemic, that an in-person cure for absentee ballots is insufficient because “there is a category of absentee voters who vote by mail because they physically cannot show up in

person”). And as discussed above, given the realities of postal delivery timelines, a voter whose ballot is rejected even a full week before Election Day cannot count on receiving a duplicate ballot in the mail in time to return it by 8:00 P.M. on Election Day. *See* 9/21 Tr. at 62:19-63:13.

Measured against these burdens on the right to vote, the Secretary’s asserted justifications for the current cure procedures—in particular, the Secretary’s failure to provide *any* post-election opportunity to cure or any option to cure a ballot by completing and submitting a simple affidavit—are weak. While the Secretary and the Superior Court assert that the State has a strong interest in its Election Day deadline, a post-election cure period does not implicate that interest; by definition, voters cannot cure a ballot that was not received by the Election Day deadline, because it is already rejected as late.⁹ While the Secretary also suggests that a post-election cure period would imperil post-election timelines, a two-day post-election cure period fits neatly within those timelines, which contemplate that clerks will file a copy of their election returns by the end of the second day after the election. *See* 21-A M.R.S. § 712.

Nor can the Secretary credibly argue that the number of ballots rejected for curable defects is so small as to be of negligible constitutional significance, while

⁹ The same would be true if the Court also granted a two-day extension of the ballot receipt deadline for ballots postmarked on or before Election Day; a voter could not cure a ballot postmarked after Election Day because it would already be rejected as late.

simultaneously contending that affording a modest, two-day extension of the deadline to cure would put an intolerable strain on the system. Indeed, courts have repeatedly rejected this argument. *See, e.g., Hobbs*, 2020 WL 5423898, at *8 (noting weak state interest where expanded post-election cure period would simply involve continuing to apply established cure procedures to limited subset of ballots); *Lee*, 915 F.3d at 1323 (finding that extending already existing cure procedures to a limited subset of voters did not meaningfully disrupt election administration).

Further, neither the Superior Court nor the Secretary has explained what reasons, if any, could justify failing to offer voters the ability to cure their ballots by turning in a simple form affidavit—as opposed to requiring them to request, receive, and return a duplicate ballot, or to travel to the clerk’s office and interact in-person with election officials in order to sign the ballot envelope or aide/witness certificate. Indeed, the Secretary allows voters to register to vote and request an absentee ballot by completing and turning in a form. Moreover, because the form affidavit would contain the voter’s signature, it would facilitate the exact same signature-matching identity verification process as a signed ballot envelope. A form affidavit also affords notable advantages over the existing cure process: unlike a duplicate absentee ballot, the Secretary could make a form affidavit available online for voters to download, complete, and return without having to wait for a duplicate ballot to arrive, and civic organizations could assist voters with the cure process by delivering

them a form affidavit and returning it to the clerk's office on the voter's behalf (just as they do with voter registration applications and absentee ballot applications).

B. Current absentee ballot cure procedures still fail to comply with the right to procedural due process.

For the same reasons, the Secretary's current procedures do not comply with the right to procedural due process. The Due Process rights protected by the U.S. and Maine Constitutions are coextensive, *see MSAD 6 Bd. of Directors v. Town of Frye Island*, 2020 ME 45, ¶ 36, 229 A.3d 514, and protect the right to vote, *see Doe v. Rowe*, 156 F. Supp. 2d 35, 48 (D. Me. 2011). To determine whether the Secretary has provided constitutionally adequate process, this Court must weigh "(1) Plaintiffs' interest in participating in the democratic process through voting; (2) the risk of erroneous deprivation of the right to vote under the procedures used by the State; and (3) the State's interest, including any extra administrative or financial burden on the State from requiring additional procedures." *Doe*, 156 F. Supp. 2d at 48 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Each of these factors makes clear that the Secretary's current procedures fail to provide adequate process to ensure that voters are not disenfranchised.

First, voting is a fundamental right, and the right to vote necessarily includes the right to have one's legitimately cast vote counted. *See, e.g., Hobbs*, 2020 WL 5423898, at *12-13. This right applies equally to voting absentee: having induced voters to vote by absentee ballot, the State must provide adequate process to ensure

that their ballots are fairly considered and, if eligible, counted. *See, e.g., Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018).

Second, the risk of erroneous deprivation is high. Most troublingly, the 8:00 P.M. cure deadline makes it difficult or impossible for clerks to provide any notice and opportunity to cure prior to the deadline for many voters whose ballots arrive near Election Day. Indeed, the right to notice and an opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.” *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (citation omitted). That is, notice “must be granted at a time when the deprivation can still be prevented.” *Id.* at 81. Similarly, the *de facto* requirement that voters whose ballots are rejected on or near Election Day must cure their ballot in-person at the clerk’s office makes the opportunity to cure far less meaningful—particularly for voters for whom avoiding exposure to COVID was the purpose of voting by mail in the first place.

