STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-25-284

ALEX TITCOMB, et al.,

Petitioners-Appellants

v.

SHENNA BELLOWS, in her official capacity as the Maine Secretary of State,

Respondent-Appellee

and

VICTORIA KORNFIELD, et al.,

Intervenors

Appeal from the Superior Court, Cumberland

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Legislation & Session Laws

INTRODUCTION

In the initiative process, "'the people, as sovereign, have retaken unto themselves legislative power.'" *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983) (citation omitted). This "is an absolute right" that "cannot be abridged directly or indirectly by any action of the Legislature," *McGee v. Sec'y of State*, 2006 ME 50, ¶21, 896 A.2d 933, much less "interfere[d] with" by the Secretary of State, *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶24, 256 A.3d 260. Still, the Constitution gives the Secretary a crucial role in administering direct initiatives: writing the ballot question. *See* Me. Const. art. IV, pt. 3, §20; 21-A M.R.S. §906(6)(B).

In discharging this duty on the people's behalf, the Secretary does not have free rein. The Constitution mandates that the Secretary accurately "represent the proposed legislation" and to do so "concisely and intelligibly." *Jortner v. Sec'y of State*, 2023 ME 25, ¶14, 293 A.3d 405 (citing Me. Const. art. IV, pt. 3, §20). The Legislature has supplemented these safeguards by expediting review of ballot questions, requiring courts to independently verify that the Secretary's question is "clear and understandable" and "will [not] mislead a reasonable, informed voter into voting contrary to the voter's intent." *Jortner*, 2023 ME 25, ¶14, 293 A.3d 405.

This case illustrates the wisdom of these precautions. Over 170,0000 Mainers signed petitions to place "An Act to Require an Individual to Present Photographic Identification for the Purpose of Voting" (the "Act") on the November 2025 ballot.

Hundreds of Mainers have spent over a year collecting these signatures and advocating for the Act. These electors want to implement voter ID requirements in Maine.

But the Secretary does not. The very day the petition was filed with her office, the Secretary declared the Act a "wolf in sheep's clothing" that "seeks to make" "shocking changes … to absentee voting." A few months later, she testified against the Act in the Legislature, claiming it "would cause a huge budget deficit" and have "a disproportionate impact on traditionally marginalized communities," including "seniors."

Unfortunately, the Secretary's final approved ballot question reflects her partisan sentiments. Ignoring the requirement of conciseness, the Secretary has drafted the longest single-subject question in state history, larding it with misleading and confusing terms and burying the primary purpose of the initiative. The Secretary's question misrepresents provisions that she concedes apply to *all voters* as targeting seniors and people with disabilities. It employs technical terminology designed to confuse the average voter and discourage them from voting "yes." And it buries the Act's primary objective of imposing voter ID (the purpose described in the Act's title) at the end, emphasizing comparatively minor changes to absentee voting. These changes, among others, render the question misleading and confusing.

The Superior Court essentially deferred to all of the Secretary's makeweight justifications for her meandering, stilted question. Its decision disregarded the court's duty to "independently" review the Secretary's question. It failed to engage several of

Appellant's key arguments and neglected to apply the relevant standard. This approach vitiates the constitutional and legislative limits on the Secretary's ballot-writing power. This Court should not repeat that mistake. The initiative process demands a clear, fair, and simple question, not one that distorts the subject matter to load the dice against the measure. Appellants respectfully request this Court reverse the Superior Court's holding and remand with instructions to the Secretary to revise the ballot question to comply with the law.

STATEMENT OF FACTS

A. Voter identification requirements are widespread and popular with Americans of all backgrounds.

Thirty-six states require some form of voter identification for those casting ballots in an election. *See* National Conference of State Legislatures, *Voter ID Laws*, https://perma.cc/RTH4-U86T (collecting states). Contrary to claims by opponents (including the Secretary), voter ID requirements are not a rejection of the reforms of the civil rights era or otherwise "rooted in white supremacy." *Hearing on L.D. 253, L.D. 447, and L.D. 1083 before the Jt. Standing Comm. On Veterans and Legal Affairs*, 130th Legis. 1 (2021) (testimony of Shenna Bellows, Secretary of State). Indeed, many states have imposed these requirements only within the last 20 years. For example, neighboring New Hampshire first required voter ID in 2011 and recently imposed stricter identification requirements. Ross Ketschke, *Gov. Chris Sununu signs new voting bill into law*, wmur.com (September 12, 2024), https://perma.cc/Y9QJ-8WM6. Wisconsin first

adopted an ID requirement more than a decade ago; voters recently enshrined it within the State's constitution by a margin of 25 percent. Henry Redman, *Wisconsin voters approve constitutional amendment to enshrine voter ID*, wisconsinexaminer.com (April 1, 2025), https://bit.ly/4jTya5e. Nebraska imposed its Voter ID requirement in 2023. Nebraska Secretary of State, *Voter ID*, sos.nebraska.gov (captured May 16, 2025), https://perma.cc/H68C-U82V.

As this trend indicates, voter ID requirements are overwhelmingly popular with the public. Recent polling indicates that a strong majority of Americans support a photo identification requirement when casting ballots. In October, a Gallup poll found that 84% of American adults favored requiring photo identification to vote. Megan Brenan, *Americans Endorse Both Early Voting and Voter Verification*, news.gallup.com (October 24, 2024), https://perma.cc/CUE2-L9KL. A similar poll from Pew Research placed support for voter ID at 81%. *See* Pew Research Center, *Bipartisan Support for Early In-Person Voting, Voter ID, Election Day National Holidays*, pewresearch.org (February 7, 2024), https://perma.cc/ZQY3-ELSY. And voter ID is strongly supported regardless of racial identity—a 2021 Rasmussen poll found that "[m]ajorities of whites (74%), blacks (69%), and other minorities (82%) say voters should be required to show photo identification before being allowed to vote." Rasmussen, *75% Support Voter ID Laws*, rasmussenreports.com (March 17, 2021), https://perma.cc/5KZJ-P43R. The same poll also found that 60% of all voters "reject [the] claim" that "Voter ID laws discriminate against black voters and other minorities." *Id.*

It is not hard to understand why voter ID requirements are so popular. First, Americans have grown used to providing identification for all types of daily activity. Photo identification is generally required to check into a hotel room, enter an office building, rent a car, attend a restricted-age movie, or take a commercial flight. Maine state law itself specifically requires proof of identification in the lawful sales of alcohol, 28-A M.R.S. §705(2), tobacco or nicotine, 22 M.R.S. §1555-B(2); and marijuana, 28-B M.R.S. §504(4). Requests for photo identification are thus routine these days.

