STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN-20-262

ALLIANCE FOR RETIRED AMERICANS, et al.

Appellants-Plaintiffs

v.

MATTHEW DUNLAP, MAINE SECRETARY OF STATE and
AARON M. FREY, MAINE ATTORNEY GENERAL, in their official capacities

Appellees-Defendants

and

DONALD J. TRUMP FOR PRESIDENT, INC., et al.

Appellees-Intervenors-Defendants

ON APPEAL FROM KENNEBEC COUNTY SUPERIOR COURT

BRIEF OF APPELLEES-DEFENDANTS MATTHEW DUNLAP AND AARON FREY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

INTRODUCTION

Maine offers one of the most dynamic and forgiving voting systems in the country. After registering to vote at any time until and including Election Day, Mainers may vote in person at their polling place on Election Day or can utilize no-excuse absentee voting.

The entire absentee ballot voting process can be completed by mail or in the presence of a clerk. Alternatively, a voter may choose to hand-deliver their completed absentee ballot or arrange for a family member or designated third person to do so. In many municipalities, hand-delivery involves simply placing the absentee ballot envelope into a secure drop box on the outside of a municipal office building.

To ensure as many Mainers are able to vote as possible, the Secretary of State has instructed local election officials to give voters an opportunity to correct any curable defects in absentee ballots. Specifically, if a correctable defect on an absentee ballot envelope is apparent, local officials have been instructed to notify the voter and provide an opportunity to either (a) cure the defect or (b) have the ballot marked as "challenged" (and counted the same as a regular ballot, pending further proceedings per 21-A M.R.S.A. § 696), rather than rejected.

After a full-day evidentiary hearing on September 21, 2020, and three hours of closing arguments the following day, the Superior Court (*Stokes, J*.) denied Plaintiffs' Motion for a Preliminary Injunction (PI Motion). In a thorough, 28-page decision, the trial court held that Plaintiffs were not likely to succeed on the merits of any of their claims because the potential "harm to the State's electoral process" posed by the extraordinary relief Plaintiffs sought "outweigh[ed] the minor burdens imposed by those laws on the right to vote." Appendix ("A-") 37.

The trial court did not abuse its discretion in declining to enter an injunction. The few statutory restrictions that exist in Maine election law do not unduly burden the franchise or violate any of the Plaintiffs' constitutional rights, but rather work in concert with Maine's otherwise generous election laws to ensure that the upcoming election is orderly, secure, administrable, and trusted by the public. This Court should affirm the Superior Court's decision.

STATEMENT OF THE CASE

Complaint. Plaintiffs filed their complaint in this matter on June 24, 2020. A-38-93. There are four named Plaintiffs: Alliance for Retired Americans, a non-profit social welfare organization; two individual voters, Doug Born and Don Berry; and Vote.org, a non-partisan voter registration organization. Plaintiffs filed suit against Secretary of State Matthew Dunlap and Attorney

General Aaron Frey, alleging that several Maine statutes and rules violate the First and Fourteenth Amendments to the United States Constitution, both facially and as applied to them in the upcoming November general election. A-7, A-41, A-74-88. They sought declaratory and injunctive relief from the Superior Court, including a mandatory injunction. A-89-92. Four organizations associated with the Republican Party and Trump Campaign were granted leave to intervene as Defendants. A-5.

On appeal, Plaintiffs are pressing only two of their numerous claims.

First, Plaintiffs challenge Maine's Election Day absentee ballot receipt deadline. To be counted, an absentee ballot must be delivered to the municipal clerk before 8 p.m. on Election Day. *See* 21-A M.R.S.A. §§ 626(2) & 755. Plaintiffs contend that Section 755 violates the First and Fourteenth Amendments and asked the Superior Court to order that absentee ballots be treated as valid even if not received by municipal clerks until seven days after Election Day.[1] A-30 (noting that Plaintiffs prefer at least seven days "but they have essentially left the number of days up to the court").

[1] Plaintiffs' request on this point has been a moving target. *Compare* Blue Br. 1 ("Ballots that arrive up to two days after Election Day should be counted.") *with* A-91-92 (Complaint) (enjoin defendants from rejecting "ballots that are postmarked on or before Election Day and arrive at the election office within a minimum of ten days after Election Day; ballots that do not have a postmark or other marking from the USPS but arrive within such timeframe shall be presumed to have been mailed by Election Day") *and* Tr. II at 34 ("We're asking for a modest extension of the deadline…. We are not wedded to eight days, seven days….").

Second, Plaintiffs take issue with the lack of a statutory requirement that election officials inform voters of defects in their absentee ballots—e.g., failure to sign a ballot or a signature mismatch, *see* 21-A M.R.S.A. §§ 756(2), 759 & 762—and permit them to be corrected. While the Secretary of State has instructed municipal election officials to provide notice and an opportunity to cure (as discussed below), Plaintiffs nonetheless still contend that the governing statutes, in concert with the Secretary's guidance, violate their right to vote under the First and Fourteenth Amendments, as well as their procedural due process rights under the Fourteenth Amendment.

PI Motion and Evidentiary Hearing. Plaintiffs waited until August 7, 2020, less than three months before Election Day, to file their PI Motion. A-94. Defendants and Intervenors opposed the PI Motion. A-6. The Superior Court held an evidentiary hearing on the PI Motion on September 21, 2020. A-7. At the hearing, Plaintiffs called two witnesses, Michael Herron, PhD., a professor of government at Dartmouth College ("Prof. Herron"), and Ronald Stroman, former Deputy Postmaster General of the United States Postal Service (USPS). Tr. I at 29, 168. The Court also admitted into evidence numerous exhibits from Plaintiffs, Defendants, and Intervenors. The evidence adduced at the PI Motion hearing and the applicable Maine election statutes demonstrate the following.

Maine voters have numerous ways to vote. After registering at any time up to and including Election Day, Mainers can, as usual, choose to vote in person at their polling place on Election Day. Numerous precautions—including the provision of personal protective equipment, plexiglass shields, and hand sanitizer; socially-distanced voting booths; and occupancy limits—have been instituted to protect the safety of voters and poll-workers. A-135-36; Def. Exs. 1 & 2. Using similar precautions and without any known adverse health effects, the statewide primary election was conducted successfully on July 14, 2020. A-136.

Maine is also one of many states that permit no-excuse absentee voting, and in an extremely flexible form. A-141-42. The entire absentee ballot voting process can be completed by mail if the voter so chooses, or a voter can opt to hand-deliver their absentee ballot themselves or via a family member or designated third person, which in many municipalities requires no more than placing the ballot into a secure outdoor drop box. A-141-42; A-153-54 ¶ 7. Registered voters can also vote by absentee ballot in the presence of the clerk at their local town office until the close of business on Friday, October 30. A-141 ¶ 25; Def. Ex. 4 ¶ I(F)(3).

