STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN 20-262

ALLIANCE FOR RETIRED AMERICANS, et al.,

Plaintiffs-Appellants

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,

Defendants-Appellees

and

DONALD J. TRUMP FOR PRESIDENT, INC.; REPUBLICAN NATIONAL COMMITTEE; NATIONAL REPUBLICAN SENATORIAL COMMITTEE; AND REPUBLICAN PARTY OF MAINE,

Intervenors-Defendants-Appellees

Appeal from the Superior Court, Kennebec

BRIEF OF INTERVENOR-DEFENDANTS-APPELLEES

Patrick Strawbridge, Bar No. 10024
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South, PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

Alexa R. Baltes
Visiting Atty motion pending
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
lexi@consovoymccarthy.com

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INTRODUCTION

This is one of many lawsuits brought across the country by Democrats and their allies to change state election laws. *States by Four Pillars Cases: Maine*, Democracy Docket, bit.ly/2FMt3ph. These groups pushed for policy changes to election laws long before COVID-19. Unable to persuade legislatures, they have now turned to the courts. Their new strategy[1] is to argue that, in light of COVID-19, the Constitution *requires* their legislative agenda. Democracy Docket (Mar. 18, 2020), bit.ly/3aVNCJU. To that end, they have filed lawsuits across the country in an attempt to remove existing voting safeguards, disrupt elections already underway, and thwart elected representatives' constitutionally assigned power to regulate elections by imposing, through judicial decree, crippling administrative burdens on states. *Compare States by Four Pillars Cases*, Democracy Docket, bit.ly/2CVjpj4, *with* U.S. Const. art I, §4, cl.1.

In June, Appellants filed this suit challenging several longstanding registration and absentee voting provisions in Maine. Appellants then sat on the case for 44 days—as November 3 drew closer—before moving for a preliminary injunction. This delay is telling. Maine is a low priority for Appellants because voting is more accessible here than virtually anywhere else, *see, e.g.*, Nat Hewett, *Maine Is Leading on Voting Rights. Other States Should Follow*, Bangor Daily News (Nov. 26, 2018), bit.ly/2Yyremo, including

[1] *See, e.g.*, Marc E. Elias, Twitter (May 3, 2020), bit.ly/2XiI74A ("If [these lawsuits] gain 1 percent of the vote [for Democrats], that would be among the most successful tactics that a campaign could engage in.").

during the pandemic, *see infra* 16-17. Indeed, Maine is so accommodating that, below, Appellants found themselves challenging alternative means to alternative means of registration and voting as somehow burdensome on the right to vote. The Superior Court rejected all of these challenges. After a two-day hearing and careful review of a voluminous evidentiary record, it determined that all of Maine's voter registration and absentee voting regulations imposed no more than a modest burden on the right to vote, and that all such burdens were outweighed by the State's important interests in fair, orderly, reliable elections. Appendix ("App.") A-36. The Superior Court recognized the great lengths and efforts that the State took to make sure that Maine continues its tradition of safe and accessible voting, *e.g.*, *id.* at A-26, A-33, and it declined Appellants' invitation to "unliterally discard" the State's election laws by imposing regulations "of its own choosing," *id.* at App. A-35; *see also id.* at A-14-15.

Undeterred, Appellants now ask this Court to make eleventh-hour, mid-election changes to the State's laws and operating procedure that the Superior Court was unwilling to make. Specifically, they ask this Court to (1) erase and arbitrarily extend the State's Election Day receipt deadline for absentee ballots, and (2) wholly craft some kind of new law or regulation changing signature verification requirements and extending already generous cure procedures past Election Day. This Court should affirm the Superior Court's thorough and well-reasoned decision denying the requested relief on these issues. Appellants have failed to show a likelihood of success on the

merits—let alone, the clear likelihood of success required for the relief they seek—and the equities tip strongly in favor of Appellees.

STATEMENT OF FACTS

On June 24, 2020, Appellants filed a complaint in Maine Superior Court challenging a litany of Maine's election laws as unconstitutional. Their challenges centered on statutory provisions dealing with absentee balloting and voter registration. Specifically, they challenged Maine's (1) requirement that voter registration forms are signed in ink rather than electronically; (2) requirement that first-time registrants provide photocopies of identification documents when they apply through the mail; (3) prohibition on ballot harvesting; (4) requirement that an absentee ballot must be delivered by 8:00pm on Election Day; (5) requirement that officials reject ballots if they are unsigned or contain a mismatched signature; and (6) failure to provide prepaid ballot postage. Forty-four days later, Appellants filed for a preliminary injunction demanding that the Superior Court rewrite Maine's election laws and grant mandatory relief against the Secretary. App. A-10-13.

The parties submitted briefing and evidence on the motion. On September 21, 2020, the Superior Court held an evidentiary hearing at which it heard live testimony from two of Appellants' witnesses and argument on the merits of the cases. App. A-11.

While this litigation was pending, Maine's Secretary of State took action to accommodate concerns raised by the pandemic. Among other things, prior to the July 2020 primary, the Secretary promulgated instructions to local election officials to

address the novel issues raised by COVID-19 and absentee balloting. These instructions direct local officials to notify voters of defects on absentee ballots and allow them to cure such defects. App. A-153. These instructions now "provide detailed, step-by-step procedures for local election officials" to notify and allow voters to cure absent or mismatched signatures on absentee ballots. App. A-26. In addition, in August, Governor Mills issued an Executive Order that made in-person voting safer by requiring social distancing at polling locations, extended the deadline for by-mail voter registration, and extended the time allowed for in-person absentee voting. Executive Order (Aug. 26, 2020), bit.ly/3jpfrPm ("EO"). The State worked hard to make voting safe and accessible while maintaining a fair, administrable, and orderly election.

On September 30, 2020, the Superior Court denied Appellants' preliminary injunction motion in full. The court addressed each challenge individually and found that Appellants failed to demonstrate a likelihood of success on the merits for any because under *Anderson-Burdick*, each of their claims failed to demonstrate anything beyond a slight or modest burden on the right to vote. App. A-19, 20, 22, 24, 25, 29, 36. The court went on to find that because (1) the "burdens on the right to vote imposed by the challenged provisions of Maine's election laws are slight or moderate, and that the State's interests outweigh any burdens," (2) Appellants would suffer no irreparable harms, and (3) the "harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote," the motion for preliminary injunction should be denied. App. A-36-37.

Appellants then filed a notice of appeal with this Court. They press only two of their six claims on appeal. *See* Appellants' Brief ("Br.") 15.