The probable value of the additional procedural safeguard of a post-Election Day cure opportunity is clear: voters would have more time to cure deficiencies and have their votes counted. Similarly, the option of a cure affidavit would make a remote or socially distanced cure process feasible for voters whose ballots are rejected in the days leading up to an election.¹⁰

¹⁰ These are not the only interests served by these additional procedural protections. As other courts have recognized, providing additional opportunities for voters to cure rejected ballots also advances the State’s interest in election integrity by confirming the validity of legitimate voters’ ballots. *Self Advocacy Sol. N.D.*,

In justifying the lack of a post-Election Day cure opportunity, the Superior Court made an unsupported distinction between a ballot rejected because of a perceived mismatched signature and a ballot rejected because of a missing signature. The Superior Court incorrectly suggests that the latter is not an “erroneous” deprivation because it does not depend on a clerk’s subjective opinion that a signature does not match. (A. 29.) But the Superior Court has it backwards: the erroneous deprivation at issue is that a voter’s timely received ballot is not counted, *even though the voter is a qualified elector*. A signature on an absentee ballot envelope is not a voter qualification; it is a means of identity verification. As a result, for purposes of evaluating the importance of the right at stake and the process due, there is no meaningful difference between an unsigned ballot envelope and one with a perceived mismatched signature: in both scenarios the voter’s identity cannot be verified. The Secretary apparently suggests, and the Superior Court agrees, that it is appropriate to afford different procedural protections—such as the ability to cure by phone—based on the distinction between a missing signature and signature mismatch. (A. 29.) If true, this only heightens the need for *additional* procedural protections to ensure that all voters have an equally meaningful opportunity to cure ballots that are missing signatures. Indeed, voters who inadvertently neglect to sign

2020 WL 2951012, at *9-10; *Fla. Democratic Party v. Detzner*, No. 4:16-cv-607-MW/CAS, 2016 WL 6090943, at *7 (N.D. Fla. Oct. 16, 2016).

the absentee ballot envelope are no less qualified to vote than any other citizen, and are no less worthy of fair and adequate process.

Finally, for all the same reasons discussed *supra* at 33-34, the State's interest in denying absentee voters a two-day post-election cure period and the option of a cure affidavit is weak or nonexistent.

C. A “challenged” ballot is not the same as a cured ballot, and the Secretary’s current procedures do not afford sufficient procedural protections to voters whose absentee ballots are challenged.

Both the Superior Court and the Secretary incorrectly assume that counting a ballot with a mismatched or missing signature as a “challenged” ballot provides sufficient procedural protections to justify the Secretary’s failure to provide a post-Election Day cure opportunity or cure affidavit option. *See* A. 28. According to the Superior Court and the Secretary, because a voter can convert their missing-signature ballot into a challenged ballot over the phone, there is no need for additional procedural protections to enable voters to cure their ballots, since the challenged ballot is counted the same as a regular (cured) ballot. *See id.*

In fact, the opposite is true. As the Superior Court acknowledges, the right at stake is “the right to vote and to have one’s vote *counted*[.]” (A. 29 (emphasis added)). But a challenged ballot, by definition, does not afford voters that protection: a challenged ballot is counted *only if* it does not affect the result of the election. *See* 21-A M.R.S. § 696(1). Put another way, if a voter’s challenged ballot matters to the

outcome of the election, there is no guarantee that the vote will actually count. Indeed, Maine law sets forth no clear guidance regarding the circumstances under which a ballot that is challenged based on a mismatched or missing signature or issue with the aide/witness affidavit would be ever be determined to be valid and counted if the ballot would make a difference to the outcome of the election. Whatever can be said of this procedure, it is plainly not sufficient to protect voters' constitutionally protected interests in having their votes counted.

For these reasons, the Secretary's current procedures fail to offer sufficient procedural protections to voters whose ballots are considered "challenged," in addition to those whose ballots are outright rejected. At a minimum, this Court should clarify that voters whose ballots are challenged based on a mismatched signature, missing signature, or issue with the aide/witness affidavit are permitted to submit cure information to their town clerks at least up to the deadline for filing a recount—five business days after Election Day. *See* 21-A M.R.S. § 737-A.

Clarifying that voters may cure challenged ballots up to the deadline for filing a recount would have the clear benefit of providing those voters more time to cure deficiencies and have their votes counted. But it would also serve the state interest in ensuring that election results are finalized in a timely fashion and without the unnecessary involvement of this Court. If more challenged ballots are cured before a recount begins, it becomes less likely that challenged ballots will make the

difference in a disputed election, and less likely that this Court will have to determine the validity of those challenged ballots in an appeal. *See* 21-A M.R.S. § 737-A.

Nor would permitting voters to cure their challenged absentee ballots until the deadline for filing a recount impinge upon any state interest. Most significantly, challenged ballots are already included in the copy of the election returns submitted to the Secretary on the second day after Election Day. As a result, curing challenged ballots after Election Day would not cause any of these election returns to change, or require the Secretary to do anything differently in the tabulation process.

III. The remaining factors weigh in favor of a preliminary injunction.

The remaining preliminary injunction factors tip sharply in the Voters' favor. When "constitutional rights are threatened or impaired, irreparable injury is presumed." *Husted*, 697 F.3d at 436; *see also Elrod v. Burns*, 427 U.S. 347, 373 (1976). Once the election comes and goes, "there can be no do-over and no redress." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014). Moreover, the irreparable harm that voters will suffer without an injunction outweighs any harm to the State in abiding by the basic constitutional protections.

CONCLUSION

The Voters respectfully request this Court reverse the Superior Court's Order and afford voters adequate relief to protect their fundamental right to vote.

Matthew S. Warner, Bar No. 4823

Attorney for Appellants

Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
mwarner@preti.com

October 5, 2020

CERTIFICATE OF SERVICE

I certify that on October 5, 2020, this document was filed with the Court by hand delivery and e-mail, and was mailed and e-mailed to Thomas Knowlton, Esq. and Phyllis Gardiner, Esq., attorneys for the State, and Patrick Strawbridge, Esq., attorney for the Intervenors.

Matthew S. Warner, Bar No. 4823
Attorney for Appellants

Preti Flaherty Beliveau & Pachios LLP
One City Center
P.O. Box 9546
Portland, ME 04112-9546
Telephone: (207) 791-3000
mwarner@preti.com