According to Maine CDC Director Dr. Nirav Shah, voting in person and delivering an absentee ballot to a clerk's office remain viable alternatives to

voting by mail in the upcoming general election. Def. Ex. 5 ¶¶ 24, 26. Even for voters who are immuno-compromised, options like delivering an absentee ballot to a drop box ensure that multiple methods of voting that entail little-to-no COVID-19 exposure risk are available to all voters. Def. Ex. 5 ¶ 28.

Election Day Deadline. "In order to be valid, an absentee ballot must be delivered to the municipal clerk at any time before the polls are closed." 21-A M.R.S.A. § 755. Pursuant to 21-A M.R.S.A. § 626(2), the "polls must be closed at 8 p.m. on election day." Thus, the Legislature has determined that absentee ballots must be received by the municipal clerk by no later than 8 p.m. on Election Day to be counted.

Plaintiffs offered no evidence that either individual plaintiff had ever had an absentee ballot delivered after Election Day or rejected for any reason at all. In fact, during the July 2020 primary, just 271 ballots – less than 0.25% of all 111,410 mailed-in absentee ballots– were rejected as late-arriving. A-155, column B, line 1 & column D, line 24. If the same percentage of voters vote absentee and return their ballots by mail during the November general election, and the same percentage of ballots are rejected as late, then roughly only 600-

700 absentee ballots will be rejected for having been received after Election Day.[2]

USPS. According to former Deputy Postmaster General Stroman, USPS standards call for first-class mail to be delivered in state within 2-5 days, and it maintains a target of 96% on-time delivery. Tr. I at 183-84. In 2018, the processing and delivery center in Southern Maine had a 99% on-time delivery score for the midterm and special elections. Tr. I at 207. Although Mr. Stroman testified about issues at USPS that have delayed the delivery of mail generally, he did not testify, nor was there evidence in the record credited by the court, regarding any Maine-specific USPS delays or processing issues in 2020. Tr. I at 207-08.

Mr. Stroman also testified – both in this case and in a recent case in federal district court in Oklahoma – that the USPS sometimes does not place a postmark on election mail in states like Maine that do not depend on a postmark for their election mail. Tr. I at 196-98. In the Oklahoma case, he explained that "in an effort to help some states, we skip the processing step – we'll get a postmark if you need a postmark … [but] if you don't need a

[2] This estimate assumes that approximately 772,000 voters participate in the November 2020 election (the same as in the 2016 presidential election, *see* A-150, column D, lines 6 & 8), and that 35% of those voters vote absentee using the mail, as they did in July 2020, with the same rejection rate of 0.24% (*see* A-155; A-146 ¶ 44).

postmark … we skip the processing step and go right to the board of election." *DCCC v. Ziriax*, No. 20-CV-211-JED-JFJ, 2020 WL 5569576 (N.D. Okla. Sept. 17, 2020). Mr. Stroman confirmed that election officials would not immediately be able to tell when an absentee ballot was mailed if the envelope lacked a postmark. Tr. I at 198.

Nonetheless, given reports of USPS delays, the Secretary of State has echoed federal officials in frequently communicating the importance of returning ballots long before election day. Def. Ex. 13. Local election officials have likewise worked to ensure that their voters return their ballots early and are well-informed amount of postage necessary for delivery. Def. Exs. 1 & 2. Further, in August 2020, Maine filed a lawsuit to reverse recent slowdowns in USPS mail processing and delivery. *See Commonwealth v. DeJoy*, No. 20-4096, 2020 WL 5763553 (E.D. Pa. Sept. 28, 2020). In that case, as in other cases that have recently been brought against the USPS, the federal district court issued nationwide injunctions against USPS, Postmaster General DeJoy, and President Trump, prohibiting them from enforcing policy changes that were announced in July 2020 that slowed delivery of mail, and requiring that election mail continue to be prioritized as First-Class mail. *See id.* at *44; *see also id.* ECF No. 63.

Election Timeline. Part of the rationale for the Election Day receipt deadline is accommodating the host of statutory and administrative deadlines that turn on it, from when ballots must be designed, printed, and distributed, to when outcomes must be finalized and reviewed. The cutoff for voting guarantees sufficient time for local and state election officials to: (1) count ballots in each municipality and submit official returns to the Secretary of State; (2) aggregate those results from 500 local jurisdictions; (3) gather ballots from multiple jurisdictions in order to perform the ranked-choice tabulations for federal offices; (4) conduct recounts in close races pursuant to 21-A M.R.S.A. § 737-A; and (5) finalize the tabulation and certify results before elected officials take office, be they local councilmembers, state legislators or members of Maine's Congressional delegation. A-147-49; Def. Exs. 1 & 2. The incoming legislators must be summoned by the Governor no less than seven days before the new Legislature convenes, on December 2, 2020 – a date set forth in the Maine Constitution, art. IV, pt. 3, § 1, and only a month after Election Day. Local officials also must take office in November and December, pursuant to local charters or ordinances. Def. Exs. 1 & 2.

Notice of defects and opportunity to cure. When the municipal clerk receives an absentee ballot, the clerk is required to make sure that the absentee ballot envelope is signed by the voter and to compare the signature on the

absentee ballot application to the signature on the corresponding return envelope. 21-A M.R.S.A. § 756(2).

The Secretary of State issued instructions to municipal election officials regarding these issues before the July primary and has clarified and improved them for the upcoming general election. *See* Plaintiffs' Ex. 38; A-143–44; A-157-59. They now provide clear direction to local officials regarding their obligation to make a good-faith effort to contact the voter when a correctable defect is observed; how each type of defect may be corrected; and when a ballot should be challenged rather than rejected. A-157-59. Challenged ballots are counted just like any other valid vote, pending further proceedings that are only necessary where the vote at issue may be outcome determinative. *See* 21-A M.R.S.A. § 696(1). A-157-59.

Data from recent elections shows that any burden imposed by Maine's signature requirement has been at most *de minimis*, even before the Secretary provided the new instructions to local election officials. For the July 14, 2020 primary election, 911 absentee ballots were rejected because the voters had not signed their envelopes, and a total of just nine absentee ballots were rejected for signature mismatch. A-145 ¶ 37; A-155, column B, lines 20 & 26. Rejection rates were similarly low during the 2016 and 2018 general elections. *See* A-150, line 20; A-151, line 26.