Second, obtaining photo identification is simple. The most common form, of course, are driver's licenses. According to recent federal statistics, 89 percent of driving-age Mainers have a valid license—an unsurprising fact, given the State's northern rural character and lack of widespread public transit options. *See* USDOT, *Highway Statistics Series 2023*, fhwa.dot.gov (captured May 22, 2025), https://perma.cc/L4WY-HXMK. And for those without driver's licenses, the State already has a simple process to provide photo identification. *See* Sec'y of State, *ID: Obtaining an Identification Card*, maine.gov/sos (captured May 16, 2025), https://perma.cc/HVG5-9TUA. According to the Secretary herself, "[a]ny person who can prove they are in the U.S. legally and show proof of a physical address in Maine may apply for a state non-driver identification card." *Id.* Maine law currently charges only a nominal fee of $5 for an identification card. *Id.*

Finally, balanced against the commonality of ID requirements in daily life and the simplicity of obtaining photo identification, the public has legitimate concerns about election security and integrity. As the Supreme Court has recognized, "flagrant

examples of such fraud … have been documented throughout this Nation's history by respected historians and journalists" and "occasional examples have surfaced in recent years." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195 (2008). Thus, "not only is the risk of voter fraud real but … it could affect the outcome of a close election." *Id.* at 196. "Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process." *Id.* And indeed, Maine's elections are not immune from voter fraud. *See, e.g.,* Associated Press, *2nd UMaine student charged with voter fraud,* https://bit.ly/44GPZzS (gathering several cases in Maine).

B. The Voter ID for ME initiative easily garners enough signatures to qualify for the ballot.

Most Mainers, like most Americans, support implementing voter ID requirements and election security measures like those adopted by other states. On February 8, 2024, several of them filed an application with the Secretary of State's office to place a direct initiative requiring voter ID on the November 2025 ballot. A.35. On April 5, 2024, after two rounds of revisions, the Secretary's Office returned an approved draft titled "An Act to Require an Individual to Present Photographic Identification for the Purpose of Voting" (the "Act"). A.53. Applicants accepted the draft shortly after. A.66.

The Act seeks to implement five basic reforms. *First*, it requires voters to display a government-issued photo ID card when voting in-person and establishes a process

for challenging ballots cast without proper ID. *See* A.55-56 (§§1, 2, 4). *Second,* it requires the government to provide "free nondriver identification cards for photographic identification" to any Maine resident over 18 years old. A.56 (§3). *Third*, it makes conforming changes to impose the same requirements on absentee ballots, including by prohibiting requests for absentee ballots by third parties, requiring voters to submit an absentee ballot application (along with photo ID) every election, and requiring applications to be submitted in writing or electronically. *See* A.58-63 (§§16-24). *Fourth*, the Act imposes new requirements increasing transparency and security for ballot drop boxes, requiring that they be stationed exclusively at the registrar's office, that ballots be removed only by a team of bipartisan election officials, and that the drop boxes be locked when the polls close. *See* A.58-59 (§§11-15). *Fifth*, the bill amends certain procedures governing the circumstances of when a third-party may help a voter fill out a ballot or deliver that ballot on behalf of the voter. *See* A.63-64 (§§25-27).

Over the next ten months, many Mainers—including Petitioners here—gathered signatures for the Act. A.74. Their efforts were wildly successful. On January 6, 2025, Petitioner Titcomb filed over 170,000 signatures with the Secretary of State's office on behalf of the initiative—nearly three times the required amount. *Id.* On February 19, 2025, the Secretary determined the petition was valid, acknowledging that the "total number of signatures submitted … far exceeded the quantity of signatures required." A.74.

C. The Secretary publicly opposes the Act in media interviews and before the Maine legislature.

Secretary Bellows immediately launched a campaign against the Act. On the day the petition was filed with her office, the Secretary told the media it was a "wolf in sheep's clothing" that was "somewhat shocking in the changes it seeks to make to absentee voting." Donavan Lynch, *Organizers say more than 170k signatures submitted for Voter ID initiative*, newscentermaine.com (January 6, 2025), https://perma.cc/RXX3-6R3R. A few months later, she testified to the Committee on Veterans and Legal Affairs that the Act "would cause a huge budget deficit [for the state]" and that "should it pass, [the Office of the Secretary of State] would likely bring forward a bill to correct [it]." *An Act to Require an Individual to Present Photographic Identification for the Purpose of Voting: Hearing on L.D. 1149 before the Comm. On Veterans' and Legal Affairs*, 132nd Legis. at 3:34:00-3:35:45 (2025), https://bit.ly/3F25Mip. She further claimed, in written testimony, that the bill would have "a disproportionate impact on traditionally marginalized communities" and cause "black, indigenous and people of color as well as seniors" to be "turned away." *Id.* at 4.

The Secretary's statements about the Act accord with her longstanding and well-documented resistance to *any* voter ID requirements. In 2021, she testified to a committee of the Maine Legislature that voter ID laws—which again, most states have adopted—are "rooted in White supremacy" and "the new means of voter suppression." *Hearing on L.D. 253, L.D. 447, and L.D. 1083 before the Jt. Standing Comm. On Veterans and*

Legal Affairs, 130th Legis. 1 (2021) (testimony of Shenna Bellows, Secretary of State). Two years later, she testified in opposition to a similar bill by arguing that "[f]orcing people to carry a specific type of photo identification to vote would result in … potential discrimination" and would "increase … complications and consequences to our elections and turn eligible voters away." *Hearing on L.D. 34 before the Jt. Standing Comm. On Veterans and Legal Affairs*, 131st Legis. 1 (2023) (testimony of Shenna Bellows, Secretary of State).

D. The Secretary drafts and finalizes a confusing, misleading and convoluted question.

On March 12, 2024, Secretary Bellows issued the following proposed ballot question for the Act:

> "Do you want to change Maine election laws to require voters to show ID before voting, end ongoing absentee voting for seniors and people with disabilities, ban prepaid postage on absentee ballot return envelopes, prohibit requests for absentee ballots by phone or family members, eliminate two days of absentee voting, and make other changes to our elections?"

A.76.

The Secretary's proposed wording was remarkable, for several reasons. At 57 words, it was among the longest ever issued in Maine history, outstripping prior questions describing longer, more complicated initiatives. *See* Maine State Legis., *Legislative History Collection: Citizen Initiated Legislation, 1911-Present*, maine.gov (captured May 7, 2025), https://perma.cc/T42F-6ME2 (hereinafter "Citizen Initiated Legislation"). The question's structure impeded its readability, stringing a series of

disconnected provisions together before an omnibus "catch-all" clause. Stranger still, the question devoted most of its word count to describing the Act's tweaks of the absentee ballot process—not the provisions requiring photo ID. And the question framed the Act as an attack on the voting rights of seniors and people with disabilities, even though the provisions the Act seeks to amend apply to all Maine residents, and in no way target the groups highlighted by the Secretary's question.

Members of the public were invited to weigh in for a 30-day comment process. A. 76. Public comments closed on April 11, 2025. A.28.

On May 5, 2025, the Secretary released the final wording of the ballot question in a Decision Letter:

> "Do you want to change Maine election laws to eliminate two days of absentee voting, prohibit requests for absentee ballots by phone or family members, end ongoing absentee voter status for seniors and people with disabilities, ban prepaid postage on absentee ballot return envelopes, limit the number of drop boxes, require voters to show certain photo ID before voting, and make other changes to our elections?"

A.28-34.

This final draft not only retained all the problems with the initial proposal—it added to them. At 66 words, it was even longer than the initial draft, inserting yet another clause with no reference to voter ID. And while the initial question underplayed the Act's voter ID components, the final draft submerged them altogether, relegating the sole reference to voter ID to the end of the sentence. And the question still falsely presented the Act as targeting seniors and people with disabilities. A.28-29.