ARGUMENT

Ordinarily, to obtain a preliminary injunction, parties have the burden of demonstrating that four criteria are met: (1) they will suffer irreparable injury absent an injunction; (2) such injury outweighs any harm that granting the injunction would inflict on the defendants; (3) they are likely to prevail on the merits, and (4) granting the injunction will not adversely affect the public interest. *Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989). This rigorous standard reflects the fact that a preliminary injunction is "an extraordinary remedy only to be granted with utmost caution when justice urgently demands." *Plourde v. Valley Sno-Riders, Inc.*, 2002 WL 747903, at *2 (Me. Super. Mar. 18, 2002) (quoting *Bar Harbor Banking & Trust, Co v. Alexander*, 411 A.2d 74, 79 (Me. 1980)). Thus, "it may be said that the attitude of [the Law Court] upon the subject of injunction is conservative." *Id.*; *see* App. A-14.

But the ordinary standard presumes that the preliminary injunction is sought to *preserve* the status quo. As the Superior Court recognized, App. A-14, that is not the case here. Rather than requesting a preliminary injunction to "preserve the status quo," Appellants seek a "mandatory" injunction to *change* the status quo by radically rewriting existing law. *See Emerson*, 563 A.2d at 768; 42 *Am. Jur. 2d Injunctions* §6. Thus, their "burden [is] even greater." *Emerson*, 563 A.2d at 768. Because they are asking for the Court to rewrite state election laws, Appellants needed to show "a *clear* likelihood of

success on the merits, not just a reasonable likelihood," and they must otherwise survive "heightened scrutiny." *Id.*; *see also Stanton v. Brunswick Sch. Dep't*, 577 F. Supp. 1560, 1567 (D. Me. 1984) ("[T]he Court should only sparingly exercise its authority to issue an interlocutory injunction which requires a defendant to take affirmative action. The purpose of preliminary injunctive relief is to preserve the status quo until a final adjudication can be had upon the merits." (citations omitted)); *American Federation of Teachers v. Gardner*, No. 216-2020-CV-0570, at 4-5 (N.H. Super. Ct. Oct. 2, 2020) ("The plaintiffs therefore seek to alter the current status quo. As a result, the plaintiffs' arguments will be held to the higher standard noted above.").

After considering all the evidence, conducting a two-day hearing, and weighing the relevant factors, the Superior Court correctly found that Appellants failed to satisfy this standard. They are not likely to succeed on the merits of any claim. And the equities tilt decisively in Appellees' favor. "[W]hen the equity court has balanced the relevant factors after hearing all the evidence on both sides, [the Law Court's] role on appeal is limited to determining whether the court's grant of the preliminary injunction constituted an abuse of discretion." *Emerson*, 563 A.2d at 768. The Superior Court did not abuse its discretion, and this Court should affirm the decision denying the motion for preliminary injunction.

I. Appellants' claims fail on the merits.

Appellants challenge the Superior Court's judgment as to only two issues. First, they claim that the State's Election Day receipt deadline imposes an undue burden on the right to vote. Br. 18-29. Second, they argue that the State's new and generous cure procedures for absentee ballots that fail to comply with signature requirements somehow create an undue burden on the right to vote and violate the due process rights of voters. Br. 29-40. Appellees address each challenge in turn below, but first emphasize a few points about the governing legal standards.

Appellants' main claims invoke the balancing test from the decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). This Court has invoked the *Anderson-Burdick* test before. *See Me. Taxpayers Action Network v. Sec'y of State*, 2002 ME 64, ¶20, 795 A.2d 75, 82 (Me. 2002). It is a "flexible standard" that "reject[s]" knee-jerk application of strict scrutiny. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190 n.8 (2008) (opinion of Stevens, J.). Contra Appellants' repeated cry of "disenfranchisement," *see* Br. 1, 2, 5, 6, 9, 10, 11, 13, 20, 21, 24, 25, 26, 29, 31, 35, a law is not invalid because it has some effect on voting. "This is so because 'as a practical matter, 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.'" App. A-15 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). Indeed, *every* election law "exclude[s], either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are

reasonable." *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004). That the election happens on November 3, for example, does not disenfranchise the voter who wants to show up on November 4.

Anderson-Burdick has two steps. First, the challenging party must establish a cognizable burden on the right to vote and the severity of that burden. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). Second, the challenging party must show that the burden outweighs the State's interest. *Id.* Only when an election law "subject[s]" voting rights "to 'severe' restrictions" does a court apply strict scrutiny. *Burdick*, 504 U.S. at 434. Burdens that are "merely inconvenient" or "impos[e] only 'reasonable, nondiscriminatory restrictions'" are not severe. *Crawford*, 553 U.S. at 205 (Scalia, J.); *Burdick*, 504 U.S. at 434. Appellants "bear[] the burden of pro[ving]" the "magnitude of the burden" through "evidence that quantifies the extent and scope of the burden imposed by the" challenged law. *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1124 (9th Cir. 2016); *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1354 (11th Cir. 2009). Courts generally treat the sufficiency of a State's justification, however, as a "legislative fact," accepted so long as it is reasonable. *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) (*Frank I*); *see also Crawford*, 553 U.S. at 194-97. In fact, States can rely on "post hoc rationalizations," "come up with [their] justifications at any time," and have no "limit[s]" on the type of "record that [they] can build in order to justify a burden placed on the right to vote." *Mays v. LaRose*, 951 F.3d 775, 789 (6th Cir. 2020).

When measuring burden, "[z]eroing in on the abnormal burden experienced by

a small group" is both unhelpful and erroneous. *Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016). Facial challenges like Appellants' fail when the challenged law "has a plainly legitimate sweep"—that is, when its "broad application to all … imposes only a limited burden on voters' rights." *Crawford*, 553 U.S. at 202-03; *see also id.* at 206 (Scalia, J.). Given the State's power to "play an active role in structuring elections" and bring "order, rather than chaos," to "the democratic process," *Burdick*, 504 U.S. at 433, the "burden some voters face[]" from a challenged law cannot "prevent the state from applying the law generally," *Frank v. Walker*, 819 F.3d 384, 386 (7th Cir. 2016) (*Frank II*).

Relatedly, when measuring burden, it is important to keep in mind that the right to vote is a singular right, and it does not include the right to vote in multiple ways. *See McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807-08 (1969) ("There is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Despite appellants' claim to the contrary, the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise ….''). Appellants retort that once a State extends the right to vote absentee, it must regulate that right constitutionally. *See* Br. 18. That is true, of course; but it is not responsive to the question of how the Court should measure the burden here. *Anderson-Burdick* measures the burden on the *right to vote*—the ability to

exercise the franchise. In Maine, voters are given extraordinary flexibility in choosing how to exercise that right: they can vote in person on Election Day, in person absentee, by mail, by hand delivery to a secure, no-human-contact drop box, by delivery of a family member, or by delivery of a third-party volunteer. *See* 21-A M.R.S. §§ 753-B, 754-A; *see also* 9/22 Tr. 65-66. It is in light of *all* the "available options" that the Court must measure any alleged burden on the right to vote. *DCCC v. Ziriax*, 2020 WL 5569576, at *8 (N.D. Okla. Sept. 17, 2020); *see Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *6 (7th Cir. Oct. 6, 2020) (rejecting a coronavirus-based challenge to voting laws because "we cannot assess Indiana's absentee voting provisions in isolation and instead must consider Indiana's electoral scheme as a whole").

