STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-21-212

CHRISTOPHER J. CAIAZZO,

Appellant

v.

SHENNA BELLOWS, in her capacity of
Secretary of State for the State of Maine, and THOMAS B. SAVIELLO,

Appellees.

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT
Docket No: AP-21-13

BRIEF OF APPELLEE THOMAS B. SAVIELLO

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
(207) 772-1941

Adam R. Cote, Bar No. 9213
Jeana M. McCormick, Bar No. 5230
Sara P. Cressey, Bar No. 6201
acote@dwmlaw.com
jmccormick@dwmlaw.com
scressey@dwmlaw.com
Counsel for Appellee
Thomas B. Saviello

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jmccormick@dwmlaw.com
scressey@dwmlaw.com
Counsel for Appellee
Thomas B. Saviello

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On September 16, 2020, Intervenor-Appellee Thomas Saviello (hereafter "Senator Saviello") and five other Maine voters filed the application for the Initiative that is the subject of this case. (A. 41). The purpose of the Initiative, as made clear in the preamble included in the draft legislation submitted with the application, is to protect Maine's wilderness and public lands. (*See* A. 42). The preamble states:

> **Whereas**, high-impact transmission lines present a unique threat to the environment, and the recreational and commercial opportunities central to the State's health and well-being;
>
> **Whereas**, the Upper Kennebec Region contains critical cold-water fisheries, deer wintering yards, and many other important wildlife resources, provides crucial recreational opportunities for visitors from Maine and elsewhere which are vital to the economy of the region, as well as sustainable timber harvesting;
>
> **Whereas**, Article IX, section 23 of the Maine Constitution was enacted to protect the State's public lands by requiring the approval of 2/3 of the Legislature for any conveyance of public land that substantially alters its use;
>
> **Whereas**, transmission lines and similar linear facilities by definition substantially alter the uses and enjoyment of these critical public lands; and
>
> **Whereas**, the People of the State of Maine wish to ensure that conveyances of interests in public lands for such uses are presented for approval to the Legislature . . . .

(A. 42). Similarly, the summary of the Initiative highlights "the potential impacts to the environment and people of Maine from high-impact transmission lines," and the "high value wildlife, recreation and logging values" in the Upper Kennebec Region. (A. 44).[1]

Respondent-Appellee the Secretary of State (hereafter "Secretary of State" or "Secretary") accepted the application and, on October 30, 2020, issued the petition form for the Initiative. (A. 45-53). On January 21, 2021, 25,058 petitions containing 95,622 signatures in support of the Initiative were submitted to the Secretary. (A. 54). Upon examination of the petitions, the Secretary found 80,506 signatures to be valid. (A. 54-55). The number of valid signatures exceeded the required number by more than 17,000 signatures. (A. 55). Accordingly, the Secretary found the petition to be valid, (A. 55), and certified the Initiative to the Maine Legislature, (A. 56). The Legislature did not enact the Initiative without change prior to adjourning its first regular session *sine die* on March 30, 2021. (A. 56). Thus, pursuant to Article IV, Part Third, Section 18 of the Maine Constitution,

[1] The New England Clean Energy Connect ("NECEC") Project brought many of these environmental concerns to the forefront and, thus, the referendum may have significant impacts on the NECEC Project, just as it would for any similar project passing through the Upper Kennebec Region or over public lands. There are, however, countless statutes that affect particular projects but also have broad applicability. Thus, Appellant's assertion that "the Initiative targets the NECEC Project," Pet'r's Br. Requesting Reversal of Sec'y of State's Determination at 6, only tells one part of the story.

the Initiative will be placed on the ballot for the upcoming November 2, 2021 election. (A. 56).

On April 13, 2021, the Secretary released proposed language for the ballot question for the Initiative and invited public comment on the wording of the question. (A. 57). The proposed language read: "Do you want to ban the construction of high-impact electric transmission lines in the Upper Kennebec Region and to require the Legislature to vote on other such projects in Maine retroactive to 2014, with a two-thirds vote required if a project uses public lands?" (A. 57) (italics omitted). Senator Saviello submitted a comment on the proposed ballot question, which read, in part:

> As the proponent of the above listed citizen initiated referendum, I am pleased to provide for you my thoughts on the proposed language you and your staff have offered, summarizing our citizen initiative petition.
>
> As an initial matter, I think the language you have offered is certainly clear, concise and easy for Maine voters to understand. In short, I think you did an excellent job of summarizing a complex issue for Maine voters.

(A. 62). Senator Saviello then recommended wording changes, including one small change to clarify a point as well as changes to the wording regarding the retroactivity requirements to make the ballot question "more consistent with the actual referendum language." (A. 63).