In addition to releasing the final question's language, the Decision Letter outlined several of the Secretary's conclusions that are relevant to this appeal:

***First*,** the Secretary defended her decision to devote five of the question's seven clauses to discrete modifications of the absentee voting process, one clause to photo identification requirements, and a sweeping catch-all clause to everything else. According to the Secretary, this was necessary to "provid[e] voters with an illustrative list while expressly indicating that it is non-exhaustive." A.31. The Secretary added that she declined to "describe all of the Act's provisions" because "[s]uch a long ballot question would … be unprecedented in the history of Maine citizens' initiatives" and "pose readability challenges for some (if not all) voters." A.31. And while the Secretary did not explain how she determined which provisions to include, she implied that other provisions were omitted because they were "less distinct in subject matter." A.31-32.

Second, the Secretary defended her decision to turn the proposed question on its head, moving the sole reference to voter ID to the end, arguing—implausibly—the "the Act's changes to absentee voting procedures are more extensive and wide-ranging than its changes to in-person voting procedures." A.32. Despite acknowledging that the final question's order conflicted with "the sequence that appears in the Act" and "the order in which the provisions amended by the Act … appear in the Maine Revised Statutes," she concluded there was "no particular reason to follow [that] sequence." *Id.*

***Third*,** the Secretary explained that she omitted any reference to the Act's imposition of photo ID requirements for absentee ballots because "that process is

encompassed in the question's catch-all 'make other changes to our elections' phrase." A.32-33.

***Fourth*,** the Secretary defended her substitution of the phrase "ongoing absentee voter status" in lieu of "ongoing absentee voting." A.33. The Secretary agreed with commenters who suggested that her original wording "could confuse some voters." *Id.* And she acknowledged that "the exact phrase 'ongoing absentee voting' does not appear in Title 21-A," but concluded that inserting "ongoing absentee voter status" in its place "remove[d] any ambiguity in the question" because it "mirror[ed] the statutory language in the provision that would be repealed by the Act." *Id.*

E. Petitioners file this challenge.

On May 12, 2025, Petitioners filed this action challenging the Secretary's decision. The Petitioners are individuals who validly signed the people's petition or are directly implicated by the Secretary's decision and therefore have standing to challenge it. *See* 21-A M.R.S. §905(2); A.16-17 (¶¶1-7). All Petitioners have been heavily involved in bringing the Act to the ballot and support the election security measures included in the measure. *Id.* They have and will continue to be injured by the Secretary's misleading question, which will substantially impede voters' ability to understand the Act and mislead those who would otherwise support the bill into voting against it. A.17 (¶6-7).

On May 22, 2025, the Democratic Senatorial Campaign Committee, the Democratic Congressional Committee, the Democratic Governors Association, along

with several individuals (collectively, "Intervenors"), filed a joint motion to intervene. A.4. The court granted that motion on June 13, 2025. A.5.

All parties submitted briefing to the Superior Court. The Secretary's brief led with administrative exhaustion, despite tacitly acknowledging no court has ever applied strict preservation rules to general notice and comment. *See* Sec'y.Br.13.[1] The Secretary also made some notable admissions on substance, including that: (1) the Act would rescind a provision the Maine Legislature has "expand[ed]… to all voters"—not just Seniors and people with disabilities, Sec'y.Br.18; (2) the Secretary's "catch-all" phrase was without precedent, Sec'y.Br.23; (3) the Secretary inserted the word "certain" ahead of "photo identification" to highlight something in the Act that she thought might "surprise" voters, Sec'y.Br.24; and; (4) that the question was the longest ever drafted by a Secretary, Sec'y.Br.26. Intervenors didn't raise exhaustion and largely mirrored the Secretary's arguments on substance. *See generally* Int.Br.16-29.[2]

The Superior Court issued its 7-page decision on June 13, 2025. *See* A.7-13. After "declin[ing] to rule" on administrative exhaustion, the court upheld the ballot question's wording, accepting all of the Secretary's arguments. A.10. On understandability, the court thought the phrase "ongoing absentee voter status" was sufficient because, while

[1] "Sec'y.Br" refers to the Respondent's Rule 80C Brief filed in the Superior Court on June 3, 2025. A.5.

[2] "Int.Br" refers to the Response Brief of Intervenor-Defendants filed in the Superior Court on June 3, 2025. A.5.

the term is "not defined in the Initiative itself," it appears elsewhere in the Maine code in a provision cited somewhere in the Act. A.11. It cited *Olson v. Secretary of State*, for this holding, even though the disputed term in *Olson* appeared in the legislation itself. 1997 ME 30 ¶11, 689 A.2d 605. The court also deemed the phrase "make other changes to our elections" was not vague because it indicates the question is "non-exhaustive." A.11. And the court thought the word "certain" ahead of "photo ID" was acceptable because it alerted voters to the kinds of government ID the Act "exclud[ed]." A.12. The court did not address Appellants' arguments that the question violated the Constitutional requirement of conciseness and was deliberately reordered to obscure the Act's primary objective: requiring photo ID.

The Superior Court further held the question's suggestion that initiative targeted seniors and the disabled was not misleading because it accurately described the state of the law "[w]hen Mainers go to the polls in November 2025. A.13. And it concluded the question created, at most, a misleading impression not warranting reversal, implying that a ballot question which invidiously discriminated against "seniors" and "people with disabilities" was no less palatable than a ballot question applying the same requirements to everyone.

Appellants timely appealed on June 18, 2025, A.6 (*see* 21-A M.R.S. §905(3)) seeking reversal and remand of the lower court's decision and the Secretary's question.

ISSUES PRESENTED

I. Does the Secretary's wording, which incorrectly describes the Act as targeting "seniors and people with disabilities," have the potential to mislead a reasonable voter into voting contrary to their intentions?

II. Does the Secretary's record-length question, which uses technical and vague wording and buries any reference to voter ID at the end of a paragraph, risk not being understood by a reasonable voter reading it for the first time?

III. Does the administrative exhaustion requirement bar this Appeal despite the fact that no court has ever applied it to notice and comment proceedings open to the public at large?

STANDARD OF REVIEW

The Secretary of State has a "constitutional obligation to 'prepare [] ballots in such form as to present the question or questions concisely and intelligibly" and a "statutory obligation to 'write the question in a clear, concise and direct manner that describes the subject matter of the … direct initiative as simply as is possible.'" *Jortner*, 2023 ME 25, ¶8, 293 A.3d 405 (quoting Me. Const. art. IV, pt. 3, §20 and 21-A M.R.S. §906(6)(B)). The legislature has implemented these obligations by directing courts to (1) "determine whether the [challenged question's] description of the subject matter is understandable to a reasonable voter reading the question for the first time" and (2) "will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R.S. §905.

Unlike the default rules governing appeals under Rule 80C, this statutory standard leaves no room for deference to the Secretary's discretion. The court is "required to *independently* determine whether the ballot question is understandable and

not misleading." *Olson*, 1997 ME 30 ¶4, 689 A.2d 605 (emphasis added); *see also id.* (rejecting a "deferential standard of review"). By statute, this Court's "standard of review must be the same as for the Superior Court," and therefore this Court "engage[s] in a direct review of the ballot question as drafted by the Secretary of State, without reference to the Superior Court's judgment." *Jortner*, 2023 ME 25, ¶8, 293 A.3d 405 (citations omitted).