Though COVID-19 has changed everyday life, it should not change how courts apply *Anderson-Burdick*. As the Superior Court noted, the State's action is not "the cause of any increased burden on the right to vote." App. A-32; *see also American Federation of Teachers*, No. 216-2020-CV-0570, at 8 ("The burdens the plaintiffs complain of here are not the result of state action, but rather stem from health concerns due to the pandemic."); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 415 (5th Cir. 2020) (Ho, J., concurring) ("Of course, there will always be other voters for whom, through no fault of the state, getting to the polls is 'difficult' or even 'impossible.' But as the Court explains, that is a matter of personal hardship, not state action. (quoting *McDonald*, 394 U.S. at 810)); *cf. Bethea v. Deal*, 2016 WL 6123241, at *2 (S.D. Ga. Oct. 19, 2016) ("[T]hese circumstances are not impediments created *by the State*" (emphasis added)).

For its part, Maine acted—through Executive Order, new guidance on cure procedures, and increased safety precautions—to ensure accessible voting despite COVID-19. App. A-137, 143, 152-54, 157-59. Any failure to vote is thus "not caused by or fairly traceable to the actions of the State, but rather [is] caused by the global pandemic." *Mays v. Thurston*, No. 4:20-cv-341, 2020 WL 1531359, at *2 (E.D. Ark. Mar. 30, 2020).

Moreover, to the extent COVID-19 factors into the analysis, it affects *both* sides of the *Anderson-Burdick* balance. States also have "important interests … in the wake of election emergencies," like focusing on recovery, ensuring adequate staffing, and maintaining election integrity. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 Emory L.J. 545, 593 (2018); *see also DNC v. Bostelmann*, 2020 WL 3619499, at *2 (7th Cir. Apr. 3, 2020). Thus, despite election emergencies, courts regularly decline to change election laws by judicial fiat. *See, e.g.*, *Ziriax*, 2020 WL 5569576, at *18 (COVID-19); *American Federation of Teachers*, No. 216-2020-CV-0570, at 17 (same); *Williams v. DeSantis*, No. 1:20-cv-67 (N.D. Fla. Mar. 17, 2020) (same); *Bethea*, 2016 WL 6123241 (Hurricane Matthew); *ACORN v. Blanco*, No. 2:06-cv-611 (E.D. La. Apr. 21, 2006) (Hurricane Katrina). "This holds true even—and especially—in midst of a pandemic." *Tully*, 2020 WL 5905325, at *6.

With these principles in mind, and for the reasons below, Appellants are not likely—let alone clearly likely—to prevail on their challenges to Maine's Election Day recent deadline or the State's generous cure procedures.

A. Election Day Receipt Deadline.

Appellants asked the Superior Court to erase and extend the State's requirement that absentee ballots be received by 8:00pm *on Election Day*. *See* 21-A M.R.S. §755. Recognizing that (1) election deadlines are inevitable, (2) determining when to draw the deadline entails a policy choice, and (3), in any event, Election Day actually made good sense as a deadline, the Superior Court declined to "re-writ[e]" the election code. App. A-35-36. Now, Appellants are again pointing aimlessly at the "disenfranchising effects" of an Election Day deadline for receiving elections ballots in hopes that this Court will rewrite the law just weeks before Election Day. At its core, this claim is wordplay: deadlines don't "disenfranchise." If they did, then it would be impossible to hold an election. At some point, there has to be a cutoff. Setting *Election Day* as the cutoff for receiving *election ballots* makes sense. *See* App. A-36 ("A deadline such as Maine's Absentee Ballot Delivery Deadline … demonstrate[es] to all voters that election day is a watershed event because it is the day when all votes are cast and counted."). In any event, Appellants have failed to carry their burden of demonstrating that the absentee ballot receipt deadline unconstitutionally burdens their right to vote.

***Burden on Voting*:** Maine's ballot receipt deadline does not burden voting rights. To begin, a receipt deadline is necessary only because (no-excuse) absentee voting is permitted as an alternative to voting in person. *See supra* 8-10. Moreover, Appellants continue to propound the falsity that voting in person on Election Day is the only alternative to voting by mail. *See* Br. 22-23 ("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."). Even if that were true, the State's top doctor asserts that the risk of contracting the virus while voting in person is "not significant." *See* Affidavit of Dr. Shah, State Defs. Hr. Ex. 5 ¶24.

But what's more, in-person voting on Election Day *is not* the only alternative to mail-in voting: voters can vote in-person absentee—largely away from any lines or crowds—or voters, their family members, or other third-party volunteers can hand-return ballots to no-human-contact drop boxes. *See* 9/22 Tr. 65-66 (discussing the new, widespread drop-box option); 21-A M.R.S. §753-B, *as modified by* EO I.F.3 (in-person absentee voting); 21-A M.R.S. §754-A (drop off). Because the State "has provided numerous avenues to mitigate chances that voters will be unable to cast their ballots," Maine's "Election Day deadline does not implicate the right to vote at all." *New Georgia Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588, at *2 (11th Cir. Oct. 2, 2020). Voters worried about mail delays can simply use one of the many alternative methods and avoid the problem all together. *Id.* ("Voters must simply take reasonable steps and exert some effort to ensure that their ballots are submitted on time, whether through absentee or in-person voting.").

Relatedly, there is nothing "incongru[ous]" about simultaneously allowing voters to request absentee ballots close to Election Day, allowing mail-in voting, and enforcing an election-day deadline. *See* Br. 14 (citing testimony from Mr. Stroman).[2] True, a person who requests an absentee ballot a few days before the deadline won't have time to use the mail. But (1) that has always been true, and (2) for voters who wish to submit their absentee ballot by other means, the later deadline for requesting absentee ballots provides voters with *more* options, *see* App. A-34 ("But allowing voters to obtain an absentee ballot as close to election day as the previous Thursday is not necessarily tied to the use of the mail."); *New Georgia Project*, 2020 WL 5877588, at *2 ("And though delays in the postal service may (not will) delay when some voters receive their absentee ballots, all of these avenues remain open to any and all voters."). It is bizarre to suggest that "a law that makes it easier" for some voters somehow "prevent[s] anyone from voting" or "violate[s] the Constitution." *Short v. Brown*, 893 F.3d 671, 677-78 (9th Cir. 2018). Any burden arising from confusion about the various options or worry about the mail can be reduced by "Plaintiffs and other political and civic activists" "educating voters." *DNC v. Reagan*, No. CV-16-01065-PHX-DLR, 2018 WL 10455189, at *3 (D. Ariz. May 25, 2018).

[2] Notably, Mr. Stroman conceded that he had made comments about the "incongruity" between the Election Day receipt deadline, the ballot-request deadline, and the service standards of the Postal Service, *see* 9/21 Tr. 186:17-19, without any independent knowledge of alternative return-delivery methods, *see id.* at 211.

