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.

SECRETARY OF STATE
Respondent-Appellee

On Appeal from the Superior Court
Cumberland County

BRIEF OF THE SECRETARY OF STATE

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Introduction

Petitioners-Appellants ("Initiators") have proposed a citizens' initiative (the "Initiative") that melds a photo-ID requirement for in-person voting with a menagerie of disparate changes to Maine's absentee voting laws. Respondent-Appellee Secretary of State ("Secretary"), after holding a public comment process in which Initiators failed to participate, executed her constitutional duty to write a ballot question that intelligibly and accurately describes some of the Initiative's roughly 25 substantive provisions, while flagging that its description is non-exhaustive. When Initiators sought judicial review of the Secretary's question, alleging an array of deficiencies, the Superior Court (O'Neil, J.) rejected their challenge on the merits, confirming that the question satisfied the twin requirements that the question be understandable and not misleading.

This Court should reach the same conclusion. Initiators' claim that the question is misleading does not even establish that question is inaccurate, let alone that it would deceive voters who understand the legislation into voting contrary to their wishes. Initiators do not dispute that the Initiative would, as the question states, "end" ongoing

absentee voter status for "seniors and people with disabilities"—the only voters who will have that status as of the Initiative's effective date. Initiators' further claim that the question is unintelligible because it presumes voter familiarity with statutory provisions that the Initiative repeals is directly contrary to this Court's precedent recognizing that the Secretary may assume that voters have educated themselves about the Initiative's provisions.

Initiators' remaining contentions fare no better. The question's use of a "catch-all" clause indicating that the Initiative would make "other changes" in addition to the enumerated changes is a reasonable solution to the problem of an unusually sprawling initiative. The question's use of the term "certain" in the phrase "certain photo ID" accurately informs voters that the Initiative's ID requirements are circumscribed. And Initiators' claims that the question is too long and should be reordered go well beyond the scope of judicial review, which is limited by statute to whether the question is understandable and not misleading.

Finally, the Court need not reach the merits of any of these contentions because Initiators failed to preserve their objections by not

raising them with the Secretary, despite a clear opportunity to do so in the public comment process.

The Court should affirm the Superior Court's decision and uphold the ballot question as drafted by the Secretary.

Statement of the Case

Constitutional and Statutory Framework for Citizen Initiatives

Under the direct-democracy provisions of the Maine Constitution, a sufficient number of voters may petition the Legislature to enact into law "any bill, resolve or resolution." Me. Const. art. IV, pt. 3, § 18(1). If the proposed measure is not "enacted without change by the Legislature at the session at which it is presented," it must be submitted to the electorate for a referendum vote. *Id.* § 18(2).

The Maine Constitution delegates to the Secretary the authority to draft the ballot question for an initiative. *Id.* § 20. The Legislature has created a multi-step drafting process for the Secretary to follow. First, the Secretary must prepare a proposed question. 21-A M.R.S.A. § 905-A (2024). Second, the Secretary must provide the public with 30 days to comment on "the content and form" of the proposed question.

Id. Then the Secretary must "write the ballot question for the initiative." *Id.*

The Initiative

On February 13, 2024, the Initiators submitted to the Secretary an application for citizen initiative, together with draft legislation. A35–38; *see* 21-A M.R.S.A. § 901. The draft legislation was narrowly focused on requiring in-person voters to show ID at the polls. A36–38. The Initiators titled their bill "An Act to Require a Person to Present Photo Identification for the Purpose of Voting." A36.

The Secretary, with the assistance of the Revisor of Statutes, reviewed the draft legislation for proper form, as required by 21-A M.R.S.A. § 901(3-A). A39–43. On March 6, 2024, the Secretary returned the draft legislation to Initiators with various technical changes. *Id.* Rather than accept those changes, however, the Initiators exercised their right under § 901(3-A)(B) to submit a "subsequent draft" of the legislation to the Secretary.

Initiators' subsequent draft, while retaining the same title, significantly expanded the scope of their proposal. While the initial draft was limited to amending laws governing in-person voting, *see* 21-A

M.R.S.A. §§ 671–675, the subsequent draft also proposed a variety of changes to the laws governing absentee voting, *see* 21-A M.R.S.A. §§ 761–765. A46–52. The Secretary again made technical changes to the draft legislation in consultation with the Revisor and returned the revised draft to the Initiators on April 5, 2024. A53–65.