SUMMARY OF THE ARGUMENT

I. The Secretary's question violates the statute.

A. The question is misleading because it presents the Act as targeting only seniors and people with disabilities when the changes at issue, in fact, would apply to all Mainers. The Secretary conveniently omitted this detail to frame the Act as discriminatory—a misrepresentation likely to mislead voters. The Superior Court's holding that the question only creates a misleading impression failed to address this problem and misapplied this Court's precedent. And the court evaded the relevant issue by adopting the Secretary's convoluted reading, notwithstanding that it is inaccurate as it will likely be understood by average voters.

B. The question is not understandable because: **(1)** it fails the constitutional requirement of concision; **(2)** its order confuses and obscures the Act's subject matter; **(3)** it employs overly technical language ("ongoing absentee voter status"); **(4)** it introduces additional confusion through an unprecedented "catch-all"; and **(5)** it invites ambiguity by inserting the word "certain" before "photo identification."

II. The question is ripe for review.

A. Petitioners' appeal is expressly authorized by the statute. The Maine Legislature has expressly authorized "any … voter" to appeal the Secretary of State's decision to approve a ballot question. Petitioners' appeal meets every statutory requirement, and imposing a new exhaustion requirement ignores the legislative's plain textual command.

B. No Maine court has applied administrative exhaustion in the context of notice and comment proceedings open to the public at large. Respondents' authorities to the contrary don't change this analysis, and many courts decline to apply them. Nor should voters have to guess at how the Secretary will decide to preserve claims.

C. This appeal involves a pure legal issue exempt from the exhaustion rules. Applying the exhaustion doctrine is inappropriate in such cases because "the special expertise of the administrative agency [as to the underlying facts] would be of no significant benefit."

D. The Secretary's manifest bias further excuses the application of any exhaustion requirement. Here, there is a "substantial countervailing reason to conclude that" the Secretary was "actually biased," given that she publicly opposed the Act and called it a "wolf in sheep's clothing."

E. In all events, the Secretary considered the issues raised by this appeal. The exhaustion doctrine exists "to allow administrative agencies to correct their own errors, clarify their policies, and reconcile conflicts before resorting to judicial relief." The

Secretary justified her question in the decision letter and all parties cited to or relied on her reasoning below. This Court should refuse the Secretary's attempt to insulate those same arguments from judicial review.

ARGUMENT

I. The ballot question violates the statute.

A. The question is misleading.

The parties agree that a ballot question may not "mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R.S. §905(2); Sec'y.Br.16; Int.Br.10. And they further agree that a misleading question is one that "will cause reasonable supporters of the Initiative, who walk into the ballot booth already understanding the things it proposes to do, to vote 'No' instead of 'Yes.'" Sec'y.Br.17, Int.Br.18. In short, a question must not misinform voters about the Act in ways that would cause them to change their votes. *See Wagner v. Sec'y of State*, 663 A.2d 564, 568 (Me. 1995) (analyzing if misstatement would alter someone's vote); *see also Olson*, 1997 ME 30 ¶¶7-9, 689 A.2d 605 (similar).

Here, the Secretary's question misleads by framing the Act as a targeted assault on the vulnerable. The Secretary claims the Act would "change Maine law … to … end ongoing absentee voter status for seniors and people with disabilities." A.28-29. That omits a crucial detail: the provision the Act would repeal allows *all* voters—not just seniors and people with disabilities—to make a one-time application for "ongoing absentee voter status," entitling them to mail in ballots forever starting December 31,

2025. *See* 21-A M.R.S. §753-A(8); P.L. 2023, ch. 404, §§1-2. Because no-questions-asked absentee voting conflicts with the Act's voter ID requirement, the Act replaces it with a new absentee ballot process requiring all voters to provide proof of identification. A.60 (§19). So, far from targeting seniors and people with disabilities, the Act seeks to apply the *same* requirements to *all* voters.

The Secretary's convenient omission was not an oversight—she testified in favor of the bill expanding Maine's automatic absentee program to everyone. *See Hearing on L.D. 1690 Before the Jt. Standing Comm. On Veterans and Legal Affairs*, 131st Legis. 1 (2023) (testimony of Shenna Bellows, Secretary of State). She knew full well that when the Act would take effect, Maine's automatic absentee voting program would be open everyone, not just the vulnerable groups she highlighted. And she acknowledged below that the provision the Act would repeal was "expand[ed]… to all voters" in 2023—not just the groups singled out in the ballot question. Sec'y.Br.18; *see also* Int.Br.3. And there's no easy way for voters to parse this error—let alone identify it before entering the ballot box—because the Act itself doesn't refer to the absentee ballot rights of "seniors and people with disabilities" anywhere.

Yet the Superior Court upheld the Secretary's material misstatement for two reasons. *First*, it downgraded the Secretary's erroneous description to a "misleading impression," implying that the Secretary's mistake would not lead anyone to change their vote. A.12 (citing *Olson*, 1997 ME 30, ¶7, 689 A.2d 605). The Court thus accepted the Secretary's argument that the question is technically accurate because "[j]ust like

other voters, 'seniors and people with disabilities' will be unable to enroll in the program in 2026 if the Initiative is approved." Sec'y.Br.19. But the Secretary's partial truth is wholly prejudicial. Saying an apartment complex with no vacancies "will not rent to African Americans" is literally true, but plainly misleading. So too is the Secretary's framing here. By omitting necessary context (that the program to be rescinded applies to all voters), the Secretary paints the bill as invidiously targeting the vulnerable. That distinction matters, because, as the Secretary knows well, there is a difference between depriving everyone of a benefit and only depriving "people with disabilities" of a benefit. See, e.g., 42 U.S.C. §§12101 *et seq.* (Americans with Disabilities Act).

This is exactly the kind of misrepresentation that could lead a reasonable voter to change their mind about the Act. And it's what distinguishes the question here from those this Court upheld in *Olson* and *Wagner*, which, while technically inaccurate, were unlikely to alter someone's vote. *See Olson*, 1997 ME 30 ¶9, 689 A.2d 605 (question mirrored an omission in the Act); *Wagner*, 663 A.2d at 568 (minor inaccuracy would not change a voter's intentions).

Second, the Superior Court analyzed the question only in reference to the Secretary's convoluted reading, not the most straightforward one. *See* A.12-13. According to the Secretary, the question is accurate because only seniors and people with disabilities are eligible for absentee voter status "when voters go the polls," and are therefore the only people who would "lose" status if the Act passes. A.13. But this reading not the one most likely to occur to a "reasonable voter reading the question for

the first time." *Jortner*, 2023 ME 25, ¶1, 293 A.3d 405. Rather, it depends on a detailed knowledge of Maine's absentee voting procedures and amendments, their respective effective dates, who would be eligible for automatic absentee voting on election day, and who would be eligible come January 1, 2026. And even then, the reasonable voter must further intuit that the Secretary has decided to describe how it would have changed the law if it went into effect on Election Day, rather than its actual effective date of January 2026. This "transgresses the outer limits of what the Secretary may expect of voters." Sec'y.Br.21; *see also Jortner*, 2023 ME 25, ¶26, 293 A.3d 405. A question that requires this much context to correct an obvious misrepresentation is misleading.