Petitioner-Appellant Christopher Caiazzo (hereafter "Appellant") also submitted a comment on the proposed ballot question. (A. 58-60). Appellant "express[ed] [his] objection" to the Secretary's proposed language for the ballot question "on the grounds that it does not comply with 21-A M.R.S. § 906(6)(A)" and stated that "this statute requires that ballots for a statewide vote on an initiative include separate questions for each issue raised by the initiative." (A. 58). Appellant then provided the full text of Section 906(6)(A), explained why he thinks the three "considerations" in Section 906(6)(A)(1)-(3) weigh in favor of multiple ballot questions for the Initiative, and proposed three questions to replace the single question the Secretary had drafted. (A. 58-60).

On May 24, 2021, the Secretary of State released the final wording of the ballot question for the Initiative, which reads as follows:

> Do you want to ban the construction of high-impact electric transmission lines in the Upper Kennebec Region and to require the Legislature to approve all other such projects anywhere in Maine, both retroactively to 2020, and to require the Legislature, retroactively to 2014, to approve by a two-thirds vote such projects using public land?

(A. 40).

On June 3, 2021, Appellant, who opposes the Initiative, challenged the final wording of the ballot question in his Verified Petition for Review of Final Agency Action against the Secretary of State. (A. 1). On June 14, 2021, Senator

Saviello filed an Unopposed Motion to Intervene, which the Superior Court granted on June 16, 2021. (A. 2). On June 14, 2021, Appellant filed a Motion for Additional Evidence, (A. 2), which was granted over the Secretary's and Senator Saviello's respective oppositions, (A. 2-3). On June 16, 2021, Appellant filed his Rule 80C Brief Requesting Reversal of the Secretary of State's Determination, and on June 23, 2021, the Secretary and Senator Saviello filed their respective Rule 80C Briefs in Support of the Secretary of State's Determination. (A. 2-3). On June 28, 2021, Appellant filed his Reply in Support of his Rule 80C Brief. (A. 3). Oral argument was held via Zoom on June 29, 2021. (A. 3).

On July 6, 2021, the Superior Court issued an Order affirming the decision of Secretary of State to draft the direct initiative as a single ballot question (hereafter the "Order"). (A. 3, 5-18). On July 9, 2021, Appellant filed a Notice of Appeal of the Order. (A. 3).

STATEMENT OF THE ISSUE FOR REVIEW

The issue for review is whether the Secretary of State erred as a matter of law in drafting a single ballot question for the direct initiative entitled "An Act to Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region."

SUMMARY OF THE ARGUMENT

Appellant has challenged the Secretary of State's decision to draft a single ballot question for the direct initiative entitled "An Act to Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" (the "Initiative"). Appellant argued before the Superior Court that the Secretary of State must reformulate the single ballot question for the Initiative into multiple ballot questions. In support of his argument, Appellant relies upon 21-A M.R.S. § 906(6)(A), which he erroneously argues requires the Secretary to draft a separate question for each issue in an initiative.

As an initial matter, in a challenge to the Secretary's formulation of a ballot question, the issue is simply whether the question is understandable and not misleading. 21-A M.R.S. § 905(2); *Olson v. Sec'y of State*, 1997 ME 30, 689 A.2d 605. Where, as here, the Appellant himself has conceded that the question is clear, his petition seeking a reformulation of the ballot question must be denied.

Moreover, even if the Court does consider whether the Secretary committed an error of law under 21-A M.R.S. § 906(6)(A), the plain language of section 906(6)(A) answers this question in the negative. Section 906(6)(A) is unambiguous and, as the Superior Court held, only requires that the Secretary advise the

petitioners "that the proper suggested format for an initiative question is a separate question for each issue" and does not require that the Secretary draft a separate question for each issue. (A. 16-17). Even if the Court were to find that section 906(6)(A) is ambiguous, as the Superior Court further held, the legislative history supports the Secretary's reasonable interpretation of the statute—"that the Legislature did not intend § 906(6)(A) to impose a mandatory duty on the Secretary to split ballot questions if they contain multiple issues." (A. 18).

Accordingly, Intervenor-Appellee Thomas B. Saviello respectfully requests that this Court affirm the decision rendered by the Superior Court affirming the Secretary of State's decision to draft a single ballot question for the Initiative and, thus, permit the ballot question to be presented to the voters as formulated by the Secretary.

ARGUMENT

I. Standard of Review

In an appeal to the Supreme Judicial Court under 21-A M.R.S. § 905(3), "[t]he standard of review shall be the same as for the Superior Court." The Superior Court conducts an action brought under 21-A M.R.S. § 905 as an appeal "in accordance with the Maine Rules of Civil Procedure, 80C, except as modified by this section." 21-A M.R.S. § 905(2). Section 905(2) provides:

> In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is

> understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes.