The Initiators accepted the revised draft on April 8, 2024. A66–67. The Secretary then issued to the Initiators the petition form to be used to collect voter signatures. A68–73. On January 6, 2025, the Initiators submitted the petition to the Secretary of State. A74. On February 19, 2025, the Secretary determined that the petition contained enough valid signatures for transmission of the initiated legislation to the Legislature. A75; *see* Me. Const. art. IV, pt. 3, § 18(2).

Provisions of the Initiative

The Initiative contains 28 sections. *See* I.B. 1 (132nd Legis. 2025).[1] As required by legislative drafting rules, the sections are ordered "in ascending numerical order, according to the statutes the bill sections affect, by title and section or larger statutory unit." Office of

[1] All citations to the Initiative are to the Legislature's printing of it as I.B. 1/L.D. 1149. The Initiative is also in the Appendix at A69–72.

the Revisor of Statutes, Maine Legislative Drafting Manual at 32 (2016), *available at* https://legislature.maine.gov/doc/1353 ("Drafting Manual"). The Initiative makes approximately 25 discrete, substantive changes to Maine's election laws, which are listed in the order they appear in the Initiative:

1. It requires a voter checking in at the voting place on election day to present "photographic identification." I.B. 1, § 1.

2. It provides that election officials must challenge ballots voted by voters unable to show permissible photo ID and further provides that such challenged ballots, unlike other challenged ballots, *see* 21-A M.R.S.A. § 673, may not be counted unless cured. I.B. 1, § 2.

3. It provides for cure processes, including that a voter may appear before their registrar with permitted ID within four days of the election. *Id.*

4. It requires the Secretary of State to issue free nondriver identification cards to certain eligible voters. *Id.* § 3.

5. It allows any voter to challenge another voter's in-person or absentee ballot for alleged failure to provide ID or for a non-matching signature. *Id.* §§ 6–10.

6. It changes where absentee drop boxes may be located. *Id.* § 12.

7. It limits municipalities to one drop box. *Id.*

8. It requires drop boxes to be maintained and serviced by bipartisan teams of election officials. *Id.* §§ 13–15.

9. It repeals the provision allowing for an immediate family member to request an absentee ballot on behalf of a voter. *Id.* § 16.

10. It prescribes a new form for requesting an absentee ballot. *Id.*

11. It requires voters to request absentee ballots no later than the close of business on the 7th day prior to the election. *Id.* Current law allows issuance of an absentee ballot to most voters through "the 3rd business day before election day." *See* 21-A M.R.S.A. § 753-B(2)(D).

12. It grants the Secretary new rulemaking authority over requests for absentee ballots. I.B. 1, § 16.

13. It repeals the provision allowing voters to request an absentee ballot by telephone. *Id.* § 17.

14. It requires electronic requests for absentee ballots to include the same information that the Initiative requires of paper requests. *Id.* § 18.

15. It repeals the provision allowing seniors and people with disabilities to obtain "ongoing absentee voter status," 21-A M.R.S.A. § 753-A(8)(B), a status that allows them to automatically receive an absentee ballot for each election. I.B. 1, § 19.

16. It provides that the clerk must receive a complete application on the correct form and further provides that the clerk must promptly notify the applicant of any deficiencies. *Id.* § 20.

17. It provides that an absentee ballot must be issued with an unsealed "identification envelope" with a printed form on the outside that voters must complete under penalty of unsworn falsification. *Id.*

18. It prohibits election officials from prepaying the return postage for an absentee ballot. *Id.*

19. It forbids election officials from filling out most portions of a voter's identification envelope. *Id.*

20. It grants the Secretary of State rulemaking authority concerning issuance of absentee ballots. *Id.*

21. It eliminates the authority for an immediate family member to return a voter's absentee ballot by mail. *Id.* §§ 21, 22.

22. It permits third persons designated by the voter to return the voter's ballot only as provided in 21-A M.R.S.A. § 754-A(3)(F). I.B. 1, § 22.

23. It allows the municipal clerk to designate only one office to which absentee ballots must be returned. *Id.*

24. It grants the Secretary new rulemaking authority concerning the timely delivery of absentee ballots. *Id.*

25. It repeals the procedures governing voting when a ballot is delivered or returned by a 3rd person. *Id.* § 23.

The Initiative also contains some conforming provisions that do not make discrete changes to election administration, *see, e.g.*, *id.* §§ 25–27, as well as an effective date provision, *see id.* § 28.