Superior Court Decision. In a Decision on Motion for Preliminary Injunction dated September 28, 2020, the trial court denied the Plaintiffs' PI Motion. The trial court held that Plaintiffs were not likely to succeed on the merits of any of their claims and that their request for an injunction did not pass muster under any of the equitable factors. A-14-37.

Election Day Deadline. Based on the evidence presented at the hearing, the trial court found that the Election Day receipt imposed only a "slight" or "modest" burden on the right to vote. A-34-35. The court agreed with Plaintiffs that "COVID-19 and the issues with the Postal Service have complicated voting in the year 2020," but it nonetheless was "not convinced … that Maine's Delivery Deadline [was] the cause of any increased burden on the right to vote." A-32.[3]

Further, in light of the important governmental interests implicated by 21-A M.R.S.A. § 755, the trial court held that the Election Day deadline did not violate Plaintiffs' First or Fourteenth Amendment rights. A-34-35. In reaching its decision, the court cited the numerous ways in which Maine voters can successfully and safely cast a ballot; the fact that Maine conducted a successful

[3] Plaintiffs rely on Prof. Herron's testimony to claim that "at least 2,300 voters" absentee ballots will be rejected due to lateness in the upcoming general election, and that "voters who are relatively inexperienced at voting absentee are particularly likely to have a missing signature on their ballot." *See* Blue Br. 10. But the trial court did not credit this testimony.

primary and March; that Maine had among the lowest COVID-19 death and positivity rates in the nation; and Maine's recent success in litigation against USPS. A-33-34. It also noted that its decision was consistent with that of other courts that had recently addressed this issue, including the Michigan Court of Appeals and the federal district court for the District of Oklahoma. *See League of Women Voters of Mich. v. Sec'y of State,* No. 353654, 2020 WL 3980216 (Mich. Ct. App. July 14, 2020); *Ziriax*, 2020 WL 5569576.

The trial court also emphasized that the Legislature, not the court, has been given the constitutional authority to regulate the time, place, and manner of elections. A-15. It determined that "unilaterally discard[ing] the statutory deadline and impos[ing] a deadline of its own choosing, would amount to a judicial re-writing of the election laws." A-35.

Finally, the trial court found that "judicial modification of the deadline risks severe disruption of Maine's electoral process." A-35. It observed that Section 755 "does not exist in a vacuum," but rather "is part of Maine's comprehensive Election Code that contains a number of time-sensitive activities that elections officials must adhere to in order to make sure that the winners in an election are declared in a timely fashion and are seated." A-35. The court likewise made clear that the Election Day receipt deadline also served the "important state interest" of "secur[ing] and maintain[ing] voter confidence

in the integrity and legitimacy of elections," which judicial modification of the deadline "risk[ed] undermining." A-36.

Notice of defect and opportunity to cure. The Superior Court also rejected Plaintiffs' claim that their procedural due process rights were violated by the process afforded to absentee voters who submit defective envelopes. A-29. The court explained that:

> The instructions embodied in Defendants' Exhibit 17 provide detailed, step-by-step procedures for local election officials in the following situations: (a) mismatched signatures; (b) missing voter signature; and (c) defective aide or witness certificate that is incomplete or incorrect.

A-26. The trial court further found that "the Secretary's process emphasizes the need to notify a voter of a defect 'as quickly as possible,' and the instructions provide a variety of ways a defect can be cured."[4] A-28. The trial court then balanced the factors under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976), and it concluded that "the Secretary's notification and opportunity to cure procedure as detailed in Defendants' Exhibit 17 provides adequate and appropriate process under the circumstances." A-28-29.

Irreparable harm, balancing the harms, and the public interest. The trial court found that Plaintiffs would not suffer irreparable injury if an injunction is

[4] As the court noted, the Secretary's on-line tracking system will allow voters who choose to take advantage of absentee voting to follow the journey of their ballot to its delivery and receipt by the clerk. A-28; A-154 ¶ 8.

not granted, and that "the harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote." A-37. The court further found that "it would not be in the public interest to grant" the injunctive relief requested by Plaintiffs. A-36-37.

Plaintiffs filed a notice of appeal and a motion to expedite the appeal.

ISSUES PRESENTED FOR REVIEW

I. Whether the trial court properly held that Plaintiffs have not demonstrated that they have a clear likelihood of success on the merits of their claims.

II. Whether the trial court's finding that Plaintiffs would not likely suffer irreparable harm without an injunction was supported by the record and not clearly erroneous.

III. Whether the trial court's finding that "the harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote" was supported by the record and not clearly erroneous.

IV. Whether the trial court's finding that "it would not be in the public interest to grant" the requested injunctive relief was supported by the record and not clearly erroneous.

ARGUMENT

Standards of Review:

An injunction is "an extraordinary remedy only to be granted with utmost caution when justice urgently demands it and the remedies at law fail to meet the requirements of the case." *Saga Commc'ns of New England, Inc. v. Voornas*,

2000 ME 156, ¶ 19, 756 A.2d 954 (quoting A.H. Horton & P.L. McGehee, Maine Civil Remedies § 5.1, at 5-2–5-3 (1991)). A party seeking a preliminary injunction must prove that (1) it has a least a substantial likelihood of success on the merits; (2) it will suffer irreparable injury if the injunction is not granted; (3) such injury outweighs any harm that granting the injunctive relief would inflict on the other party; and (4) the public interest will not be adversely affected by granting the injunction. *Dep't. of Envtl. Prot. v. Emerson*, 562 A.2d 762, 768 (Me. 1989); *Ingraham v. Univ. of Me. at Orono*, 441 A.2d 691, 693 (Me. 1982). "Because the requested preliminary injunction ha[s] mandatory aspects, the [plaintiffs] ha[ve] to show a clear likelihood of success on the merits, not just a reasonable likelihood." *Emerson,* 563 A.2d at 768. "Failure to demonstrate that any one of the criteria is met requires that injunctive relief be denied." *Bangor Historic Track v. Dept. of Agric.*, 2003 ME 40, ¶ 10, 837 A.2d 129.

The appellate standard of review of a trial court's denial of a motion for preliminary injunction is deferential. Because injunctive relief is an equitable remedy, this Court reviews the Superior Court's decision denying the PI Motion for abuse of discretion. *See Bangor Historic Track*, 2003 ME 40, ¶ 11, 837 A.2d 129. A "Superior Court's denial of the mandatory preliminary injunction requested by appellants must stand unless plainly wrong or based on an error of law." *Crafts v. Quinn*, 482 A.2d 825, 830 (Me. 1984).