Thus, when reviewing the Secretary of State's formulation of a ballot question, the Court must "independently determine whether the ballot question is understandable and not misleading." *Olson v. Sec'y of State*, 1997 ME 30, ¶ 4, 689 A.2d 605.

Further, to the extent necessary, the Court reviews *de novo* issues of law, including the interpretation of constitutional and statutory provisions. *McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933. "Because the Superior Court acted as an intermediate appellate court, we directly review the Secretary of State's decision." *Id.* (citing *Palesky v. Sec'y of State*, 1998 ME 103, ¶ 9, 711 A.2d 129, 132). When reviewing an unambiguous statute, the Court "interpret[s] the statute according to its plain language." *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 53, 39 A.3d 74, 91 (quoting *Cobb v. Bd. of Counseling Pros. Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271). "If the statute is ambiguous, we defer to the agency's interpretation, and we affirm the agency's interpretation unless it is unreasonable." *Id.* (quoting *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271).

II. The single ballot question is understandable and not misleading and must be affirmed.

The Appellant brought his challenge to the Secretary's wording of the final ballot question pursuant to 21-A M.R.S. § 905, 5 M.R.S. § 11001, and M.R. Civ. P. 80C, and argued that the wording violated 21-A M.R.S. § 906(6)(A). (A. 19). As

discussed in more detail below, section 906(6)(A) does not impose any obligation on the Secretary to draft the ballot question for a direct initiative in any particular way. *See infra* Section III; *see also* Order at 10 ("§ 906(6)(A) does not mention the Secretary's obligation to prepare the final ballots.") (A. 14). The fundamental issue underlying Appellant's challenge is whether the Secretary erred in how she chose to formulate the final ballot question—as one question versus three questions. This issue is properly reviewed under the standard set forth in § 905(2) and applied by this Court in *Olson*—a standard that asks simply whether the ballot question is understandable and not misleading. 21-A M.R.S. § 905(2); *Olson*, 1997 ME 30, ¶¶ 4-6, 689 A.2d 605, 606-07. Appellant has conceded that the Secretary's formulation of the ballot question is clear. Pet'r's Reply Br. in Supp. of 80C Pet. and Mot. for Add'l Evid. at 21 ("The question here is not whether the ballot question is *un*clear; rather, the question is whether multiple questions is *more* clear."); *see also* Order at 12 ("Petitioner does not dispute that the Secretary drafted the ballot question in a concise and intelligible manner.") (A. 16). Accordingly, Appellant's challenge to the Secretary's formulation of the ballot question must fail.

This Court's decision in *Olson* is instructive. The plaintiffs in *Olson* challenged the Secretary's formulation of a ballot question pursuant to M.R. Civ. P. 80C and 21-A M.R.S. §§ 905, 906(6)(B). *Olson v. Secretary of State*, No. CV-

96-417, 1996 WL 34628254, at *1 (Me. Super. Ct. Oct. 28, 1996, *Alexander J.*). The plaintiffs claimed that the Secretary's question—"[s]hould spraying pesticides from the air or putting pesticides in Maine's waters be a Class A crime?"—violated the Secretary's duty under § 906(6)(B) to "write the question in a simple, clear, concise and direct manner . . . ." *Id.* The Superior Court explained that:

> The precision of this question is . . . reviewed in accordance with 21-A M.R.S.A. § 905(2) which directs the court, in its review, to "determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to his wishes."

Id. at *2. It further explained that:

> The key question is not whether the question presented outlines the legislation to be voted on with precise accuracy. That will be difficult, particularly with complicated multi-part measures. What must really be achieved is assurance that a voter – who otherwise comes to understand the issue will not be misled into how to vote.

Id. The Superior Court upheld the Secretary's formulation of the ballot question under this standard and the plaintiffs appealed.

On appeal, this Court applied the same standard, determined that "the ballot question conforms to the requirements of the applicable law," and affirmed the Superior Court's judgment upholding the Secretary's formulation of the ballot question. *Olson*, 1997 ME 30, ¶¶ 1, 4, 689 A.2d 605. This Court noted that the Secretary drafted the ballot question for the initiative pursuant to Me. Const. art. IV, pt. 3, § 20 and 21-A M.R.S. § 906(6)(B), *id.* ¶ 3, and after applying "[t]he

statutory grant of judicial review [in 21-A M.R.S. § 905(2)]", *id*. ¶ 4, "reject[ed] the notion that section 905 requires that the description be understandable to a voter who is reading both the question and the legislation for the first time," *id.* ¶ 11. This Court further explained "[t]he procedure is designed to ensure that voters, who may be reading the question for the first time in the voting booth, will understand the subject matter and the choice presented." *Id.*