Even among by-mail voters, however, any burden imposed by the Election Day deadline is not severe. And, tellingly, it is not even meaningfully different than in an "ordinary election." *See RNC v. DNC*, 140 S. Ct. 1205, 1207 (2020). Mail-in absentee voters have *always* had to account for delivery, including delays. *See* 9/21 Tr. at 210:19-20 (Stroman: "[W]e have been talking to states for years about this issue."). "[E]ven in an ordinary election, voters who request an absentee ballot at the deadline for requesting ballots … will usually receive their ballots on the day before or day of the election," which precludes mail submission of the completed ballot. *RNC*, 140 S. Ct. at 1207; *see also* 9/21 Tr. at 212:17-22 (Stroman: "[T]hat happens, and has happened, and continues to happen in … elections across the country."). In sum, the deadline is not "a significant increase over the usual burdens of voting." *Crawford*, 553 U.S. at 198. It *is* the usual burden. *See Ziriax*, 2020 WL 5569576, at *18 ("The Supreme Court similarly observed that voters who wait weeks into absentee voting and request a ballot at the last minute are suffering the typical burden of a late-requesting voter, not a burden imposed by state law.").[3]

Thus, the idea that COVID-19 changed everything simply isn't true. Not only have voters always had to account for possible delays in mail delivery, the Appellants

[3] The need to account for voting delays is not even unique to mail-in voters: "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 with a sufficient cushion of time to account for traffic, weather, or other conditions that might otherwise interfere with their ability to arrive in time to cast a ballot." App. A35-36 (quoting *Ziriax*, 2020 WL 5569576, at *18).

presented no evidence specific to Maine suggesting that Postal Service delays would be any worse than usual in the State or have any meaningful impact on the election. Mr. Stroman, the Appellants' expert on the U.S. Postal Service, instead testified that his analysis of USPS performance was limited to "national data" even though "data can vary from state to state, from board of elections to board of election." 9/21 Tr. 203:17-20. Indeed, he "did not see data from Maine," *id.* at 203:20-21, did not know whether Maine tends to run above or below the national average in its processing of election-related mail, *id.* at 203:23-204:2, and attached to his affidavit a report specific to Milwaukee, not Maine. *Id.* at 204-05. On cross-examination, Mr. Stroman admitted that a similar audit indicated that in 2018, the Southern Maine postal facility was considered "high performing." *See id.* at 207:4-6, 207:22-24. Mr. Stroman admitted to having no more recent data "with respect to how the Maine specific facilities have been performing … in the last year." *Id.* at 208:4-10. Thus, the notion that mail delays will cause particular problems for Maine voters is pure speculation.

That speculation is further undercut by the smooth functioning of the mid-pandemic July primary. Unlike States that had particular issues with their 2020 primaries, Maine's went off largely without a hitch. *See* App. A-33. Indeed, in July, even though unprecedented numbers of voters chose to vote by mail, *see* 9/21 Tr. at 41; App. A-31, only 0.26% of the total by-mail ballots cast (297 total) arrived late. *see id.* at 114-

15.[4] According to Appellants' election expert, Dr. Herron, that is a "lower" late-rate than in in all but one of the prior primary elections he studied, and a lower late-rate than in all of the general elections he studied. *Id.* at 115:5-21; *id.* 142:13-24. Moreover, in *every* presidential election year studied by Dr. Herron, the percentage of ballots that arrived late in the primary election was *higher* than the percentage of ballots that arrived late in the general election. *Id.* at 143. That means, if the statistics hold, we should expect to see fewer than 0.26% of mail-in ballots arrive late in the November election.[5]

In short, the July primary—the only mid-Covid-19 Maine election to compare, and an election conducted prior to the newest accommodations by the State—indicates that the State's long-standing Election Day receipt deadline has not suddenly morphed into a tool for voter suppression. And there is no evidence in the record to suggest that the burden of complying with the deadline will be meaningfully different in November than it was in July. *See* App. A-33 ("Moreover, the State of Maine, through the Attorney General, has joined in litigation in federal courts … and has obtained relief to enjoin the Postal Service form implementing changes to its policies and operations that may have contributed to mail delays.").

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[4] Of those 297 late ballots, Appellants' expert, Dr. Herron, had no data as to how many were postmarked by Election Day, and thus no data on how many, if any would be saved by re-writing the law to Appellants' desired form. *Id.* at 115-16.

[5] Of course, in predicting how many ballots will arrive after November 3, for reasons that escape neutral logic, Dr. Herron chose to adopt a late-rate from a non-presidential election year that was nearly four times the July primary late-rate (1.02%). *See id.* at 143-44. Ultimately, however, the Superior Court held that even using Dr. Herron's math, any burden on voting created by the Election Day receipt deadline was (1) "slight" and (2) outweighed by the State's interests. App. A-31, A-34-36.

But external factors notwithstanding, even if mail delays were worse now than they were in July, voters can simply request a ballot early and avoid any concern about late submission altogether. *See* App. A-35-56; *ACORN*, No. 2:06-cv-611 (denying request "to extend the deadline for counting absentee ballots received by mail" in the wake of Hurricane Katrina); *see also* 9/21 Tr. at 210:4-13. Although some emergencies might require last-minute changes in the law, this one doesn't. COVID-19 is no longer a surprise. Unlike earlier spring elections,[6] voters have now had ample opportunity to plan for November. COVID-19, the election, and absentee-voting options have been widely publicized. *See DNC v. Bostelmann*, Doc. 76 at 4, No. 20-2835, ___ F.3d ___, ___ (7th Cir. Oct. 8, 2020) ("A last-minute event may require a last-minute reaction. But it is not possible to describe COVID-19 as a last-minute event."). Although more people may be voting absentee, they have had time to account for COVID-19. Appellants Born and Berry are cases in point. Both knew months ago that they would vote absentee in November. App. A-44-45 ¶¶13-14. They can request ballots today—or perhaps they already have—and eliminate any burden imposed by the deadline.

In sum, the Superior Court correctly determined that the Election Day receipt deadline imposes no more than a "slight" burden on voting. App. A-35; *cf. New Georgia*

[6] The Wisconsin primary remains an isolated judicial alteration of a ballot receipt deadline. *See* Br. 22. The U.S. Supreme Court did not pass on this issue because the deadline extension was "not challenged in this Court." *RNC*, 140 S. Ct. at 1206. Forced to accept an extended date as controlling, the Court was adamant that, at the very least, ballots must be postmarked by Election Day. *Id.* at 1206-07. But it never endorsed the district court's action in that case. *See id.* at 1207.

Project, 2020 WL 5877588, at *2 ("no one is 'disenfranchised'" by a receipt deadline "[a]nd the burden on a voter to ensure that a ballot is postmarked by Election Day is not meaningfully smaller than the burden of, say, dropping the ballot in a drop box at one's polling place on Election Day.").