Relatedly, the Secretary's reading fails because it does not accurately describe the "subject matter" of the Act or "represent the proposed legislation." *Jortner*, 2023 ME 25, ¶14, 293 A.3d 405. The Act doesn't mention seniors or people with disabilities. Nor does it "change Maine law" in ways that affect only those groups. Yet the Secretary opts to cherry pick the Act's possible effects on certain groups—at least under the laws in effect until December 31, 2025—to paint it as invidiously discriminatory against the vulnerable and dissuade people from voting for it. That is not even-handed description, but partisan rhetoric. And it's exactly what the Legislature sought to foreclose by "limiting the Secretary of State's authority to interfere with the intent of the petitioners" through the ballot question process. *Caiazzo*, 2021 ME 42, ¶24, 256 A.3d 260. This Court should enforce those limits and vacate the Secretary's misleading question.

B. The question is not understandable.

1. The question is not concise.

The Maine Constitution requires the Secretary of State to "prepare the ballots in such form as to present the question … *concisely*…." Me. Const. art. IV, pt. 3, §20. This Court has held this means "[t]he question must … represent the proposed legislation … 'in a clear, *concise* and direct manner that describes the subject matter of the ... direct initiative as simply as is possible.'" *Jortner*, 2023 ME 25, ¶8 293 A.3d 405 (quoting Me. Const. art. IV, pt. 3, §20); *see also* 21-A, M.R.S. §906(6).

The Superior Court's decision completely ignored this requirement. Likewise, Respondents below tried to wave it away by arguing that under *Jortner*, it had been "subsume[d]" by the statutory standard. *See* Sec'y.Br.25 *and* Int.Br.16-17 (both citing *Jortner*, 2023 ME 25, ¶8, 293 A.3d 405. But "subsumed" does not mean "deleted"—rather, it means the conciseness requirement has been incorporated as a component part of the Court's review of the question's intelligibility.[3] This makes sense; very long sentences are hard to understand. "A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts." Strunk, William and E.B.

[3] *See Merriam-Webster Dictionary*, "subsume," at https://www.merriam-webster.com/dictionary/subsume ("[T]o include or place within something larger or more comprehensive: encompass as a subordinate or component element.").

White, *The Elements of Style* (4th ed. 2000).[4] And—inconveniently for the Respondent—the Secretary expressly acknowledged the requirement in her decision letter, stating that it is "[m]y legal duty is to write a question that is 'concise' … and describes the Act's subject matter 'as simply as possible'" and to avoid ballot questions of "unprecedented" length that may "pose readability challenges for some (if not all) voters." A.31 (citing *Jortner*, 2023 ME 25, ¶8, 293 A.3d 405). So, this Court is not only allowed to strike down a ballot question that is "too long," *contra* Sec'y.Br.25, but is constitutionally and statutorily *required* to do so.

The Secretary's question is not concise. As drafted, it is the longest a Secretary has ever written on a single subject, containing seven separate clauses and 66 total words, and running over two-times longer than the average. *See* Citzen Initiated Legislation, *supra* (average question length is around 28 words). Far from "describ[ing] the subject matter … as simply as is possible," it buries the main goal of the bill (voter ID requirements) at the end of a paragraph-long sentence that first describes comparatively minor changes. This defeats the statute's purpose, which directs the Secretary to simply "ask a *clear* question about whether the voter wishes to approve

[4] *See, also* United States Department of State, *Plain Writing Guidance*, state.gov (captured June 5, 2025) https://perma.cc/9EU4-3LE9 ("The average sentence length should be approximately 15 to 20 words."); The United Kingdom, *Sentence Length: why 25 words is our limit*, gov.uk (captured June 5, 2025), https://perma.cc/94DW-VJGS ("When you write more, people understand less … at 25 words, sentences become difficult, and 29 words or longer, very difficult.").

proposed legislation of which the voter is presumed to be already aware." *Jortner*, 2023 ME 25, ¶12, 293 A.3d 405 (emphasis added).

A brief survey of previous ballot questions demonstrates how far the Secretary has strayed from the norm. *See generally* Citizen Initiated Legislation, *supra*. In 2016, the Secretary's office used just 46 words to describe a complex, 30-page bill legalizing marijuana, establishing retail licensing, and constructing an entirely new compliance regime. Likewise, in 2009, a 27-page initiative seeking to veto a complex school district consolidation bill merited just 19 words. And the ballot question for a 17-page initiative imposing sweeping changes on Maine's campaign finance laws simply asked: "do you want to adopt new campaign finance laws and give public funding to candidates for state office who agree to spending limits?"[5] All of these initiatives were significantly longer than the Act at issue here.[6] But their prompts were *much* shorter. And more importantly, unlike the Secretary's question, they centered the main idea behind the legislation.

It is irrelevant that no prior court has "invalidat[ed] a ballot question based on length." *Contra* Sec'y.Br.25. The question's unprecedented length presents a question of

[5] *See* L.D. 1701 (127th Legis. 2016), L.D. 977 (124th Legis. 2009), L.D. 1823 (117th Legis. 1996) *and* Citizen Initiated Legislation, *supra*.

[6] *Compare* A.55-65 *with* L.D. 1701 (127th Legis. 2016) *and* L.D. 977 (124th Legis. 2009) *and* L.D. 1823 (117th Legis. 1996).

first impression in its own right.[7] The counterexamples the Secretary offered below are not persuasive. The 83-word bond question was "drafted by the Legislature," Sec'y.Br.25, and thus not governed by the statutory requirements at issue here. *See Caiazzo*, 2021 ME 42, ¶25, 256 A.3d 260 (contrasting requirements for the Secretary and the Legislature). The other two questions the Secretary identified were significant outliers in their own right, never challenged, and were still shorter than this question. *See* Sec'y.Br.26.

More fundamentally, the Secretary's attempt to brush aside the concision problem reflects an apparent misunderstanding of the ballot question's role. The ballot question is not an opportunity for the Secretary to share her opinion on the "magnitude" of the Act's various "effects" with the public. *Contra* Sec'y.Br.27. Nor is it a forum to highlight which aspects of a particular initiative she most disagrees with—or submerge the ones she suspects will be popular. *See supra* at 6-9. Rather, the ballot question is meant to stand in for the initiative itself, presenting a clear question about whether a voter wants to approve legislation they are already aware of. *See* Me. Const. art. IV, pt. 3, § 20; *Jortner*, 2023 ME 25, ¶12, 293 A.3d 405. And it is the citizen's job—not the Secretary's—to study the Act and educate others about it before entering the

[7] This Court has only reviewed a handful of previous ballot questions, all of which involved shorter prompts. *See Jortner*, 2023 ME 25, ¶9, 293 A.3d 405 ("We have considered on two occasions whether ballot questions met the standard set forth in section 905(2)."); *see also id.* ¶3 (28 words); *Olson*, 1997 ME 30, ¶3, 689 A.2d 605 (17 words); *Wagner*, 663 A.2d at 566 (48).

ballot box. *See Olson*, 1997 ME 30, ¶11, 689 A.2d 605; *see also Allen*, 459 A.2d at 1102. The requirement of conciseness is not an arbitrary limit—it is a safeguard limiting the Secretary's ability to interfere with the initiative process. *Caiazzo*, 2021 ME 42, ¶24, 256 A.3d 260. The Secretary can advocate against the question in other fora; she is not allowed to inject that advocacy into the ballot wording itself.