Here, just like the plaintiffs in *Olson*, the Appellant is challenging the Secretary's formulation of the ballot question. The Superior Court in *Olson* expressly contemplated a scenario where the court had to review a direct initiative that contained "complicated multi-part measures" and indicated that such review would ask whether a question involving multi-part measures was understandable and not misleading. *See Olson*, 1996 WL 34628254, at *2. Thus, if the basis for Appellant's challenge was that the ballot question at issue required multiple questions to be understandable and not misleading, then such a challenge could result in the Secretary having to reformulate the single ballot question into multiple ballot questions. But that is not the case here, where Appellant has conceded that the final ballot question at issue is clear.[2] *See also* R. 36-38 (comments from

[2] Appellant stated in passing in his brief before the Superior Court that the "compound question" for the Initiative "creates a lack of clarity that would not exist if separate questions were used," in support of his argument that the criteria listed in Section 906(6)(A) require multiple questions. Pet'r's Br. at 16. Appellant did not, however, develop an argument that the language of the ballot question is not written "in a clear, concise and direct manner" such that it violates 21-A M.R.S.

supporter of the NECEC approving the use of a single ballot question to present the direct initiative in a straightforward and simple manner).

Moreover, similar to the plaintiffs in *Olson*, Appellant raised a constitutional concern under Me. Const. art. IV, pt. 3, § 20, and argued that the Secretary would be abdicating her constitutional authority to prepare ballots for direct initiatives if she did not independently determine whether the Initiative requires multiple questions. Pet'r's Br. Requesting Reversal of Sec'y of State's Determination (hereafter Pet'r's Br.) at 11. As the Superior Court noted, however, that section of the Maine Constitution requires that "the Secretary of State shall prepare the ballots in such form as to present the question or questions concisely and intelligibly." (A. 16) (quoting Me. Const. art. IV, pt. 3, § 20). The Appellant did not argue before the Superior Court that the final ballot question is not concise or intelligible, which, again, supports the fundamental conclusion here that the ballot question is understandable and not misleading.

In sum, the Secretary has drafted the final ballot question in a way that complies with all of the applicable express statutory mandates: understandable and not misleading, § 905(2); clear, concise and direct, § 906(6)(B); and phrased so that an affirmative vote is in favor, § 906(6)(C)*;see also* Order at 10 (summarizing

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§ 906(6)(B) or § 905(2). Accordingly, Appellant has waived such an argument. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290, 293 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

the statutory obligations of the Secretary in preparing the final ballot question) (A. 14). With respect to this particular Initiative, the Legislature has already created a special category of high-impact transmission lines, recognizing the potential impact that such lines may have on the State of Maine. *See, e.g.*, 35-A M.R.S. § 3131(4-A). Upon reading the single ballot question formulated by the Secretary, voters will understand that voting in favor of the single ballot question will ensure better protection of Maine's environment by subjecting high-impact transmission lines and similar projects to legislative scrutiny. Thus, Appellant's challenge seeking a reformulation of the Secretary's single ballot question must fail where, as here, the question is understandable and not misleading.

III. There are no grounds for compelling the Secretary to reformulate the ballot question for the Initiative.

Even if the Court determines that it must look beyond the requirements of section 905(2) to review whether the Secretary's formulation of the single ballot question is appropriate under 5 M.R.S. § 11007(4), section 906(6)(A) plainly does not require the Secretary to draft multiple ballot questions for the Initiative. "When a case concerns the interpretation of a statute that an administrative agency administers and that is within its area of expertise," a court first determines whether the statute is ambiguous. *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271, 275. If the statute is unambiguous, the court simply applies the statute's plain language. *Id.*

As the Superior Court held, "[t]he plain language of § 906(6)(A) supports the Secretary's position. § 906(6)(A) only requires the Secretary to advise initiative petitioners of Maine's preference for ballot initiatives that have one issue per question and to notify them of the statutory factors guiding this determination." Order at 12-13 (A. 16-17). Section 906(6) mandates that the Secretary draft ballot questions in a certain way, namely "in a clear, concise and direct manner," § 906(6)(B), and "phrased so that an affirmative vote is in favor of the direct initiative," *id.* § 906(6)(C). The Legislature could have chosen to additionally mandate that, for the type of "complicated multi-part measures" alluded to in *Olson*, the Secretary draft a separate ballot question for each issue in a direct initiative, but it did not do so. The plain language of Section 906(6)(A) unambiguously requires only that the Secretary "advise petitioners" regarding the "suggested" format for a ballot question. Accordingly, the Secretary's decision to draft a single ballot question for the Initiative does not constitute an error of law under 5 M.R.S. § 11007(4)(C)(4).

A. Section 906(6) unambiguously mandates only that the Secretary write ballot questions in a clear, concise and direct manner that will not mislead voters; it does not mandate that the Secretary prepare a separate question for each issue in an initiative.