"Fact-finding that is a prerequisite for judicial action, such as a finding of irreparable injury, or lack thereof, is reviewed for clear error." *Bangor Historic Track*, 2003 ME 40, ¶ 11, 837 A.2d 129. The trial court's assessment of the extent of any burden on Plaintiffs' First Amendment rights is based in large part on its factual determinations, *see Jones v. Sec'y of State*, 2020 ME 113, ¶ 27 ("[T]he determination of the extent of an election regulation's burden on First Amendment rights is fact-intensive"), and therefore should also be reviewed for clear error. Further, "on review after a hearing in which the court has stated its findings, and there has been no motion for further findings, [this Court] infer[s] that the [lower] court found all the facts necessary to support its judgment if those inferred findings are supportable by evidence in the record." *Town of Glenburn v. Pinkham*, 2018 ME 145, ¶ 7, 195 A.3d 1226 (quoting *State v. Connor*, 2009 ME 91, ¶ 9, 977 A.2d 1003); *see Windham Land Trust v. Jeffords*, 2009 ME 29, ¶ 42, 967 A.2d 690 (same).

I. The trial court properly held that Plaintiffs have not demonstrated that they have a clear likelihood of success on the merits of any of their claims.

As the Supreme Court has long recognized, "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730 (1974). To achieve these objectives, states have enacted

"comprehensive, and in many respects complex, election codes" regulating the time, place, and manner of holding primary and general elections for state and federal offices, including with respect to the "registration and qualifications of voters." *Id.* Various provisions of state election laws will "inevitably affect[] - at least to some degree - the individual's right to vote and his [or her] right to associate with others for political ends. Nonetheless, the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

There is no "hard-and-fast rule" for evaluating the constitutionality of state laws regulating the election process. *Werme v. Merrill*, 84 F.3d 479, 483 (1st Cir. 1996). Instead, the Supreme Court of the United States (and this Court) have adopted a balancing test under which the degree of scrutiny depends on the severity of the burden imposed.[5] Under this *Anderson-Burdick* test, the Court should first should "consider the character and magnitude of the asserted injury" to First and Fourteenth Amendment rights asserted by Plaintiffs and "then evaluate the precise interests put forward by the State as justifications

[5] As made clear in briefing before the trial court, despite what amici claim, there is neither a constitutional nor a common-law basis for applying a novel "right to vote safely," particularly given not even Plaintiffs suggest that any deviation from traditional federal standards is appropriate. *See* Defs.' Mem. in Reply to Br. of Amici Curiae (Sept. 9, 2020).

for the burden imposed by its rule." *Id.* (quoting *Anderson*, 460 U.S. at 789); *see Me. Taxpayers Action Network v. Sec'y of State* (*"MTAN"*), 2002 ME 64, ¶ 20, 795 A.2d 75.

If the burden on First and Fourteenth Amendment rights imposed by the state's regulation is "severe," then the state must show that the regulation is "narrowly drawn to advance a state interest of compelling importance." *Burdick*, 504 U.S. at 434; *see Anderson*, 460 U.S. at 788-89. By contrast, when a state election law "imposes only reasonable, nondiscriminatory restrictions" on First and Fourteenth Amendment rights, "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434; *MTAN*, 2002 ME 64, ¶ 20**,** 795 A.2d 75. This lower level of scrutiny resembles the rational basis test under traditional Equal Protection analysis.

"[A]ll acts of the Legislature are presumed constitutional." *Bouchard v. Dept. of Public Safety*, 2015 ME 50, ¶ 8, 115 A.3d 92 (quoting *State v. Gilman*, 2010 ME 35, ¶ 13, 993 A.2d 14). "To prevail against the presumption that [a] statute is constitutional, … the parties challenging the statute[] must demonstrate convincingly that the statute and the Constitution conflict." *Godbout v. WLB Holding, Inc*., 2010 ME 46, ¶ 5, 997 A.2d 92. "[A]ll reasonable doubts must be resolved in favor of the constitutionality of the statute." *Id*.

A. The trial court did not clearly err in finding that Maine's Election Day receipt deadline imposes only a modest burden that is amply justified by the state's interest in conducting an orderly and legitimate election.

Under the Elections Clause of the United States Constitution, election regulation is the province of state legislatures. *See* Const. art. I, § 4 cl. 1; *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). Voting deadlines are a central aspect of such regulation, the heart of a system designed to "keep the democratic process from disintegrating into chaos." *Perez-Guzman v. Gracia*, 346 F.3d 229, 238 (1st Cir. 2003).

Maine's Election Day receipt deadline for absentee ballots is therefore both necessary and inevitable. *See League of Women Voters of Mich.*, 2020 WL 3980216, at *8 ("Obviously … there must be a deadline – at some point, the ballots must be counted and a winner declared."). While there are certainly "significant debate-worthy policy considerations" for state legislatures to consider when settling on the precise timing of that deadline, *Thomas v. Andino*, No. 3:20-cv-01552-JMC, 2020 WL 2617329, at *25 (D.S.C. May 25, 2020); *accord League of Women Voters of Mich.*, 2020 WL 3980216, at *19 ("What that deadline should be is a policy decision."), here the Legislature made a "perfectly sensible" choice when it required that absentee ballots arrive by Election Day, *see* A-35. *Cf. D.N.C. v. Bostelmann*, Nos. 20-2835 & 20-2844, 2020 WL 5951359,

at *2 (7th Cir. Oct. 8, 2020) (*per curiam*) ("Deciding how best to cope with difficulties caused by [the pandemic] is principally a task for the elected branches of government.").

1. Maine's Election Day receipt deadline imposes only a slight burden on voters.

The trial court did not clearly err when it determined that Maine's Election Day receipt deadline imposes no more than a "modest" or "slight" burden on the right to vote. A-34-35. *See Thomas*, 2020 WL 2617329, at *26 (absentee ballot receipt deadline "imposes only a minimal burden, if any"); *see also Grossman v. Sec'y of the Commonwealth*, 151 N.E.3d 429, 438 (Mass. 2020) (election day deadline entitled to only rational basis scrutiny).

As with any election regulation, it has long been the responsibility of voters to exercise judgment and forward planning to ensure compliance such that their votes are counted. *See* A-32. Adhering to Maine's Election Day receipt deadline is no different, nor is it a difficult task. Voters need only "take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting." *New Georgia Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *2 (11th Cir. Oct. 2, 2020) (Grant, C.J.); *see also Ziriax*, 2020 WL 5569576, at *18 ("An absentee voter is responsible for acting with sufficient time to ensure

timely delivery of her ballot, just as a voter intending to vote in-person must take appropriate precautions by heading to the polls … to account for traffic, weather, or other conditions ….”); *cf. Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) (voters not entitled to relief from “own failure to take timely steps to effect their enrollment”). Just as it falls on voters to leave sufficient time to reach the polls before they close, so too has it always been the obligation of voters returning their absentee ballots by mail to send them sufficiently early for them to arrive by Election Day. *See Bostelmann*, 2020 WL 5951359, at *2 (“[V]oters who wait until the last minute face problems with or without a pandemic.”).