Drafting of the Ballot Question

On March 12, 2025, the Secretary of State announced a draft ballot question for public comment:

> 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?

A76. The draft question thus captured items 1, 9, 11, 13, 15, and 18 of the list above, while acknowledging that the Initiative makes additional changes not specifically outlined in the question.

During the public comment period, the Secretary received 318 comments from members of the public. R051–388. Many commenters supported the question as written. *See, e.g.*, A113 ("[Y]our draft ballot question is well drafted. It is accurate and more than fair in summarizing the gist of the proposed amendments."); A119 ("The ballot question wording clearly identifies all major portions of the proposed law change in a way that's easy for everyday people to understand."); A93.

But a sizeable number of comments criticized the draft question for not describing some of the Initiative's provisions. *See, e.g.*, A78 ("I think all the changes need to be spelled out in the question"); A91 ("Wording like 'and make other changes' need to be spelled out so that the voter is aware of every change and every limitation on access to voting that would be made by its successful passage"); A105 ("The finalized ballot question must list the full scope of the legislation so

voters understand the impact . . . ."); A114; A118. The Initiative's provisions on drop boxes were specifically mentioned by several commenters as worthy of inclusion in the question. *See, e.g.*, A108 ("I would suggest that the limitation on the number of drop boxes per municipality be mentioned specifically as well"); A83; A94; A100.

In contrast to the large number of comments encouraging the Secretary to make the question longer and more comprehensive, virtually no commenters advocated for a shorter question. *But see* A79 (proposing slightly shorter question). No commenters advocated for a question that referenced only voter ID.

Some commenters also opined that the wording of the question should be adjusted so that the proposed changes to absentee voting are stated before the in-person voter ID requirement. For example, the League of Women Voters of Maine opined that "this question should first begin with what laws are being repealed . . . then it would be appropriate to name the law that would be added (require voters to show ID)." A116; *see also* A117.

Commenters also made a variety of other suggestions, including adding detail concerning the voter ID requirement, *e.g.* A83, A115,

clarifying the phrase "ongoing absentee voting," *e.g.* A84, and describing predicted effects and costs of the Initiative, *e.g.*, A107.

Though the draft question contained nearly all of the features to which they now object, none of the five Initiators bringing this challenge submitted public comments on the question. Administrative Record ("R") at 51–388.

Decision on Final Question

On May 5, 2025, the Secretary issued her decision on the final wording of the ballot question:

> 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?

A28–29. Although the final question largely tracks the language of the draft question, the Secretary altered it in a few ways in response to public comments: First, she changed "ongoing absentee voting" to the more precise "ongoing absentee voter status." Second, she accepted the suggestions of several commenters to reorder the question's clauses. Third, she accepted commenters' suggestions to add more detail to the

voter ID portion of the question, replacing "show ID" with "show certain photo ID." And, fourth, she added the phrase "limit the number of drop boxes."

The Secretary's decision letter offers a detailed explanation of her drafting choices. Addressing the length of the question, the Secretary explained:

> The multifaceted nature of this Act makes formulation of a "concise" ballot question challenging. On the one hand, a full description of all of the Act's proposed changes, while perhaps informative to some voters, would be overwhelming to others and would be at least in tension with my duty to make the question concise. On the other hand, a focus on only one or two aspects of the Act would disserve voters by failing to reflect that the Act proposes many disparate changes to the voting process in Maine. Therefore, in the draft question I struck a middle ground: describing some of the more significant changes proposed by the Act while also making clear that the question's description was not exhaustive.

A30. The Secretary rejected the suggestions of many commenters to make the question longer, explaining, among other things, that a question detailing all of the Initiative's provisions "would pose readability challenges for some (if not all) voters and might also require unorthodox and costly changes to the standard ballot layout." A31.

On the sequencing of the question, the Secretary concluded that the question need not be sequenced to mirror the order of provisions in the Initiative, since none of the legal authorities on ballot question drafting required any particular sequencing and there was no reason to follow the sequence within the Initiative, which is determined by a technical legislative drafting standard. A32. The Secretary therefore concluded that she had discretion on the sequencing of the question and that "[b]ecause the Act's changes to absentee voting procedures are more extensive and wide-ranging than its changes to in-person voting procedures, those provisions should be listed earlier in the question." *Id.*