Section 906(6) sets out the requirements for the wording of ballot questions for direct initiatives. Each subsection of Section 906(6) includes mandatory language, like "must" and "shall." *See* 1 M.R.S. § 71(9-A) ("'Shall' and 'must' are

terms of equal weight that indicate a mandatory duty, action or requirement."); *see also Portland Sand & Gravel, Inc. v. Town of Gray*, 663 A.2d 41, 43 (Me. 1995). For example, "[t]he Secretary *shall* write the question in a clear, concise and direct manner that describes the subject matter of the . . . direct initiative as simply as is possible," 21-A M.R.S. § 906(6)(B) (emphasis added), and "[t]he question for a direct initiative *must* be phrased so that an affirmative vote is in favor of the direct initiative[,]" *id.* § 906(6)(C) (emphasis added). The Secretary plainly must comply with the requirements that follow such mandatory language, and the Legislature plainly knows how to require the Secretary to take a particular action in drafting ballot questions.

The first sentence of Section 906(6)(A), the provision upon which Appellant's argument hinges, also includes mandatory language: "The Secretary of State *shall* advise petitioners that the proper suggested format for an initiative question is a separate question for each issue." *Id.* § 906(6)(A) (emphasis added). This language merely requires the Secretary to "advise petitioners" of the "proper suggested format for an initiative question." *Id.* The use of the word "suggested" in describing the "separate question for each issue" format plainly communicates that such a format is not required. The ordinary meaning of the word "suggest" is "to mention or imply as a possibility," "to propose as desirable or fitting," or "to offer for consideration." *Suggest*, Merriam-Webster Dictionary, https://www.merriam-

webster.com/dictionary/suggest; *see also Thornton Acad. v. Reg'l Sch. Unit 21*, 2019 ME 115, ¶ 5, 212 A.3d 340, 342 ("[W]e give words in a statute their 'plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them.'" (quoting *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 15, 868 A.2d 210)).

In his brief before the Superior Court, Appellant highlighted the similarity in language between Section 906(6), which governs the wording of ballots for direct initiatives, and Section 906(6-A), which governs the wording of referenda questions enacted by the Legislature. Pet'r's Br. at 10. There is an important difference between Section 906(6)(A) and Section 906(6-A), however: Section 906(6-A) omits the word "suggested." Thus, Section 906(6-A) reads: "The proper format for a statutory referendum enacted by the Legislature is a separate question for each issue." That the Legislature chose to include the word "suggested" in the subsection that addresses the format for direct initiative ballot questions, *see* § 906(6)(A), but not in the subsection that addresses the format for statutory referenda enacted by the Legislature, *see id.* § 906(6-A), shows that the Legislature intended to confer discretion on the Secretary to decide whether a particular initiative requires more than one ballot question. To conclude otherwise would be to render the word "suggested" in Section 906(6)(A) mere surplusage. *See Cent. Me. Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262, 1266

("'All words in a statute are to be given meaning,' and no words are to be treated as surplusage 'if they can be reasonably construed.'" (quoting *Davis Forestry Prods., Inc. v. DownEast Power Co.*, 2011 ME 10, ¶ 9, 12 A.3d 1180); *see also* Order at 9 ("Petitioner's interpretation of the first sentence of § 906(6)(A) would render the word 'suggested' surplusage.") (A. 13).

The remainder of the language of Section 906(6)(A) also does not mandate that the Secretary draft a separate ballot question for each issue in an initiative. After the first sentence discussed above, Section 906(6)(A) goes on to state:

> In determining whether there is more than one issue, each requiring a separate question, considerations include whether:
> (1) A voter would reasonably have different opinions on the different issues;
> (2) Having more than one question would help voters to better understand the subject matter; and
> (3) The questions are severable and can be enacted or rejected separately without negating the intent of the petitioners.

Id. Appellant has emphasized the use of the word "requiring" in the second sentence of Section 906(6)(A). *See* Pet'r's Br. at 10. Yet the word "requiring" does not render the provision mandatory, as the words "must" or "shall" would. *See Portland Sand & Gravel*, 663 A.2d at 43. The ordinary meaning of "require" includes "to call for as suitable or appropriate," as well as "to demand as necessary or essential: have a compelling need for." *Require*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/require. Here, when read in context with the "suggested format" language, the most natural meaning of the term

"require" is the former. *See* Order at 9 ("The court cannot read the second sentence of § 906(6)(A) in isolation from the first when the second sentence by its plain language is elaborating on the considerations for determining whether there are separate issues in the same ballot initiative, which the first sentence states is contrary to the 'proper suggested format.' While it is true that the statute states that each issue requires a separate question, read as an elaboration of the first sentence the only significance of the term 'requiring' is to clarify what the Secretary must communicate to the initiative petitioners.") (A. 13). Simply put, the Legislature could have chosen to mandate that the Secretary draft a separate question for each issue in an initiative, but it chose instead to give the Secretary discretion over that choice.