***State Interest*.** Any burden imposed by the receipt deadline is outweighed by the State's interest in the "orderly, accurate, and reliable administration of elections." *Arizona Democratic Party v. Reagan*, No. CV-16-03618-PHX-SPL, 2016 WL 6523427, at *11 (D. Ariz. Nov. 3, 2016); *see Crawford*, 553 U.S. at 196; *Eu v. San Fran. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989). An election-day deadline "eliminates the problem of missing, unclear, or even altered postmarks" and "delay that can have adverse consequences." *Nielsen v. Desantis*, No. 4:20CV236-RH-MJF, 2020 WL 5552872, at *1 (N.D. Fla. June 24, 2020). Moreover, a deadline significantly decreases the risk of fraud that is inherent in mail voting. Contrary to Appellants' bald assertion, these are not "generalized, abstract" interests. Br. 27. Courts have long recognized that "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Eu*, 489 U.S. at 231.

First, the State has common-sense and federalism interests in aligning Election Day with the date for the receipt of ballots. *See Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *26 (D.S.C. May 25, 2020) ("[S]etting specific election deadlines is part and parcel of a state's generalized interest in the orderly administration of elections." (citing *Mays*, 951 F.3d at 787)). Doing so not only makes sense, it is

consistent with Congress's authoritative decision requiring that "[t]he electors of President and Vice President … be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. §1; *see also* 2 U.S.C. §§1, 7. This, like all "uniform rules for federal elections," is "binding on the States." *Foster v. Love*, 522 U.S. 67, 69 (1997). Allowing ballots to be accepted *after* Election Day and *presuming* that ballots without a postmark were cast *before* puts states at great risk of running into federal preemption problems.

Second, the State has an important interest in its election deadline to ensure an orderly election. Courts across the country have held that the State's "interest in conducting an efficient election, maintaining order, quickly certifying election results" "is more than enough to uphold its reasonable ballot-receipt restriction." *See New Georgia Project*, 2020 WL 5877588, at *3; *see also, e.g.*, *American Federation of Teachers*, No. 216-2020-CV-0570, at 24 (upholding receipt deadline "in light of 'a state's legitimate interest in providing order, stability, and legitimacy to the electoral process'"); *Ziriax*, 2020 WL 5569576, at *19. Because "all ballots must have some deadline," and Election Day makes sense as an election deadline, an Election Day receipt deadline furthers the State's "unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Arizona Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488, at *1 (9th Cir. Oct. 6, 2020).

Third, a receipt "deadline also secures voter confidence in the election: voters become less sure of the results if a candidate is declared a winner on or shortly after election day, but the results are changed several days or a week later." *Ziriax*, 2020 WL 5569576, at *19; *see American Federation of Teachers*, No. 216-2020-CV-0570, at 4-5. Upholding the deadline set by Maine's elected officials "promotes confidence in our electoral system" and "assur[es] voters that all will play by the same, legislatively enacted rules." *New Georgia Project*, 2020 WL 5877588, at *4; *see also Crawford*, 553 U.S. at 197 ("[P]ublic confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process."). As the Superior Court put it, the State has an "important … interest" in "secur[ing] and maintain[ing] voter confidence in the integrity and legitimacy of elections. A deadline such as Maine's Absentee Ballot Delivery Deadline serves that interest by demonstrating to all voters that election day is a watershed event because it is the day when all votes are cast and counted." App. A-36.

Finally, the State has an interest in drawing the line for accepting ballots at Election Day so that it can administer the election and count ballots consistent with the time demands of other laws. *See* App. A-147-49 (Flynn Aff. ¶¶ 49-54). Appellants argue that no justification is "sufficient" for the deadline given that 21-A M.R.S. §722 does not require Maine to finalize election results for twenty days. Br. 28 n.6. But that is inconsistent with logic, Appellants' own assertions about the impending strain on elections officials, *e.g.*, Br. 31, and the Governor's recent order allowing officials to start

counting absentee ballots *earlier* than normal to make sure there is sufficient time to properly tally the results, EO I.F.1. The State has time *after* the ballots come in because it *needs* time to ensure an accurate result.

If nothing else, unlike *any* state in which a court changed a receipt deadline, Maine's unique system in some races which use ranked-choice voting—a system that takes time to implement—supports drawing the cutoff at Election Day. The State has represented that undoing the receipt deadline would hinder implementation of its ranked-choice tabulation and even "jeopardize the Secretary's ability to reach final election results in time for the Governor to summon incoming legislators to convene on December 2, 2020." State Defs. PI Brief 12; *cf. Ziriax*, 2020 WL 5569576, at *19 (noting that such timing considerations are "state interests [that] outweigh the reasonable and nondiscriminatory impact that the deadline may have on some voters").

At various points Appellants suggest that the weight of judicial authority leans toward discounting the State's interest in the receipt deadline. That's wrong. Recently, the Eleventh Circuit explained that the pandemic has led the Supreme Court to intervene to ensure *more*, not less, discretion to state policymakers when it comes to election deadlines. *New Georgia Project*, 2020 WL 5877588, at *3-4 (citing *RNC*, 2020 WL 4680151, at *1). The Supreme Court consistently holds that courts must allow elected state officials "to run their own elections." *Id.* at 3. Indeed, "[s]ince March, the Supreme Court has reviewed, by our count, seven emergency motions related to district court injunctions of state election laws due to COVID-19" and in six of those cases it stayed

the injunction or declined to vacate a stay issued by the circuit court. *Id.* "And in the one case where the Court denied the application for a stay, it did so only because the state officials and the plaintiffs had already agreed to settle the case." *Id.*

Twenty-five states currently employ Election Day receipt deadlines. *Ziriax*, 2020 WL 5569576, at *19 n.7 (collecting laws). This "broadly shared judgment" among the States that this regulation is both useful and appropriate "is entitled to respect." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1888 (2018). The Superior Court was thus exactly right to refrain from "unilaterally discard[ing] the statutory deadline and impose a deadline of its own choosing," which "would amount to a judicial re-writing of the election laws." App. A-35. "Such a judicial modification of the deadline risks severe disruption of Maine's electoral process." *Id.*

B. Second Opportunity to Comply with Absentee Ballot Signature Requirements.

Below, Appellants asked the court to require the State to provide notice and an opportunity to cure before rejecting ballots based on mismatched or missing signatures. App. A-113. Notably, they did not initially request a post-Election Day cure period. During the pendency of this suit, the Secretary issued instructions to local election officers *requiring* them to make a good faith effort to notify voters "as quickly as possible" if their ballots lack a signature or contain a mismatched signature. App. A-157. The instructions also direct local officials to allow voters to cure signature mismatch problems over the phone. App. A-157-58. But despite the Secretary's

issuance of precisely the relief Appellants requested below, they refuse to take yes for an answer. Instead, they've expanded their suit, now demanding that this Court require the State to *extend* its generous cure provisions for some arbitrary number of days (largely left to the Court's own choosing) *after* Election Day. *See, e.g.*, Br. 33.