The Secretary explained her change of "ongoing absentee voting" to "ongoing absentee voter status" by noting that the later phrase "mirrors the statutory language in the provision that would be repealed by the Act" and would therefore remove any ambiguity. A33. And the Secretary addressed her change of "ID" to "certain photo ID" by explaining that "[a]lthough listing the specific forms of identification that the Act does (or does not) permit would unacceptably complicate the wording of the question," the phrase "certain photo ID" would "make

clear to voters that the Act includes a specific list of acceptable photographic identification documents." *Id.*

Proceedings Below

On May 12, 2025, Initiators filed an appeal under 21-A M.R.S.A. § 905(2), challenging the wording of the ballot question. Initiators argued that the phrase "end ongoing absentee voter status for seniors and people with disabilities" was misleading because it did not inform voters that the program was scheduled to expand to all voters in 2026. Super. Ct. Pet. Br. ("Pet. Br.") at 12–14. Initiators further argued that the question was not understandable in certain ways and was both too long and failed to sufficiently highlight the voter ID provisions. *Id.* at 14–24. The Secretary opposed relief, both on the merits and because the Initiators failed to preserve their objections by raising them in the public comment process.

Following expedited briefing, the Superior Court rejected Initiators' appeal on the merits. The court concluded that question's use of the terms and phrases "ongoing absentee voter status," "make other changes to our elections," and "certain photo ID" were understandable to a reasonable voter who understands the Initiative.

A11–12. It further concluded that the phrase "end ongoing absentee voter status for seniors and people with disabilities" was not misleading because it accurately reflected who would lose an existing status under the program, notwithstanding the planned expansion of the program. A12–13. The court declined to rule on the Secretary's failure-to-preserve argument in light of its conclusion that the question should be affirmed on the merits. A10.

This appeal followed.

Statement of the Issues

1. Did the Superior Court err in its independent determination that the ballot question is understandable and not misleading?

2. Did the Initiators fail to preserve their objections to the ballot question by not raising them during the statutory public-comment process?

Argument

I. The Superior Court's conclusion that the ballot question meets all applicable legal standards should be affirmed.

A. Standard of review.

In reviewing the sufficiency of a ballot question the Court must 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." 21-A M.R.S.A. § 905(2); *Jortner v. Sec'y of State*, 2023 ME 25, ¶ 8, 293 A.3d 405.

It is Initiators' burden to demonstrate that the ballot question is not understandable or misleading. *Jortner*, 2023 ME 25, ¶ 8, 293 A.3d 405. To show that a ballot question is misleading, "[m]erely demonstrating that the question creates a misleading impression about the legislation is not enough." *Id.* ¶ 7 (quoting *Olson v. Sec'y of State*, 1997 ME 30, ¶ 7, 698 A.2d 605). Nor is it sufficient to demonstrate that descriptors in the ballot question might have an "emotional impact" on voters. *Id.* ¶ 28 n.6. Rather, the Initiators must establish that the ballot question "will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes." *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605.

To show that a ballot question is not understandable, Initiators must demonstrate that "'a reasonable voter who *understands the proposed legislation*' but is reading the question for the first time would

not be able to understand the question." *Jortner*, 2023 ME 25, ¶ 13, 293 A.3d 405 (quoting 21-A M.R.S. § 905(2)) (emphasis in original). The question is not "whether a voter who does not understand the proposed legislation would be able to fully understand it based on the question alone." *Id.* Indeed, because "[v]oters are not to rely on the ballot question alone in order to understand the proposal," the question may "assume[] that the voters have discharged their civic duty to educate themselves about the initiative." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605.

B. The Superior Court correctly concluded that the ballot question is not misleading.

Initiators argued below that the ballot question's description of the Initiative as "end[ing] ongoing absentee voter status for seniors and people with disabilities" meets this Court's demanding standard for a ballot question to be misleading. Initiators' theory is that this portion of question is misleading because it fails to describe a scheduled expansion of the program to other voters in 2026. The Superior Court correctly concluded that this portion of the question "is in fact an accurate representation of the content and effect of the Initiative" and

therefore cannot be misleading. A13. *See Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605.

Maine established ongoing absentee voter status in 2021. *See* P.L. 2021, ch. 398, pt. UUUU, § 3. The program—then and now—allows *only* voters over 65 years old and voters who self-identify as having a disability to file a request to be automatically sent absentee ballots without needing to file a separate application for each election. *Id.*; *see* 21-A M.R.S.A. § 753-A(8). In 2023, the Legislature enacted legislation to expand eligibility for the program to all voters but delayed the effective date of that expansion to December 31, 2025. *See* P.L. 2023, ch. 404.