2. The question's order is confusing.

The question's order obscures its subject matter. Rather than signaling that the question referred to "An Act to Require … Photographic Identification to Vote," the Secretary buried the lede by mentioning voter ID requirements *last*. A.28-29. This forces the reader to muddle through a complex, paragraph-long sentence to determine whether it the question has anything to do with voter ID. And it contradicts the Secretary's duty to draft a question that "represent[s]" the Act and "describe[s] [its] subject matter" clearly. *Jortner*, 2023 ME 25 ¶¶14, 293 A.3d 405. The decision below simply ignored this issue, affirming the question's order without any reasoning. That alone warrants reversal.

The Secretary's justifications for the question's order fare no better. *First*, the Secretary tried to defend the order as "irrelevant to" whether the question is confusing or misleading. Sec'y.Br.28. But order conveys meaning, and the Secretary's order privileges certain features of the Act and deemphasizes others. Unsurprisingly, that order highlights the Act's conforming changes to absentee voting (which the Secretary deems "shocking"), and not the overwhelmingly popular voter ID requirements

highlighted by the Act's title, summary, public campaign, and first four sections. *See supra* at 6-11. Listing the provisions described in the Act's title dead last sends a clear message: "these provisions are not that important to the Act." Of course that's relevant.

Second, the Secretary disputed that voter ID requirements were the central focus of the Act. Sec'y.Br.28. That is miles removed from the Act's title, summary, and internal structure, all of which put voter ID front and center. *See* A.55-65; *see also* A.64-65 ("This initiated bill requires the presentation of photographic identification for in-person and absentee voting."). The Secretary tacitly acknowledged this in the decision letter, admitting that the question's order does not "follow the sequence that appears in the Act" or "the order in which the provisions amended by the Act … appear in the Maine Revised Statutes." A.32. Nor does it align with her own understanding of the Act, as evidenced by her initial proposed question, A.76, and her own description of the initiative, A.29-30, both of which start where voters would expect: the voter ID requirements.

Third, the Secretary argued that her order reflected the fact that the Act's "changes to absentee voting procedures are more extensive and wide-ranging than its changes to in-person voting procedures." A.32. Not so. Maine has long allowed for absentee voting and has often (and recently) overhauled absentee voting procedures. *See*, e.g., L.D. 1690 (131st Legis. 2023) (allowing indefinite automatic delivery of absentee ballots to any applicant). It has never implemented a voter ID requirement. Requiring proof of identification before casting a ballot is the primary substantive

change encapsulated by the Act and should be the focus of the ballot question. And even if the Secretary were right about the primacy of the absentee ballot provisions (she is not), she never explains referencing the voter ID requirements *last*.

Fourth, the Secretary tried to dismiss the Act's written sequence as an arbitrary reflection of the sequence of provisions in the Maine Revised Statutes. Sec'y.Br.29. But she admits she reorganized the provisions based on her personal views on the relative significance of the Act's provisions. *Id.* That alone justifies vacatur, because even assuming the Secretary's reversed sequencing were just as valid as the order presented in the Act, there's no contest: the "tie" should be decided in favor of the "the intent of those who drafted or signed the petition" as reflected in the Act. *Caiazzo*, 2021 ME 42, ¶24, 256 A.3d 260. And the Secretary confirmed below that she reorganized the ballot question for rhetorical effect, not to increase its intelligibility or clarity. *See* Sec'y.Br.29-30 (word order "inform[s] voters that the Initiative does more than just" voter ID). This Court should refuse to countenance such open "interfere[nce] with the intent of the petitioners." *Id.*

3. The phrase "ongoing absentee voter status" is overly technical.

The Secretary's use of the term "ongoing absentee voter status" is not understandable because it is "not a common term," nor is it defined (or mentioned) anywhere in the Act. *Jortner*, 2023 ME 25, ¶25, 293 A.3d 405. The Superior Court acknowledged this, but nonetheless held it was not confusing because it appears in *another* statute that the Act would repeal. *See* A.11. But this is exactly what *Jortner*

proscribed: inserting a "descriptive term" into the ballot question that "does not appear *in the proposed legislation* and does not have a clear dictionary definition." 2023 ME 25, ¶26, 293 A.3d 405 (emphasis added).

The Superior Court thought *Olson* supported its conclusion, A.11, but it supports Appellants. 1997 ME 30, 689 A.2d 605. In *Olson*, the challenged term in the ballot question ("Class A Crime") appeared in the initiative itself, leading this Court to conclude that the ballot question reasonably "reflect[ed] the ambiguities, complexities, and omissions *in the legislation* [it] describe[s]." *Olson*, 1997 ME 30, ¶11, 689 A.2d 605 (emphasis added). Here, by contrast, the term "ongoing absentee voter status" appears nowhere in the Act, inviting confusion at the ballot box for even a reasonable voter familiar with the initiative. The mere fact that the term is defined *somewhere* in the Maine code doesn't mean the voter "would [] have encountered" it or will understand it on election day. *Jortner*, 2023 ME 25, ¶26, 293 A.3d 405. Voters should not be forced to trawl the Maine Revised Statutes in the voting booth to comprehend a ballot question.

4. The "catch-all" clause introduces confusion.

The question's final clause asks voters whether they want to "make other changes to our elections." But the phrase "make other changes" does nothing to "describe[] the … direct initiative" or help voters "understand the subject matter and the choice presented; rather, it introduces "additional ambiguity [and] confusion" by suggesting that voters should do more research before voting yes. *Id.* ¶¶27-28. Indeed, it's not surprising that no prior secretary has included a similar clause in a ballot measure, *see*

Citizen Initiated Legislation, *supra*, or that this was "by far the most common critique of the draft question," A.31.

Yet the Superior Court upheld this language because it simply "indicates that the ballot question reflects a non-exhaustive list of changes." A.11-12. That simply ignores the requirements of clarity and concision. *See Jortner*, 2023 ME 25, ¶12, 293 A.3d 405. Vaguely gesturing at undefined "other changes" does nothing to further these goals. Nor is the clause necessary, as the Secretary asserted below, to explain that the question is "non-exhaustive" with respect to the "wide scope of the Act." A.31. The ballot question's wording is not an opportunity for the Secretary—a partisan official—to educate voters about the underlying initiative. The clause should be stricken.

5. Inserting "certain" before "photographic identification" ambiguity.

The Secretary's question further muddies the waters by inserting the word "certain" in front of "photo identification" for no reason. Requirements to show "ID" or "photo ID" are extremely common and require no further explanation. The Act's title reflects this, referring simply to "photo identification." A.28. So did the Secretary's original wording, which uses "ID" to broadly refer to the Act's verification requirements. A.76. Modifying "photo identification" with "certain," as the final question does, just invites questions. Which forms of ID? Why only "certain" ID? Does this mean a so-called Real ID is required? And so on. This addition introduces ambiguity, does nothing to enhance clarity, and should be removed.