Even absent the Secretary's instructions, Appellants failed to establish a burden on voting rights or establish a due process violation attributable to the State's cure procedures. But in all events, they certainly fail to do so now.

1. Alleged harms from technical errors on ballot forms are speculative.

As an initial matter, much of Appellants' allegations of harm require the assumption that voters will make errors in filling out their ballots. But parties seeking relief from Maine courts must show that the harm they face is more than speculative. Injuries that are "purely speculative" are "not ripe for judicial review," *see Blanchard v. Town of Bar Harbor*, 221 A.3d 554, 560 (Me. 2019), and are not sufficient to justify equitable relief, *see Downeast Mortg. Corp. v. Balzano*, 2004 WL 1925525, at *1 (Me. Super. June 29, 2004). Here, there is no reason to *assume* that Appellants (or any voter) will fill out their ballots incorrectly. To the extent that Appellants' arguments rest on such an assumption, the alleged harm is purely speculative and not entitled to relief.

2. The State's signature cure procedures do not unduly burden the right to vote.

Even without the Secretary's instructions, Maine's signature requirement and verification system did not unduly burden the right to vote. With the Secretary's instructions, this is not a close call.

***Burden on Voting*:** Absentee-ballot signature requirements and procedures (like signature matching) impose no burden on voting rights. They couldn't, since they apply only to absentee ballots and in-person voting remains available. *See supra* 8-10. Moreover, Appellants identify no actual injury. They worry that clerks might not be able to contact voters in time to allow them to cure defective or missing signatures, and from there cobble together the notion that ballots rejected for signature mismatch disenfranchise voters. But their claim fails for several reasons.

First, it requires the Court to assume not only that voters will sign their ballots incorrectly, but also that their clerk would not provide an opportunity for cure—either in flagrant disregard of the Secretary's instructions or because the ballot arrived too late. Such speculation does not support an injunction. *See Democracy N.C. v. N.C. State Bd. of Elections*, 2020 WL 4484063, at *17 (M.D.N.C. Aug. 4, 2020) ("The potential future rejection of an absentee ballot request is … entirely speculative and cannot serve as the basis for either a right-to-vote claim or a procedural due process claim").

Second, Appellants' claim ignores the fact that a last-minute time crunch to cure a ballot can be avoided by following the advice of election officials "to complete and file

[] absentee ballots quickly." Br. 31. It can be further avoided by utilizing the new "online absentee ballot tracking system that will allow voters who choose to take advantage of absentee voting to follow the journey of their ballot from the time of their request for an absentee ballot to its delivery and receipt by the clerk, including whether it has been rejected." App. A-28.

Third, Appellants' claim gives insufficient weight to the fact that ballots with signature mismatch are automatically treated as "challenged" even if not cured. App. A-28. And voters with a missing or incomplete signature "can take steps to cure the defect over the phone without having to come to the town office or to complete a duplicate ballot. When that option is used, the ballot will be counted as a challenged ballot." App. A-28. Maine law explicitly provides challenged ballots "must be counted the same as a regular ballot"—that is, they are given equal weight in determining the outcome of an election. 21-A M.R.S. § 696(1). Accordingly the signature requirement as supplemented by the Secretary's instructions imposes *no* burden on voting.

Finally, Appellants assert that the system continues to disproportionately burden certain classes of Maine voters who may be unwilling or unable to go to a clerk's office in person. Br. 10-11. This argument discounts the ability for voters to cure signature mismatch over the phone and similarly cure absent signatures, which will be treated as challenged and therefore cured, over the phone as well. It also discounts the fact that an opportunity to cure is a second opportunity to comply with one of many alternatives

to voting. It is thus a regulation that accommodates rather than restricts voting. *See supra* 8-10, 13-15.

State Interest: Even if the signature requirement imposes a slight burden on the right to vote, it is more than justified by the State's overwhelming interests. *First*, mail-in votes are inherently more susceptible to fraud, *see, e.g.*, *Building Confidence in U.S. Elections* 46, bit.ly/2KF3WUE (*Carter-Baker Report*); *Griffin*, 385 F.3d at 1131, so States have an interest in enforcing integrity-policing measures like signature matching, *see Crawford*, 553 U.S. at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters."). *Second*, the State has a strong interest in playing an "active role in structuring elections" to bring "order, rather than chaos" to "the democratic process" through the imposition of measures such as deadlines. *Burdick*, 504 U.S. at 433. In light of this interest, the Superior Court properly refused to rewrite the State's election laws.

Appellants have no answer to these interests. Instead, they attempt to undermine the State's interest by suggesting less restrictive alternative means such as a two-day cure period and form affidavit. But strict scrutiny applies only to "severe" burdens on the right to vote. *New Georgia Project*, 2020 WL 5877588, at *1 ("[I]f the rule imposes only 'reasonable, nondiscriminatory restrictions,' then 'a State's important regulatory interests will usually be enough' to justify it." (quoting *Timmons*, 520 U.S. at 358)). When the alleged burdens are not severe, a compelling state interest pursued by the least restrictive means is not required. *Id.* at *3 (citing *Timmons*, 520 U.S. at 358).

In the absence of a severe burden, Appellants' identification of debatably less restrictive means is irrelevant. *Id.* Indeed, the Ninth Circuit recently held that an Election Day deadline to cure missing signatures serves a State's "unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion." *Arizona Democratic Party*, 2020 WL 5903488, at *1. The court also emphasized the discretion States possess to "reasonably decline to assume [administrative] burdens simply to give voters who completely failed to sign their ballots additional time after Election Day to come back and fix the problem." *Id.* at *2. Because the State has wide discretion to ensure "order, rather than chaos," in its election process, *Burdick*, 504 U.S. at 433, and the cure requirement imposes no burden on voting, the Court should reject Appellants' attempt to impose their preferred policy through the judiciary, *Crawford*, 553 U.S. at 196 ("While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear."). Out of "respect for the differing functions and capabilities" of the branches, this Court should "stay [its] hand and defer" to the Secretary's reasonable exercise of discretion to provide tailored accommodations in response to the pandemic. *See Durepo v. Fishman*, 533 A.2d 264, 265 (Me. 1987).

3. Maine's signature policies do not violate Due Process.

Appellants purport to allege a separate procedural due process violation related to the opportunity to cure. Br. 35-38. Their claim fails on two separate grounds.