This understanding of Section 906(6)(A) as conferring discretion on the Secretary is consistent with the rest of the statutory scheme of which Section 906 is a part. "In addition to examining the plain language [of a statute], [courts] also consider the whole statutory scheme of which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." *Fernald v. Shaw's Supermarkets, Inc.*, 2008 ME 81, ¶ 7, 946 A.2d 395, 398 (quoting *Jordan v. Sears, Roebuck & Co.*, 651 A.2d 358, 360 (Me. 1994)). The statutory scheme governing direct initiatives, *see* 21-A M.R.S. §§ 901-06, is "replete with provisions that require the Secretary to exercise discretion in

connection with the initiative process," *McGee v. Sec'y of State*, 2006 ME 50, ¶ 57, 896 A.2d 933, 948 (Clifford, J., concurring). As Justice Clifford observed in his concurrence in *McGee*:

> [I]n enacting [sections 901 through 906], the Legislature provided for the Secretary of State's inextricable involvement in almost every aspect of the legislation by initiative process from its inception to its completion. The Secretary designs the application to initiate proceedings for a direct initiative of legislation, 21-A M.R.S. § 901; may witness the voter's signing of the application, 21-A M.R.S. § 901; reviews and determines the form of the petition to be submitted to the voters, 21-A M.R.S. § 901; and reviews the proposed law sought to be enacted, and has the discretion to reject or revise the proposed law, 21-A M.R.S. § 901(3-A). The Secretary then chooses whether to approve the form of the petition, 21-A M.R.S. § 901; drafts the ballot question, 21-A M.R.S. § 901(4); requests from the Revisor of Statutes a summary describing the content of the proposed law, 21-A M.R.S. § 901(5); decides whether to approve or amend the summary as is deemed appropriate, 21-A M.R.S. § 901(5); and prepares instructions specifying statutory and constitutional requirements, as well as the conditions in which signatures and/or petitions may be invalidated, 21-A M.R.S. § 903. Finally, the petitions are filed with the Secretary, and the Secretary then reviews the petitions, and is empowered to determine their validity and to issue a written decision to that effect. 21-A M.R.S. § 905(1). Thus, at every step of the initiative process, the Secretary is charged with making decisions. Such decision-making is the very essence of discretion.

Id.

The plain language of Section 906(6)(A) does not mandate that the Secretary draft a separate ballot question for each issue in an initiative. Section 906(6) mandates only that the Secretary draft the ballot question "in a clear, concise and direct manner," § 906(6)(B), and phrase the question "so that an

affirmative vote is in favor of the direct initiative," *id.* § 906(6)(C). The Legislature chose, however, not to mandate that the Secretary draft a separate ballot question for each issue in an initiative. Instead, the Legislature granted the Secretary discretion to decide whether to draft multiple questions for a single initiative, consistent with the Secretary's exercise of discretion throughout the direct initiative process.[3]

B. Alternatively, if the language of Section 906(6) is ambiguous, the Court must affirm the Secretary's reasonable interpretation of the statute.

Alternatively, if the Court determines that the language of Section 906(6)(A) is ambiguous, the Secretary's interpretation of Section 906(6)(A) must be accorded deference and the Secretary's decision must be affirmed because it is reasonable. Where the plain language of a statute is ambiguous, courts "look beyond that language to examine other indicia of legislative intent, such as legislative history." *Wuori v. Otis*, 2020 ME 27, ¶ 7, 226 A.3d 771, 774 (citing *Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 14, 157 A.3d 223). Courts "defer to an agency's interpretation of a statute administered by that agency and will uphold that interpretation 'unless the statute plainly compels a contrary result.'" *Tenants Harbor Gen. Store, LLC v. Dep't of Env't Prot.*, 2011 ME 6, ¶ 8, 10 A.3d 722, 726.

[3] Again, this goes to the fundamental issue of whether the Secretary's formulation of a ballot question is understandable and not misleading. If the Secretary were unable to draft a single ballot question in a manner that was understandable and not misleading, then she would have to draft multiple ballot questions—though under section 905(2) and not 906(6)(A).

In other words, the agency's interpretation must stand as long as it is reasonable. *See Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271, 275.

Here, the Secretary plainly interprets Section 906(6)(A) as conferring upon her discretion to determine whether to draft a single question or multiple questions for a direct initiative involving multiple related issues. The Secretary's interpretation is reasonable because Section 906(6)(A) does not "compel a contrary result," *Tenants Harbor Gen. Store*, 2011 ME 6, ¶ 8, 10 A.3d 722, 726, and therefore the Secretary's decision must stand. Additionally, the legislative history of Section 906(6)(A) supports the Secretary's interpretation.