Moreover, the modifier should be stricken because it was added for political reasons. Below, the Secretary confirmed she inserted it to signal that the Act only recognizes a limited number of IDs, a fact the Secretary thought voters might find "particularly surprising … given Maine's comparatively expansive rules for proving identity when registering to vote." Sec'y.Br.24. Hinting that the Act's requirements go against the Secretary's preferred regime or that they might "surpris[e]" voters is not the purpose of a ballot question. Worse, if the Secretary's wording aims to influence "voters who may not have reviewed the full text of the Initiative," as the Secretary suggested below, Sec'y.Br.24, it is simple partisan meddling in the initiative process.

II. The question is ripe for review.

Below, the Secretary tried to evade judicial review of the ballot question with a novel administrative exhaustion theory. *See* Sec'y.Br.12-16. It is meritless. The lower court declined to rule on it, and this Court should reject it.

A. The statute authorizes this appeal.

The Maine Legislature has authorized every Maine voter to appeal the Secretary of State's decision to approve a ballot question. 21-A M.R.S. §905(2). The Legislature could not have been clearer on this point. Section 901 states that "[a] *voter* named in the application under this section may appeal any decision made by the Secretary of State under this section." *Id.* §901. Section 905 clarifies that this right extends to "voter[s] named in the application" and "*any other voter[s]*." *Id.* §905 (emphasis added). Nor does section 905-A—which governs the notice and comment procedures at issue here—limit

this broad grant, affirming simply that an "aggrieved *voter* may appeal the final decision of the Secretary of State." *Id.* §905-A (emphasis added).

Petitioners' appeal meets every statutory requirement. Petitioner Titcomb is a "voter named in the application" and all Petitioners are "voter[s]." They are "appeal[ing] a decision made by the Secretary" to approve a ballot question using the unique procedures established by the Legislature for such appeals. *See id.* §§901, 905(2)-(3), 905-A. These expedited procedures, amended by the Legislature as recently as 2023, explicitly "modif[y]"—and thus supersede—the general rules governing Rule 80C appeals. *Id.* §905; *see also Caiazzo*, 2021 ME 42, ¶10, 56 A.3d 260 (contrasting an appeal by a "voter named in the application" under Section 905 from "an ordinary appeal from the final action of a state agent."). These provisions thus expressly authorize Petitioners' appeal.

B. No Maine court has applied administrative exhaustion in the context of notice and comment proceedings open to the public at large.

Below, the Secretary sought to import an exhaustion requirement applicable to administrative adjudicatory proceedings that no Maine court has ever applied in the context of notice and comment proceedings open to the public at large. *See, e.g.*, *Hale v. Petit*, 438 A.2d 226, 232 (Me. 1981) (discussing the distinctions between adjudicatory pleadings and other processes open to the public). But the Secretary failed to identify a single Maine authority applying such preservation rules in the context of a public notice and comment. All of the Secretary's cases cited below involved paradigmatic "formal

adjudicatory proceeding[s]," as the Secretary tacitly acknowledged. *See* Sec'y.Br.13. *See Hale-Rice v. Maine State Ret. Systems*, 1997 ME 64, ¶1, 691 A.2d 1232 (adjudication of disability benefits); *Off. of the Pub. Advocate v. Public Utilities Comm'n*. 2024 ME 11, ¶1, 314 A.3d 116 (appeal of administrative proceedings); *see also Clark v. Hancock Cnty Comm'rs*, 2014 ME 33, ¶22, 87 A.3d 712 (formal adjudication never sought). There is no analogy between these quasi-judicial proceedings—where doctrines of waiver and issue preservation necessarily apply with greater force—and a public comment process that involves every Maine resident and is subject to challenge by "any … voter."[8] 21-A M.R.S. §905(2).

Respondent's sole remaining authority doesn't change this analysis. *New England Whitewater Center, Inc. v. Department of Inland Fisheries & Wildlife*, while not a formal adjudication, bore many hallmarks of a formal adjudicatory process: (i) a select group of industry applicants; (ii) the distribution of a limited number of benefits; (iii) a live hearing, (iv) parties who had all "participated previously in the Department's allocation

[8] The Secretary's authorities from away miss for the same reason—the Ohio and Colorado proceedings were also adjudicatory in nature. *See Sohocki v. Colorado Air Quality Control Comm'n*, 12 P.3d 274, 276 (Colo. App. 1999) (plaintiffs had "party status" and agency held a hearing); *Golden Christian Acad. v. Zelman*, 760 N.E.2d 889 (Oh. 2001) (review of revocation of school's registration in program). Nor is there any analogy between federal agency review and the unique citizen initiative process and appellate rights at issue here. And even if there were, federal courts have expressly recognized "the rulemaking/adjudication dichotomy pervasive in administrative law" and cautioned that "[t]he waiver rule should not be applied freely in both areas, given the fundamental differences between the two endeavors." *Citizens Coal Council v. E.P.A.*, 447 F.3d 879, n.25 (6th Cir. 2006).

process," and (v) the "distribut[ion], collect[ion] and analy[sis of] the [parties'] applications" by the agency. 550 A.2d 56, 60 (Me. 1988). These selective and highly structured proceedings again bear little resemblance to the comment period at issue here, which involves no hearings, applications, distribution of benefits, or adversarial process whatsoever, and is open to the public at large.

Recognizing this distinction, many courts have declined to impose exhaustion requirements on non-adjudicative proceedings altogether. As the *Sims* plurality explained, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (Opinion of Thomas, J.); *see also Frango v. Gonzales*, 437 F.3d 726, 728 (8th Cir. 2006). Where that "proceeding is not adversarial, … the reasons for a court to require issue exhaustion are much weaker." *Sims*, 530 U.S. at 103. Maine's ballot question process—in which the Secretary simply drafts a question, solicits public feedback, and issues a final version—in no way resembles adversarial litigation. The Court should decline to break new ground by imposing an exhaustion requirement.

Nor would it make sense to apply exhaustion rules in this context. The Secretary's proposed rule would require a voter to be "a psychic able to predict the possible changes that could be made in the proposal when the [question] is finally promulgated." *City of Seabrook v. E.P.A.*, 659 F.2d 1349, 1361 (5th Cir. 1981); *see also Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 n.13 (9th Cir. 2007)

(similar); *Habas Sinai v. Tibbi Gazlar*, 33 C.I.T. 695, 730 (C.I.T. 2009) (similar). Several of Petitioners' arguments relate to changes made from the proposed question, which listed the voter ID requirement first and simply described the Act as requiring "ID"—not "certain photo ID." *Compare* A.76 *with* A.28-29. Petitioners had no reason to object to those aspects of the question. Indeed, it is a basic assumption of preservation rules that a party will raise *objections* to the agency's action—not register *agreement*.