Plaintiffs’ claim that voters are nonetheless “severely” burdened by the Election Day deadline is premised on testimony offered by Prof. Herron and Mr. Stroman that the trial court did not credit. *See, e.g.,* Blue Br. 9, 21-22 (Stroman testimony regarding risk of disenfranchisement from USPS delays); *see also id.* at 10, 20, 28 (Herron testimony and report concerning estimates of late ballots). That said, as the trial court found, any extant burden is substantially reduced by the ways in which Maine law empowers voters to minimize the risk of a late-arriving ballot. *See* A-21-22, A-34.

Mainers have been able to request absentee ballots since early August, and began receiving ballots in early October such that, consistent with guidance

from state and local officials, they have had ample time to return their ballots by mail, regardless of any USPS performance irregularities. *Thomas*, 2020 WL 2617329 at *26 n.26. Further, as the trial court noted, *see* A-33, Maine recently obtained a preliminary injunction in litigation against USPS, and while Plaintiffs contend that this injunction—and the three others that have been issued, *see DeJoy*, 2020 WL 5763553, at *44—are insufficient to address the performance issues Mr. Stroman identified, they have presented no evidence that suggests that USPS still remains unable to deliver ballots with sufficient speed.

Further, any burden imposed by Maine's Election Day receipt deadline is not tied to the performance of USPS. As the trial court explained, Maine law authorizes a host of ballot return options, from in-person drop-off in a secure drop box to third-party delivery, each of which is buttressed by "detailed guidance" developed with the Maine CDC to mitigate COVID-19 contraction risk. A-33-34. The availability and safety of these options underscore why the burden imposed on voters by the Election Day receipt deadline is no more than minimal. *See New Georgia Project,* 2020 WL 5877588, at *2 (reasoning that deadline "does not implicate the right to vote at all" given "numerous avenues to mitigate charges that voters will be unable to cast their ballots"); *Ziriax*, 2020 WL 5569576, at *8 ("In light of [the] available options, the receipt deadline constitutes no more than a minimal burden on voters"); *see also Bostelmann*,

2020 WL 5951359, at *2 (staying injunction where voters only needed to "plan[] ahead and tak[e] advantage of the opportunities allowed by state law").

The multiple methods for returning a ballot contemplated by Maine law, particularly in light of the trial court's findings that Maine (1) has among the lowest COVID-19 positivity and death rates in the nation, and (2) conducted a successful primary election in July, A-33, also render this case far different than those cited by Plaintiffs, *see* Blue Br. 23-24. The federal district court's decision in *Democratic National Committee v. Bostelmann*, for example, came on the heels of a disastrous primary and hinged on the state setting new COVID-19 case records; its history of trouble managing absentee ballot requests in a timely manner; its admission that the general election would pose similar difficulties; and a "near certainty" that tens of thousands of voters would be disenfranchised absent relief. *See* No. 3:20-cv-00249, 2020 WL 5627186, at *1, *9, *13, *20-21 (W.D. Wis., Sept. 21, 2020). Moreover, the Seventh Circuit recently stayed that injunction and expressed clear disagreement with the district court's decision. *See Bostelmann*, 2020 WL 5951359, at *1-3.

In *Pennsylvania Democratic Party v. Boockvar*, the Pennsylvania Supreme Court enjoined an absentee ballot deadline where third-party ballot delivery was forbidden; following a primary in which thousands of ballots were not even sent until the night of the primary; where processing delays were near-certain

to occur again; and after the state admitted that an extension was necessary and recommended the timeframe the court ultimately adopted. *See* No. 133 MM 2020, 2020 WL 5554644, at *3, *10-11, *18, *25 (Pa. Sept. 17, 2020).

In *Michigan Alliance for Retired Americans v. Benson*, the Michigan Court of Claims enjoined a deadline under the Michigan Constitution where third-party ballot delivery was substantially restricted, and after being presented with "uncontroverted data" of in-state mail delays and instances where primary election ballots did not arrive to voters until Election Day or later. *See* No. 20-000108-MM, Opinion and Order 3-4, 6, 10, 12, 21 (Mich. Ct. Cl. Sept. 18, 2020). Further, as the trial court observed, A-33, a contrary decision that upheld the absentee ballot receipt deadline was entered by the Michigan Supreme Court in *League of Women Voters*, *see* 2020 WL 3980216, before which an appeal from *Benson* is pending, *see* No. 354429, 2020 WL 5747093 (Mich. Ct, App. Sept. 25, 2020) (granting motion for immediate consideration).

Finally, in *Common Cause of Indiana v. Lawson*, the district court enjoined an Election Day receipt deadline in the context of a less-permissive absentee voting system based on "documented delays in the transmission of ballots to voters as well as from voters back to election officials"; evidence of thousands of ballots being rejected for lateness during the primary; and evidence of in-

state mail processing delays, all of which is absent here. *See* No. 1:20-cv-02007-SEB-TAB, 2020 WL 5798148, at *7-8, *14-16 (S.D. Ind. Sept. 29, 2020).

Plaintiffs also harp on an alleged incongruity between the absentee ballot request deadline—Thursday, October 29—and the timeframe identified by USPS for returning ballots. *See* Blue Br. 8. But far from burdening Maine voters, the expansive time frame for requesting an absentee ballot makes voting *easier*. Permitting voters to request an absentee ballot until a few days before the election—which they can do in person at their local town hall—permits a voter to change their mind about how to vote, and to complete an absentee ballot which can still be delivered in person, delivered by a third party, or placed in a drop-box well before the Election Day deadline. As the trial court observed, the fact that Maine's law affords this flexibility to voters "does not somehow render Maine's Delivery Deadline unconstitutional." A-25. *See Ziriax*, 2020 WL 5569576, at *8.

Defendants do not contest that voting by mail will be more popular this year due to the pandemic, and that a small number of voters may return their ballots after the Election Day receipt deadline. But *any* election rule inevitably results in some degree of inconvenience and noncompliance, and that result does not render the underlying rule unconstitutional. *See Utah Rep. Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (noting any deadline "will invariably

burden some voters … for whom the earlier time is inconvenient"). Here, all the record substantiates is an extremely small impact on the franchise—one that voters have ample power to mitigate—such that there is no basis for concluding that the Election day deadline imposes any more than a slight burden. *See New Georgia Project*, 2020 WL 5877588, at *2 ("[A]s a legal matter, it is just not enough to conclude that if some ballots are likely to be rejected because of a rule, the burden on many voters will be severe" (internal quotation marks omitted)); *Ziriax*, 2020 WL 5569576, at *8 (declining to enjoin deadline where 2.4%—2,385—of mail-in ballots were rejected as late).