1. The Secretary's interpretation of Section 906(6)(A) is reasonable and must be upheld.

As discussed above, Appellant submitted a comment regarding the Secretary's proposed ballot question language in which Appellant argued that "21-A M.R.S. § 906(6)(A) . . . requires that ballots for a statewide vote on an initiative include separate questions for each issue raised by the initiative." (A. 58). Appellant then expressed his view that the Initiative "seeks to have the voters change provisions of Titles 12 and 35-A of Maine law in three different, substantive respects," (A. 59), and urged the Secretary to draft three separate ballot questions "in accordance with Section 906(6)(A)," (A. 60). Accordingly, during the public comment period the Secretary was confronted with the question of whether the applicable statutory scheme mandated that she draft three questions for

the Initiative. Ultimately, the Secretary retained the single-question format for the final wording of the ballot question for the Initiative. (A. 40). Thus, the Secretary necessarily determined that she retained the discretion to decide whether the Initiative was best presented to the voters as one question or three questions under Section 906(6)(A).

The Secretary's determination regarding the meaning of Section 906(6)(A), a statute that the Secretary administers, is entitled to deference and must be upheld because Section 906(6)(A) does not "plainly compel[] a contrary result.'" *Tenants Harbor Gen. Store*, 2011 ME 6, ¶ 8, 10 A.3d 722, 726. For the reasons discussed above, Section 906(6)(A) does not "compel" the conclusion that the Secretary is required to draft a separate ballot question for each issue in an initiative. It was eminently reasonable for the Secretary to determine that Section 906(6)(A) permitted a single ballot question in the absence of a clear directive to the contrary.

2. The legislative history of Section 906(6)(A) supports the Secretary's interpretation of Section 906(6)(A).

When the language of a statute is ambiguous, a court may "look behind the face of the statute to divine the Legislature's intent." *Corinth Pellets, LLC v. Arch Specialty Ins. Co.*, 2021 ME 10, ¶ 30, 246 A.3d 586, 595. Here, the legislative history of Section 906(6)(A) shows that the Legislature clearly intended to require only that the Secretary "advise petitioners" regarding the suggested format for a

ballot question, and left the ultimate decision regarding how many ballot questions should be drafted for a particular Initiative within the discretion of the Secretary.

In 1983, the Legislature enacted 21 M.R.S. § 1351(5), which read, in relevant part: "The ballot question for initiative and people's veto referenda shall be drafted by the Secretary of State in accordance with Section 702-A and rules adopted pursuant thereto." L.D. 1663 (111th Legis. 1983). Section 702-A(1) was enacted at the same time and stated:

> Wording of ballots for people's veto and initiative referenda. Ballots for a statewide vote on people's veto and initiative questions shall set out the question to be voted on in clear, concise and direct language. The Secretary of State, by rules adopted pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, shall establish a method for drafting ballot questions which will attain that standard of readability.

Id. Thus, from the very beginning, the Secretary of State had discretion over the wording of direct initiative ballot questions. In 1985, the Legislature recodified the election laws and 21 M.R.S. § 702-A(1) was moved to 21-A M.R.S. § 906(6). *See* L.D. 576 (112th Legis. 1985). Only one word was changed: the first "shall" in Section 702-A(1) was changed to "must." *Compare* L.D. 1663 (111th Legis. 1983), *with* L.D. 576 (112th Legis. 1985).

In 1987, the Legislature made a significant substantive change to Section 906(6) by establishing a particular required format for direct initiative ballot questions:

> 6. Wording of ballots for people's veto and initiative referenda. Ballots for a statewide vote on people's veto and initiative questions shall set out the question to be voted on as set forth in this subsection.
> . . .
> B. With respect to initiative referenda, the question shall be presented to the voters in substantially the following form:
>
> "Do you favor the changes in Maine law concerning (the subject matter of the law) proposed by citizen petition?"

L.D. 289 (113th Legis. 1987). Subsection (D) provided that "the Secretary of State shall select language to describe the subject matter of the law that would be affected by approval of the referendum and shall complete the question factually as may be necessary." *Id.* Thus, although the Secretary retained some discretion over the wording of direct initiative ballot questions, the Legislature dictated the form that questions would take.