First, Appellants' procedural due process claims are duplicative of their *Anderson-Burdick* claims. *Anderson-Burdick* is the "single standard for evaluating challenges to voting restrictions." *Obama for Am. v. Husted*, 697 F.3d 423, 430 (6th Cir. 2012); *see also Arizona Democratic Party*, 2020 WL 5903488, at *2 n.1 ("The State is also likely to succeed in showing that the district court erred in accepting the plaintiffs' novel procedural due process argument, because laws that burden voting rights are to be evaluated under the *Anderson/Burdick* framework instead." (quotation marks omitted)); *New Georgia Project*, 2020 WL 5877588, at *3 ("The generalized due process argument that the plaintiffs argued for and the district court applied would stretch concepts of due process to their breaking point. And even looking at that approach in the most charitable light possible, it is conceptually duplicative of the specific test we have been instructed to apply under *Anderson* and *Burdick*."); *DNC v. Bostelmann*, 2020 WL 3077047, at *6 (W.D. Wis. June 10, 2020). And in any event, *Anderson-Burdick* right-to-vote claims rely on a much more "specific guarantee[]" than "the more generalized notion of" of procedural due process, so the generalized claim is duplicative of the specific claim. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Arizona Democratic Party*, 2020 WL 5903488, at *2 n.1; *New Georgia Project*, 2020 WL 5877588, at *3; *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005). Because Appellants' *Anderson-Burdick* claim fails, *supra* 24-28, so too does their due process claim.

Second, even if the due process claims were not completely redundant, they fail the *Mathews v. Eldridge* balancing test "for the same reasons" that the parallel right-to-

vote claims fail *Anderson-Burdick*. *See Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008); *see also* Br. 35 (invoking procedural due process "[f]or the same reasons" that they invoke *Anderson-Burdick*). While Appellants have a strong interest in the right to vote, there is *no* risk of being *deprived* of that right by an absentee-ballot regulation, given that they can vote in person. But even assuming that rejections for determined noncompliance with integrity policing regulations (like signature requirements) are "deprivations" and that *all* of the rejections are "erroneous," there is still only minimal risk of an "erroneous deprivation," *see Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), given the opportunity to cure and the challenged ballot procedure, *see* App. A-29. The "probable value" of any additional process is now less than negligible. *Mathews*, 424 U.S. at 335. And, in any event, the risk would be outweighed by the State's strong interest in enforcing its Election Day cure deadline. App. A-29; *see Arizona Democratic Party*, 2020 WL 5903488, at *1 ("All ballots must have some deadline, and it is reasonable that Arizona has chosen to make that deadline Election Day itself so as to promote its unquestioned interest in administering an orderly election and to facilitate its already burdensome job of collecting, verifying, and counting all of the votes in timely fashion."). Thus, even assuming such a claim is available to Appellants, the State clearly satisfies the requirements of due process, *see* App. A-28, which "guarantees fair procedure, not 'perfect, error-free determinations.'" *Aurelio v. R.I. Dep't of Admin.*, 985 F. Supp. 48, 56 (D.R.I. 1997) (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)).

II. The equities weigh decisively against Appellants.

Even if this Court concludes that Appellants' claims have merit—and neither does—it should affirm the Superior Court's denial of preliminary relief. A preliminary injunction "does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943-44 (2018). It remains "an extraordinary remedy never awarded as of right," which this Court can deny "[a]s a matter of equitable discretion." *Id.* at 1943; *see Alexander*, 411 A.2d at 79. And this Court must do so if Appellants cannot show that they are "likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Benisek*, 138 S. Ct. at 1944. Appellants did not show below that they were likely to suffer irreparable harm, and their four-sentence, formulaic argument on the equities certainly fails to do so in this Court. The equitable factors, including the so-called *Purcell* principle, all favor Appellees and provide independent bases to affirm the Superior Court's decision.

A. Appellants will suffer no irreparable harm.

The Superior Court was "not persuaded that withholding injunctive relief to the Appellants will result in irreparable harm" and determined that, in any event, "the harm to the State's electoral process outweighs the minor burdens imposed by those laws on the right to vote." App. A-37. Indeed, any irreparable injury would fall on the State. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *see also Little v. Reclaim Idaho*, 140 S. Ct. 2616, 2617 (2020) (Roberts, C.J., concurring) ("[T]he State is likely to suffer irreparable harm

absent a stay. Right now, the preliminary injunction disables Idaho from vindicating its sovereign interest in the enforcement of initiative requirements that are likely consistent with the First Amendment."). Appellants, however, will suffer no irreparable injury absent a stay because they "may submit their absentee ballots (on time) or take advantage of any of the other avenues that [Maine] has made available to ensure that voters are able to cast their ballots." *New Georgia Project*, 2020 WL 5877588, at *4.

Indeed, Appellants' claim for irreparable harm is premised on the loss or severe burdening of their right to vote. Br. 40. This wrongly assumes that they are likely to succeed on their claims. *Reagan*, 2018 WL 10455189, at *4 ("Because Plaintiffs are not likely to succeed on the merits of their appeal, they necessarily have not shown a likelihood of irreparable harm or a sharply favorable tip in the balance of hardships, especially considering their requested relief would upend rather than preserve the status quo."). And "in a case such as this," where Appellants moved to enjoin laws enacted to "reduce voting fraud," "the right to vote is on both sides of the ledger." *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007). Thus, an injunction absent a chance of success on the merits would "seriously and irreparably harm" the State. *Abbott*, 138 S. Ct. at 2324.

B. The balance of the harms and public interest favor Appellees.

When the government is a defendant, harm to the defendants and public interest merge into one factor. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). The "inability to

enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott*, 138 S. Ct. at 2324 n.17. Those plans, as explained above, are supported by weighty public interests that outweigh any burdens on voters. *See Benisek*, 138 S. Ct. at 1944 (public interest in "orderly elections"). And the public interest would be disserved by this Court imposing burdensome injunctions on State officials at this juncture, while they are working to address a public-health emergency. With "public election offices … stretched to the limit in this pandemic crisis," the equities do not lie with any plaintiff who "calls for quick implementation of a systemic remedy" to statewide election procedures. *Black Voters Matter Fund v. Raffensperger*, No. 1:20-CV-01489-AT, 2020 WL 2079240, at *4 (N.D. Ga. Apr. 30, 2020); *see also Arizona Democratic Party*, 2020 WL 5903488, at *2; *New Georgia Project*, 2020 WL 5877588, at *4; *Arizonans for Fair Elections v. Hobbs*, No. 20-cv-00658, 2020 WL 1905747, at *3 (D. Ariz. Apr. 17, 2020); *Ziriax*, 2020 WL 5569576, at *23.

C. The *Purcell* principle prohibits eleventh-hour changes to Maine election laws.

When parties ask federal courts to enjoin voting laws just before an election, they must weigh "considerations specific to election cases"—what is known as the *Purcell* principle. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). The *Purcell* principle counsels against judicial interference close to an election for at least two related reasons: (1) judicial interference upsets policy decisions by the political branches charged and vested with the power to make them; and (2) *late* judicial interference with election laws and policies

risks confusion and undermines confidence in the system. *See id.* at 4-6; *Clingman v. Beaver*, 544 U.S. 581, 586 (2005) ("The Constitution grants States broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives." (internal quotation marks omitted)). In short, "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell*, 549 U.S. at 4-5. Likewise, last-minute orders can "send[] the State scrambling to implement and to administer a new procedure … at the eleventh hour," which disserves the public interest. *Arizona Democratic Party*, 2020 WL 5903488, at *2. Unsurprisingly then, courts treat the *Purcell* principle as an "independent" basis to deny injunctive relief. *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020) (Kavanaugh, J., concurring in grant of application for stay); *see Purcell*, 549 U.S. at 5 (vacating a lower court's injunction "[g]iven the imminence of the election" while "express[ing] no opinion here on the correct disposition" of the case); *Short*, 893 F.3d at 680 ("[E]ven if the merits question were close, the district court did not abuse its discretion [by denying a preliminary injunction on *Purcell* grounds].").