2. The state's interests in an Election Day deadline are important, even compelling, and are more than sufficient to justify any burden on the franchise.

The minimal burden imposed by the Election Day receipt deadline is amply supported by Maine's reasons for maintaining it. The state's interests, each independently sufficient, fall into two categories: (1) administering an equitable, orderly election, and (2) protecting the legitimacy and integrity of the election. The trial court properly found these interests to be "weighty" and sufficient to justify the deadline. A-27.

The Supreme Court has long recognized that a state's "important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions" on the right to vote. *Anderson*, 460 U.S. at 788.

In Maine, as discussed above, the Election Day receipt deadline ensures that state and local officials can complete "a number of time-sensitive activities that [they] must adhere to in order to make sure that the winners in an election are declared in a timely fashion and are seated." A-26. At a time when local election officials already stand to be bombarded with an unprecedented number of absentee ballots, it was thus not clear error for the trial court to conclude that "a judicial modification of the deadline risks severe disruption of Maine's electoral process," such that the Election Day receipt deadline should stand. *See New Georgia Project*, 2020 WL 5877588, at *3 (recognizing "Georgia's regulatory interest" in "conducting an efficient election, maintaining order, quickly certifying election results, and preventing voter fraud," as "strong," "important," and "more than enough to uphold its reasonable ballot-receipt restriction."); *Thomas*, 2020 WL 2617329, at *26-27 (absentee ballot receipt deadline justified by need to ensure "sufficient time to canvass votes and meet the ballot certification deadline"); *accord Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1376-77 (S.D. Fla. 2004); *Grossman*, 151 N.E.3d at 438 (election day deadline justified in light of other statutory election deadlines that state officials were required to meet).[6]

[6] This interest is not one that the Defendants in *Bostellman*, *Boockvar*, or *Common Cause* could credibly claim, as in each case the state had already successfully extended deadlines in

Maine also has at least a "legitimate interest" in imparting "stability[] and legitimacy to the electoral process." *Cox*, 885 F.3d at 1228. The trial court found this interest "significant," A-27, and the Supreme Court has found such an interest to be compelling, *see, e.g., Eu v. San Francisco Cnty. Dem. Cent. Comm.*, 489 U.S. 214, 231 (1989). In its decision, the Superior Court highlighted a central aspect of this interest, namely "the need to secure and maintain voter confidence." A-27. In a year where the nation's voting system has faced a constant drumbeat of criticism, the need to reassure voters is apparent. Undermining the surety of a clear deadline is thus "neither warranted nor appropriate." A-27.

In the face of these interests—which it was the Legislature's responsibility to weigh when setting the Election Day receipt deadline—Plaintiff's request for a deadline extension of two days is entirely unsupportable. Neither Plaintiffs nor their expert endorsed a two-day extension before the trial court, underscoring the fact that while it may be good policy, it is not relief that the Constitution requires. Further, now that absentee voting has already begun, a two-day extension has the potential to severely disrupt Maine's electoral process. *See New Georgia Project*, 2020 WL 5877588,

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connection with the 2020 primary. *See Bostelmann*, 2020 WL 5627186, at *20-21; *Boockvar*, 2020 WL 5554644, at *11; *Common Cause*, 2020 WL 5798148, at *6, *18.

at *2 (finding interest in maintaining deadline to be "at least 'important'" and "likely compelling" given "absentee voting ha[d] already begun"). If a postmark requirement were adopted at this late stage, putting aside the difficulty of implementing such a requirement mid-stream, it could "potentially result in the rejection of more absentee ballots," including those where the USPS "skipped processing" to speed up delivery or otherwise did not have a postmark. *See Ziriax*, 2020 WL 5569576, at *10; *see also* Tr. I at 195-98. Accordingly, "requiring the counting of ballots received after election day would risk serious interruption in the [Maine] electoral process, would not … result in the counting of all ballots mailed before election day, and could even result in an increase in the number of ballots that would be rejected." *Ziriax*, 2020 WL 5569576, at *11.

B. The trial court did not clearly err in finding that Maine's procedures for notifying voters of defects on absentee ballot envelopes and providing an opportunity to cure those defects by 8:00 p.m. on Election Day satisfy due process and do not impose undue burdens on voters' First Amendment rights.

Plaintiffs commend the Secretary for developing instructions directing local election officials to notify and provide voters with an opportunity to cure defects on absentee ballot envelopes, A-157-59, yet Plaintiffs claim that these procedures fail to satisfy due process because they do not include (a) a *post-election* time period for voters to cure defects, and (b) the option of submitting an affidavit as a method of curing the defects. Blue Br. 29-30. Plaintiffs also

take the trial court to task for not analyzing their original claim under both the First Amendment and the Due Process Clause. *Id*.

The appropriate question under the Due Process Clause is not whether more time or a different method for curing defects in absentee ballots would be preferable – that is a policy question for the Legislature – but rather whether the procedures established by the Secretary and in Maine law are consistent with the Constitution. The trial court correctly found that they comport with due process. A-29.

While the First Amendment inquiry is subtly different—it requires an analysis of whether the requirements for absentee voting, with the cure procedures in place, impose burdens on voters that are not justified by sufficient state interests—the trial court's findings and rulings still clearly dispense with this claim. Specifically, the trial court found that the burdens imposed by Maine's absentee voting system are slight, and the deadline to cure is justified by the same state interests that support the Election Day receipt deadline for all ballots. A-26–29.

1. Maine's signature requirements for absentee ballots and the deadline to cure any defects impose only a minimal burden on voters that is justified by the state's important interests in the Election Day deadline.

Plaintiffs contend that the burden to be assessed under *Anderson-Burdick* is that "of complying with the State's current cure procedures." Blue Br. 30-34. But cure procedures do not themselves burden the right to vote. *See Ariz. Dem. Party v. Hobbs*, No. CV-20-01143-PHX-DLR, 2020 WL 5423898, at *7 (D. Ariz. Sept. 10, 2020) ("*Hobbs I*"), *emergency stay granted on other grounds*, No. 20-16759, 2020 WL 5903488 (9th Cir. Oct. 6, 2020) ("*Hobbs II*"). Rather, the proper focus of the analysis concerns the absentee voting requirements themselves. *See Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) (burden is that imposed by signature match requirement), *appeal dismissed*, 2018 WL 7139247; *Democratic Exec. Comm. of Florida v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (burden created by signature match requirement lacking uniform standards or consistent application across counties).