C. This appeal involves a pure legal issue exempt from the exhaustion rules.

This Court has also ruled that the exhaustion doctrine does not apply in cases, like this one, "where the questions involved are questions of law only[,] which the courts must ultimately decide." *Churchill v. S.A.D. No. 49 Tchrs. Ass'n*, 380 A.2d 186, 190 (Me. 1977); *see also Ne. Occupational Exch., Inc. v. Bureau of Rehab.*, 473 A.2d 406, 411 (Me. 1984) (citing exception); *Utsch v. Dep't of Env't Prot.*, 2024 ME 10, ¶16 n.2, 314 A.3d 125 (same). Applying the exhaustion doctrine is inappropriate in such cases because "the special expertise of the administrative agency [as to the underlying facts] would be of no significant benefit." *Churchill*, 380 A.2d at 190. *Churchill* illustrates this principle. There, a party to a pending administrative arbitration over a disputed collective bargaining agreement appealed to the Superior Court, seeking to stay the agency proceeding pending a ruling on whether the agreement complied with Maine's public employee labor statute. *Id.* at 188. The Superior Court declined to rule on the issue and denied the stay motion, citing failure to exhaust the issue before the agency arbitrator. *Id.* at 189-

90. This Court reversed, ruling that the "issue of the legality of the … agreement in the instant case is one solely of law" and therefore the exception for pure legal issues applied. *Id.* at 190.

As in *Churchill*, this appeal involves pure legal questions: whether the Secretary's ballot question transgresses the statutory requirements. *See Olson*, 1997 ME 30, ¶4, 689 A.2d 605 (21-A M.R.S. §905 is a "statutory grant of judicial review" to determine whether the question satisfies the legal standard). As this Court has repeatedly established, this question is subject to the Court's "independent" review and the Secretary is awarded no deference. *Id.*; *see also Jortner*, 2023 ME 25, ¶1, 293 A.3d 405. The Secretary does not weigh evidence or make findings of fact when drafting the ballot question. *Churchill*, 380 A.2d at 190; *cf. Buckeye Cablevision, Inc. v. United States*, 438 F.2d 948, 952 (6th Cir. 1971). The sole issue on appeal is whether the question as written is legal. No exhaustion is necessary.

D. The Secretary's manifest bias excuses application of the waiver requirement.

And even if the exhaustion requirement applied here, it is excused by the Secretary's indisputable bias. "Persons who come before an administrative board are entitled to a fair and unbiased hearing." *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶19, 153 A.3d 768; *see also New England Tel. & Tel. Co. v Pub. Uti. Comm'n*, 448 A.2d 272, 280 (1982). So where "the potential decisionmaker is biased or can be shown to have predetermined the issue, failure to exploit an administrative remedy may be forgiven."

Portela-Gonzalez v. Sec'y of the Navy, 109 F.3d 74, 77 (1st Cir. 1997); *see also O&G Indus., Inc. v. Planning & Zoning Comm'n of Beacon Falls*, 232 Conn. 419, 429, 655 A.3d 1121 (1995) ("actual bias" may excuse failure to exhaust).

Here, there is a "substantial countervailing reason to conclude that" the Secretary was "actually biased." *Beal*, 2017 ME 6, ¶19, 153 A.3d 768. Indeed, it's hard to imagine a more obvious example of bias than the Secretary's public testimony opposing the Act on the record before the Legislature as an assault on "marginalized" groups, including "seniors." *See supra* at 11. Likewise, as soon as the petition was filed with her office, the Secretary attacked it as a "wolf in sheep's clothing." *Id.* Secretary Bellows' public opposition to the Act—with neither of the Respondents even attempt to rebut—makes clear she is "actually biased" against the Act and Petitioners, and that she had predetermined her view on it long before the public comment period. Such manifest prejudice compels excuse of any otherwise applicable preservation requirements.

E. The Secretary considered the issues raised by this appeal.

Even if the rules of administrative exhaustion applied here, they are satisfied. The exhaustion doctrine exists "to allow administrative agencies to correct their own errors, clarify their policies, and reconcile conflicts before resorting to judicial relief." *Bryant v. Town of Camden*, 2016 ME 27, ¶10, 132 A.3d 1183. Faulting a petitioner for not commenting on an issue the agency considered and decided does nothing to further these aims. For this reason, courts generally "excuse[] the exhaustion requirements … when the agency has in fact considered the issue." *Nat. Res. Def. Council, Inc. v. E.P.A.*,

824 F.2d 1146, 1151 (D.C. Cir. 1987).[9] As the Ninth Circuit has explained, "we will not invoke the waiver rule in our review of a notice-and-comment proceeding if an agency has had an opportunity to consider the issue … even if the issue was considered *sponte* by the agency or was raised by someone other than the petitioning party." *See Portland Gen. Elec. Co.*, 501 F.3d at 1023-24.

Here, the Secretary has already passed on the issues in her decision letter. *See* Sec'y.Br.10-12, Int.Br.6-8; *see* A.31 (conciseness); A.31-32 (defending the catch-all clause); A.32 (question order); A33 (defending her inclusion of the phrase "ongoing absentee voter status"); *Id.* ("certain photo ID"). The Secretary received comments on these issues,[10] or else raised them *sua sponte*,[11] and provided her reasoning. And all Parties referred to or relied on that reasoning below. *See, e.g.*, Pet'r.Open.Br.8-10, 16, 20; *see,*

[9] *See also Buckeye Cablevision, Inc.*, 438 F.2d at 951 ("The Commission has had an opportunity to consider the identical issues in this case but which were raised by other parties … and it was not necessary for [plaintiff] to raise them again."); *New York State Broad. Ass'n v. United States*, 414 F.2d 990, 994 (2d Cir. 1969) ("Indeed, [another party] did explicitly raise those issues, so that they were before the Commission.").

[10] *See* A.31 ("A number of … comments specifically criticized the question's use of the catch-all phrase"); A.32 ("Several commenters suggested changes to how the question described the Act's photo identification requirements"); *id.* ("After considering the public comments on this topic, I agree with commenters that the final question should be reordered"); A.33 ("A few commenters suggested changes to the phrase 'ongoing absentee voting' to clarify its meaning.").

[11] *See* A.31-32 (*sua sponte* raising concision); A.33 (addressing *sua sponte* her inclusion of the phrase "ongoing absentee voter status" and describing it as a "program for allowing *seniors and people with disabilities* to apply for a status").

e.g., Sec'y.Br.10-12, 29; Int.Br.7-8, 11, 14, 16-17, 19. This Court should refuse the Secretary's brazen attempt to insulate those same arguments from judicial review.

CONCLUSION

For the reasons above, Petitioners ask that this Court reverse the decision below and instruct the Superior Court to vacate the ballot question and remand to the Secretary to revise the final wording to comply with Maine law.

Dated: June 27, 2025

Respectfully submitted,

/s/ Patrick Strawbridge

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, pursuant to M.R. App. P. 1E, that copies of the foregoing were served upon the parties to this appeal.

Dated: June 27, 2025

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CERTIFICATE OF COMPLIANCE

This brief complies with M.R. App. P. 1 because it is in double-spaced, 14-point font. It complies with M.R. App. P. 7A(f)(1) because it is 9,950 words excluding the portions listed in M.R. App. P. 7A(f)(3).

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