Below, Appellants gave short shrift to the *Purcell* principle because, in their view, the doctrine constrains only *federal*-court interference with election laws and policies. *See, e.g.*, 9/22 Tr. at 52: 19-22. That is misguided. While the *Purcell* principle originated in federal court, it is simply an election-specific application of normal equitable principles concerning the public interest. *Purcell* itself discusses "court orders affecting

elections," and its reasoning does not depend on a federal-state distinction. *Purcell*, 549 U.S. at 4-5. And when the Supreme Court recently discussed *Purcell* in the Wisconsin election case, *RNC v. DNC*, 140 S. Ct. 1205 (2020), it boiled down what it called "the wisdom of the *Purcell* principle" in avoiding "*judicially* created confusion" caused by last minute orders altering election rules, *id.* at 1207 (emphasis added). State court orders have the potential to confuse and disrupt elections just the same as federal court orders.

It is thus no surprise that Maine courts, including this one and the Superior Court, have employed *Purcell*-like reasoning. *See Crafts v. Quinn*, 482 A.2d 825, 829 (Me. 1984) (refusing to "invalidat[e] … the requirements for candidacy" "so close to the election"); App. A-35, A-37 ("Such judicial modification of the deadline risks severe disruption of Maine's electoral process…. [T]he State has a significant interest in providing order, stability, and legitimacy to the electoral process,…. [I]t would not be in the public interest to grant injunctive relief against state officials responsible for the implementation and enforcement of Maine's election laws for the November 3, 2020 general election." (internal quotation marks omitted)). Indeed, the Law Court just recently employed *Purcell* to reject a challenge because "[v]oting has begun … and there is a strong public interest in not changing the rules for voting at this late time." *Jones v. Sec'y of State*, 2020 ME 117, ¶4 (citing *Purcell*, 549 U.S. at 4-6). Other States have likewise followed the "*Purcell* principle" and rejected judicial changes to election laws as an election approaches. *See American Federation of Teachers*, No. 216-2020-CV-0570, at 18-19; *Pet. of N.H. Sec'y of* State, No. 2018-0208 (N.H. Oct. 26, 2018); *Liddy v. Lamone*, 919

A.2d 1276, 1288 (Md. 2007); *Dean v. Jepsen*, No. CV106015774, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010); *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 740 N.W.2d 444, 454 (Mich. 2007).

Appellants' failure to engage the *Purcell* principle at all is particularly troubling because, as was the case in *Respect Maine PAC v. McKee*, 622 F.3d 13 (1st Cir. 2010), the eve-of-election predicament this Court finds itself in is "largely of [Appellants'] own making," *id.* at 16. In *Respect Maine*, the First Circuit was not impressed that despite the fact that circumstances hadn't really changed for months, the appellants in that case "chose not to bring this suit until August 5, 2010, shortly before the November 2 elections." *Id.* Applying the *Purcell* principle, the First Circuit was mindful of "the harm to the public interest from the chaos that [would] ensue if the Maine election laws, which have been in place [for many years], are invalidated by a court order in the crucial final weeks before an election." *Id.*

Similarly here, though the events and circumstances giving rise to their claims largely began in March or earlier, Appellants waited to file suit until June 24. They then waited forty-four days before moving for a preliminary injunction on August 7. This timeline is not in keeping with similar suits filed by similar plaintiffs represented by the same lawyers across the country. *See, e.g.*, *DNC v. Bostelmann*, No. 3:20-cv-249 (W.D. Wis.) (complaint filed March 18, 2020; preliminary injunction motion filed nine days later on March 27, 2020); *Corona v. Cegavske*, No 20-OC-64-1B (Nev. Dist. Ct., Carson City) (complaint filed April 16, 2020; preliminary injunction motion filed five days later

on April 22); *Middleton v. Andino*, No. 3:20-cv-1730 (D. S.C.) (complaint filed May 1, 2020; preliminary injunction motion filed six days later on May 7, 2020). By the time Appellants filed their preliminary injunction motion in this case, voters were already free to begin requesting absentee ballots, *see Absentee Voting Guide*, bit.ly/2QET4cs, and the State's logistical planning for the November election—taking into account and accommodating any new concerns raise by Covid-19—was already well underway, *see, e.g.*, App. A-33.

Now, with 25 days left to go before Election Day, the State's plans are set, and absentee voting has commenced. *See* 21-A M.R.S. § 752. This Court already invoked *Purcell* in a situation where the amount of time between the court's order and Election Day is longer than the time left before the November election, *see Jones v. Sec'y of State*, 2020 ME 117, ¶4 (citing *Purcell*, 549 U.S. at 4-6), as have numerous other courts, *see, e.g.*, *North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a lower-court order that changed election laws 32 days before Election Day); *Husted v. Ohio State Conference of NAACP*, 573 U.S. 988 (2014) (staying a lower-court order that changed election laws 61 days before Election Day); *Purcell*, 549 U.S. at 4-5 (staying a lower-court order that changed election laws 33 days before Election Day); *see also Perry v. Perez*, 565 U.S. 1090 (2011) (staying a lower-court order that changed election laws 22 days before the candidate-registration deadline). And for good reason. *See New Georgia Project*, 2020 WL 5877588, at *3 ("[W]e are not on the eve of the election—we are in the middle of it, with absentee ballots already printed and mailed. An injunction here would thus

violate *Purcell*'s well-known caution against federal courts mandating new election rules—especially at the last minute."); *see also Arizona Democratic Party*, 2020 WL 5903488, at *2; *Ziriax*, 2020 WL 5569576, at *23.

Appellants seek disruptive changes to Maine's election system, and they waited until the eleventh hour to do so. The relief sought would inevitably sow confusion and distrust among the electorate. The *Purcell* principle guards against those concerns and should by itself preclude the relief Appellants seek.

CONCLUSION

For these reasons, this Court should affirm the Superior Court's denial of Appellants' motion for preliminary injunction.

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Respectfully submitted,

Patrick Strawbridge
Maine Bar No. 10024
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(703) 243-9423
patrick@consovoymccarthy.com

Counsel for Appellees/Intervenor-Defendants Donald J. Trump for President, Inc., Republican National Committee, National Republican Senatorial Committee, and Republican Party of Maine

CERTIFICATE OF SERVICE

The undersigned hereby certifies, pursuant to M.R. App. P. 10(b), that copies of the foregoing were served upon the parties to this action below.

Dated: October 9, 2020

Patrick Strawbridge, Bar No. 10024