In 1993, however, the Legislature amended Section 906(6) again and adopted the present language of the statute. *See* L.D. 1488 (116th Legis. 1993). This change removed the formulaic ballot question language and returned to the Secretary discretion over the wording of ballot questions. *See id.* The language of what is now subsection (A) was not originally included in the section of the bill that replaced the prior language of Section 906(6). The Committee on Legal Affairs amended L.D. 1488 to add what is now Section 906(6)(A). The Statement of Fact for the amendment states: "This amendment . . . adds a provision that requires the Secretary of State to advise petitioners on the proper suggested format

for questions." Comm. Amend. A to L.D. 1488, No. H-497 (116th Legis. 1993). Thus, the only obligation that the Committee intended to impose on the Secretary through Subsection (A) was the obligation to "advise petitioners on the proper suggested format for questions." *Id.*

Before the Superior Court, Appellant's discussion of the legislative history of Section 906(6) focused on whether the Legislature used the singular or plural of "question." *See* Pet'r's Br. at 11-13. Prior to the 1993 amendment, Section 906(6) used the singular "the question," which Appellant asserted means that the Legislature "require[d] a single ballot question for a single initiative." Pet'r's Br. at 14. Thus, Appellant asserted, "the drafting history of section 906 demonstrates that the Legislature knew how to require a single question for a direct initiative; it did so initially, but subsequently revised Section 906 to require separate questions for a multi-issue initiative." Pet'r's Br. at 12. This is a strained interpretation of the Legislative history in light of the longstanding rule of statutory construction that "[w]ords of the singular number may include the plural; and words of the plural number may include the singular." 1 M.R.S. § 71(9); *see also, e.g.*, *Hurley v. Inhabitants of S. Thomaston*, 105 Me. 301, 74 A. 734, 736 (1909) (discussing "our statutory rules of construction, under which . . . words of the singular number include the plural" (citation omitted)); *Rich v. Roberts*, 48 Me. 548, 550 (1860)

(citing to statute providing "that every word importing the singular number only may extend to and embrace the plural number").

The legislative history of Section 906(6) does not show a shift from requiring a single ballot question for each initiative to requiring multiple questions for multiple issue initiatives. Rather, it shows a long history of the Legislature granting to the Secretary discretion over the wording of ballot questions. The Legislature curtailed the Secretary's discretion in 1987 and drafted its own, statutorily-mandated language for ballot questions, but that format lasted only six years before the Legislature returned near complete discretion over the wording of ballot questions to the Secretary. *See* L.D. 289 (113th Legis. 1987); L.D. 1488 (116th Legis. 1993). Moreover, the 1993 Statement of Fact for Committee Amendment A plainly shows that Section 906(6)(A) was intended only to mandate that the Secretary "*advise* petitioners on the proper suggested format for questions." Comm. Amend. A to L.D. 1488, No. H-497 (116th Legis. 1993) (emphasis added). Appellant's mischaracterization of the amendment as "introduc[ing] language mandating the Secretary to notify the proponents of an initiative of the Secretary's obligation to 'prepare a separate question for each issue,'" Pet'r's Br. at 13, is unsupported by either the language of the amendment itself or the Statement of Fact for Committee Amendment A. Finally, as the Superior Court observed, "[t]he fact that the Legislature did not choose to write

§ 906(6)(A) with mandatory language mirroring § 906(6-A) suggests that the Legislature did not intend § 906(6)(A) to impose a mandatory duty on the Secretary to split the ballot questions if they contain multiple issues." (A. 18).

CONCLUSION

For the foregoing reasons, Intervenor-Appellee Thomas B. Saviello respectfully requests that the Court affirm the Superior Court's decision affirming the Secretary of State's final wording of the ballot question.

Dated: July 19, 2021

/s/ Jeana M. McCormick

Adam R. Cote, Bar No. 9213
Jeana M. McCormick, Bar No. 5230
Sara P. Cressey, Bar No. 6201

DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, Maine 04101-2480
(207) 772-1941
acote@dwmlaw.com
jmmcormick@dwmlaw.com
scressey@dwmlaw.com

Counsel for Intervenor-Appellee Thomas B. Saviello

CERTIFICATE OF SERVICE

I, Jeana M. McCormick, hereby certify that on this 19th day of July, 2021, I served two copies of the foregoing Brief of Appellee Thomas B. Saviello on counsel below by electronic mail and first class mail, postage-prepaid:

APPELLANT:	ATTORNEYS:
Christopher J. Caiazzo	Jared S. des Rosiers, Esq. Joshua D. Dunlap, Esq. Newell A. Augur, Esq. Matthew O. Altieri, Esq. Pierce Atwood LLP Merrill's Wharf 254 Commercial Street Portland, ME 04101 jdesrosiers@pierceatwood.com; jdunlap@pierceatwood.com maltieri@pierceatwood.com naugur@pierceatwood.com
APPELLEES:	ATTORNEY:
Shenna Bellows	Jonathan R. Bolton, Esq. Assistant Attorney General Officer of the Attorney General 6 State House Station Augusta, ME 04333-0006 jonathan.bolton@maine.gov
Dated: July 19, 2021	*/s/ Jeana M. McCormick* Jeana M. McCormick, Bar No. 5230 DRUMMOND WOODSUM 84 Marginal Way, Suite 600 Portland, Maine 04101-2480 (207)772-1941 *Counsel for Appellee* *Thomas B. Saviello*