The burdens associated with absentee balloting in Maine are modest. Casting an absentee ballot requires the voter to fill out the ballot exactly as they would do if voting in person at the polls, then fold the ballot, place it in an envelope, and fill in three spaces marked on the outside of the envelope (Def. Ex. 12): "Voter Signature," "Name of Voter," and "Voting Residence." For most

absentee voters, this is all they need to do before delivering their ballot to the clerk by mail, by hand delivery, or via a secure drop box. A-142.

If a voter receives assistance in reading or marking the ballot, then the person who assisted the voter also must sign and print their name in the block marked "Aide Certificate." 21-A M.R.S.A. § 754-A(3). And if a witness is involved because the ballot is being delivered by a third person not related to the voter, then the witness must complete the "Witness Certificate" by checking the appropriate box(es) and signing and printing their name. *Id*. § 754-A(2).

Plaintiffs do not claim that these requirements are burdensome, nor could they credibly make such a claim. *See Hobbs II*, 2020 WL 5903488, at *7 (because there is "nothing generally or inherently difficult about signing an envelope by Election Day," requiring voters to cure a missing signature by that deadline "imposes only minimal burdens"). In fact, the notice and opportunity to cure procedures established by the Secretary, coupled with the challenged ballot process (discussed below) and absentee ballot tracking system, virtually eliminate any burden associated with noncompliance.

It is also undisputed that these requirements are reasonable, nondiscriminatory regulations designed to protect the integrity of the election process. Specifically, they assist election officials' efforts to verify that the voter who requested the ballot is the same person casting the ballot, and that the

ballot was cast without undue influence. These aims are more than adequate to justify any extant burden imposed by Maine's absentee voting requirements.

With respect to the *deadline* for curing defects—the primary target of Plaintiffs' ire—the state's interests are the same as those underlying the ballot receipt deadline discussed above. Specifically, and as the Ninth Circuit recently found, such a deadline "promote[s] [the state's] unquestioned interest in administering an orderly election and … facilitate[s] its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Hobbs II*, 2020 WL 5903488, at *1. It is indeed entirely reasonable to require every voter to either get to the polls or submit an absentee ballot by the same deadline in order for their votes to be counted. *See id.* Maine's interest in imposing that deadline therefore adequately justifies any resulting burden.

2. Maine's process for notifying voters of defects and providing an opportunity to cure those defects or to cast a challenged ballot satisfy the requirements of due process.

While absentee voting is "a privilege and a convenience to voters," and not a constitutional right, courts generally have held that once a state offers the option of absentee voting, it must afford adequate procedural due process. *See, e.g., Kemp*, 341 F. Supp. 3d at 1338, and cases cited therein. "To establish a procedural due process violation, [a] plaintiff must identify a protected liberty or property interest and allege that the defendants, acting under color of state

law, deprived [them] of that interest without constitutionally adequate process." *Gonzalez-Droz v. Gonzalez-Colon*, 660 F.3d 1, 13 (1st Cir. 2011). Noting that procedural due process "is a flexible concept and what process is due depends on what the particular situation demands," the trial court applied the analysis under *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976),[7] and concluded that the state's procedures satisfied due process. A-28-29. This Court should affirm that ruling.

Mismatched signatures. As noted by the trial court, nearly every court to have held that there is a due process right to notice and an opportunity to cure defects in absentee ballots has focused exclusively on mismatched signatures. A-27. There is a risk of erroneous deprivation of the right to vote when an election official makes a judgment call about whether a signature on the ballot envelope appears to have been written by the same person who signed the absentee ballot request form. As the trial court found, however, the Secretary's instructions and the challenged ballot procedure eliminate this risk for Maine voters. A-29.

[7] The four factors as defined in *Mathews v. Eldridge* are: (1) the private interest that will be affected by the government action, (2) the risk of an erroneous deprivation of that interest through the procedures used; (3) the probable value, if any, of additional procedural safeguards; and (4) the government's interests. The first factor in this case is the right to vote.

The voter's signature "must be on the [absentee ballot] envelope for the ballot to be accepted" pursuant to 21-A M.R.S.A. § 762(2). But if the election official reviewing an absentee envelope is concerned that the signature does not match that of the voter on the absentee ballot request form, then the official has reason to question whether this requirement is met. Under the Secretary's instructions, the clerk must first contact the voter to ascertain whether he or she did, in fact, cast the ballot in the envelope. A-157. If the voter confirms this fact by telephone, then the ballot must be accepted. If the clerk is unable to reach the voter before the polls close on Election Day, then the clerk is instructed to *accept the ballot*, but challenge it in accordance with 21-A M.R.S.A. § 673(1). A challenged ballot "must be counted the same as a regular ballot." *Id*. § 696(1). In either context, the cure is complete.

Missing signatures. No judgment by election officials is involved in determining that a signature on an absentee ballot envelope is missing. For that reason, the trial court found that this circumstance poses "a greatly reduced risk of an 'erroneous' deprivation." A-29. Indeed, the risk of deprivation in this instance stems from the voter's own oversight – or that of a witness or aide acting at their direction – and not from the act of an election official or the effect of state law. *See Dem. Exec. Comm*., 915 F.3d at 1325 (drawing distinction between voter who fails to follow instructions in filling out absentee ballot

affidavit and voter whose signature is rejected without notice by election official for reasons beyond voter's control); *see also Hobbs II*, 2020 WL 5903488, at *2 ("[T]he failure to sign one's ballot is entirely within the voter's control ….").

Nonetheless, the Secretary's instructions make clear that where a signature is missing, the municipal clerk must make a good-faith effort to notify the voter and give the voter an opportunity to come to the town office to sign their ballot envelope or request a new ballot. A-158. If the voter does not wish to take either action, or if time does not permit those actions, then the clerk may accept the ballot based on the voter's verbal confirmation by telephone and challenge the ballot pursuant to section 673. *Id*. The ballot may be rejected only if the voter cannot be reached. *Id*. The same process applies to a missing witness or aide signature. *Id*..

Challenged ballots. Plaintiffs continue to misunderstand Maine's challenged ballot process. Blue Br. 38-40. Unlike "provisional ballots" used in many states, which are <u>not</u> counted unless and until the voter proves their qualifications to vote within a certain period of time after the election, *see* 52 U.S.C. § 21082, in Maine a challenged ballot <u>is counted</u> in the same manner and at the same time as all other ballots. All of the votes reflected on a challenged ballot are therefore included in the official tally.

No further action is required unless (1) a race is close enough to trigger an election recount, pursuant to 21-A M.R.S.A. § 737-A, and (2) at the conclusion of that recount, the margin between the two candidates is so small that the resolution of challenged ballots would determine the outcome, *id*. §§ 737-A(10) & 696(1). *See In re Ballot Dispute in City of Waterville Municipal Referendum*, Dkt. No. SJC-18-14.[8] If this circumstance were to arise,[9] then the voter would have the opportunity to prove that they did, in fact, cast the ballot, or that the ballot was appropriately witnessed, notwithstanding the missing signature.

Additional procedures. Despite the aforementioned clear and forgiving cure procedure, Plaintiffs rely heavily on the third factor in the *Mathews v. Eldridge* test to argue that more is necessary to satisfy due process – specifically, a post-election period to cure and the option for a voter to submit an affidavit to prove that they are the voter who submitted the envelope that was missing a signature. Plaintiffs contend that an extended period is needed because there might not be sufficient time to cure a defect on a particular voter's ballot by the 8:00 p.m. Election Day deadline, and that an affidavit is

[8] A disputed election for a state legislative office would be resolved by that legislative body, pursuant to the Maine Constitution, art. IV, pt. 3, § 3, or by the U.S. Senate or Congress for those offices, pursuant to the U.S. Constitution, art. I, § 5.

[9] Defendants are not aware of an absentee ballot challenge ever affecting the outcome of an electoral contest in Maine.

preferable for voters who do not wish to go to the town office or cast a challenged ballot. Blue Br. 36.

The trial court expressly—and properly—"reject[ed] Plaintiffs' argument that the Secretary's process is not adequate because it does not include an opportunity to cure after the polls are closed, when the voter could not be reached or has otherwise failed to cure the defective ballot." A-29. As described above, the risk of a voter's ballot being rejected for a *missing* signature is entirely within the voter's control. *Hobbs II*, 2020 WL 5903488, at *2. Indeed, a voter can mitigate any risk of their ballot being rejected for such a defect by submitting their ballot early, *see Ziriax*, 2020 WL 5569576, at *18, or simply checking to make sure that they have signed their ballot envelope, and that any aide or witness involved has done so as well. Further, any risk of erroneous deprivation is once again outweighed by the state's interest in the orderly—and timely—administration of the election. *Hobbs II*, 2020 WL 5903488, at *1.

With respect to mismatched signatures, such a defect cannot result in the rejection of a ballot under any circumstances; at a minimum, it will be challenged, such that there is no risk of erroneous deprivation at all. A-157 ¶ 1. Accordingly, no further process is due.

More broadly, the Fourteenth Amendment requires the state to afford due process, but it does not dictate the exact nature of the process that is due.

"Procedural due process guarantees fair procedure, not perfect, error-free determinations." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 222 (D. N.H. 2018) (internal quotations omitted); *see also Ohio Head Start Ass'n v. U.S. Dep't of Health & Human Servs.*, 902 F. Supp. 2d 61, 67-68 (D.D.C. 2012) ("*Mathews* does not require perfect procedures in order to satisfy due process."). Even if an affidavit may be *preferable* for some voters—though that proposition is suspect given completing an affidavit requires more effort, and potentially more contact, than a simple telephone call—Plaintiffs' suggestions for further improvement should be directed to the Legislature, not the courts.

II. The trial court's finding that Plaintiffs would not likely suffer irreparable harm without an injunction was supported by the record and not clearly erroneous.

The trial court found that Plaintiffs will not likely be irreparably harmed if the challenged laws are not enjoined. A-36-37. That finding was supported by the record and is not clearly erroneous.

As described above, the potential harms to the named Plaintiffs—and unnamed members of the Alliance—are speculative at best. Neither individual Plaintiff has ever cast an absentee ballot that has been rejected for any reason. The record shows that Maine offers voters a wide variety of methods for Plaintiffs to exercise their right to vote, all of which can be completed consistent with CDC guidelines, and some of which do not require a voter to leave their

household at all. Indeed, in the remaining time before Election Day, the individual Plaintiffs still have ample opportunity to vote in person or submit absentee ballots on time. *See New Georgia Project*, 2020 WL 5877588, at *4 (no irreparable harm given "Election Day [remained] one month away and … plaintiffs may [still] submit their absentee ballots (on time) or take advantage of any of the other avenues Georgia has made available.").

III. The trial court's finding that "the harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote" was supported by the record and not clearly erroneous.

Courts are reluctant to grant injunctions in election cases, in particular, because the harm falls on all citizens of the state. *See Southwest Voter Reg. Educ. Project v. Shelley*, 344 F.3d 914, 919 (9th Cir. 2003) (citing cases). Courts are even more reluctant to issue injunctions in the middle of an election cycle. *See Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (*per curiam)*; *Frank v. Walker*, 574 U.S. 929 (2014) (Mem.); *see also Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (trial courts "should ordinarily not alter the election rules on the eve of an election").

The trial court found that the "harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote." A-37. That finding was supported by the record and not clearly erroneous.

While the harms to Plaintiffs are, as noted above, speculative, the harms to the state and the public if the Court were to order an injunction at this time are significant. Enjoining the challenged provisions would (a) make the election extremely difficult to administer at a time when an anticipated flood of absentee ballots has necessitated an all-hands-on-deck approach—and the Governor's broadening of the timeframe to process absentee ballots—in order to meet statutory timelines and ensure elected officials can take office on schedule; (b) dramatically increase costs at a time when the state faces a multi-million dollar budget shortfall and is allocating its scarce resources to increasing the safety of existing voting options; and (c) threaten the integrity of the election itself at a time when national leaders are actively undermining confidence in the voting system.

IV. The trial court's finding that "it would not be in the public interest to grant" the requested injunctive relief was supported by the record and not clearly erroneous.

The trial court found that "it would not be in the public interest to grant" the injunctive relief requested by Plaintiffs. A-36-37. That finding was supported by the record and is not clearly erroneous.

The public interest would best be served by keeping the status quo pending final judgment in this case. As the record shows, disrupting Maine's

carefully calibrated voting system at this late date threatens confusion and may well do more harm than good. A-37.

The record shows that Maine remains committed to ensuring that voting is safe and available to all Mainers this November, and, as noted above, the Secretary has taken several concrete steps towards that end consistent with his statutory obligations and the practical realities of administering an election. An injunction is far too blunt an instrument in these unprecedented times, and would threaten, rather than support, Maine's ability to conduct an accessible and orderly general election in November.

CONCLUSION

For the reasons stated above, the Superior Court's decision should be affirmed.

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