Initiators argued that the phrase "end ongoing absentee voter status for seniors and people with disabilities" is misleading because it does not describe this expansion of the program, which the Secretary will become authorized to implement the day before the Initiative's stated effective date. *See* I.B. 1, § 28. The flaw in this argument is that the ballot question, by its plain terms, describes who will *lose* their status as ongoing absentee voters (i.e., who will have their status

"end[ed]"), not who might in the future be eligible for such status but for approval of the Initiative.

As the Superior Court recognized, the question thus properly and accurately describes the Initiative's "content and effect." A13. When voters are confronted with this ballot question on November 4, 2025, *see* Me. Const., art. IV, pt. 3, § 18(3), the only people in Maine with ongoing absentee voter status will be seniors and people with disabilities. Likewise, if the Initiative is approved, the Secretary obviously would not move forward with expanding the program to all voters on December 31, 2025, only for the program to be abolished one day later (and before expansion could benefit anyone). Thus, on the Initiative's effective date, too, the only people in Maine whose status will be "end[ed]" will be seniors and people with disabilities. In short, the ballot question accurately informs voters of the entire universe of people whose ongoing absentee voter status will "end" on January 1, 2026, if they vote "Yes."

It is certainly true that the Secretary in her discretion could have *also* noted in the question that approval of the Initiative would prevent expansion of the program to other voters in 2026. But she is not

required to provide such "comprehensive" information about the legislation, particularly given the number of other changes the Initiative proposes and her obligation to make the question concise. *Jortner*, 2023 ME 25, ¶ 13, 293 A.3d 405. That is the whole reason she included the catch-all provision. *See* Part I.D, *supra*. The place for Initiators to advocate for such an addition was in the public comment period, which they eschewed, not in the courts.

Moreover, even under the Initiators' misreading of the question as describing the program as it will exist in 2026, as opposed to an explanation of whose existing benefits will be "end[ed]," the phrase would be accurate. If the Initiative is approved, seniors and people with disabilities are among those who would not be allowed to enroll in the program in 2026. Since those groups were the impetus for creating the program—presumably because they benefit the most from the reduction in administrative burdens it offers—it would be reasonable for the question to mention them. Initiators' argument, even if it were not based on a distortion of the question, would boil down to a complaint that the ballot question language might have an "emotional impact" on

voters, which is insufficient as a matter of law to render a question misleading. *Jortner*, 2023 ME 25, ¶ 28 n.6, 293 A.3d 405.

Because the phrase "end ongoing absentee voter status for seniors and people with disabilities" is accurate, there is no basis for the Court to entertain Initiators' further claim that the question's wording may cause someone to vote contrary to their wishes. A voter who "understands the proposed legislation," 21-A M.R.S.A. § 905(2), will understand before they read the ballot question that a "Yes" vote will take away—"end"—an existing status for voters who are exclusively seniors or people with disabilities. Voters who understand those provisions thus will not be misled into voting against their preference.

C. The Secretary properly presumed voter familiarity with statutes that the Initiative expressly repeals.

Initiators attacked two phrases in the question, "seniors and people with disabilities" and "ongoing absentee voter status," as unintelligible because they are not found in the text of the Initiative. As the Superior Court recognized, A011, Initiators' arguments are foreclosed by this Court's decision in *Olson*, 1997 ME 30, 689 A.2d 605.

In that case, the petitioners claimed that the phrase "Class A crime" was not understandable. *Id.* ¶ 10. But this Court explained

that, in assessing intelligibility, voters must be assumed to have carried out their "civic duty to educate themselves about the initiative." *Id.* ¶ 11. Thus, even though "Class A crime" was not defined in the initiative text, the Court held it was understandable because it was "readily understood by reference to external sources because it is defined by statute and would undoubtedly be discussed in the context of political debate on the initiative." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 (citing 17-A M.R.S.A. §§ 1252 & 1301).

Here, "ongoing absentee voter status" is a direct quote from the statute repealed by the Act while "seniors and people with disabilities" is an unmistakable paraphrase of "a voter who will be at least 65 years of age by the next election or who self-identifies as having a disability." 21-A M.R.S.A. § 753-A(8). Initiators' theory that these phrases are not understandable is premised on the notion that voters' civic duty to "educate themselves" about an Initiative does not extend to reading the very statutory provisions that the Initiative expressly repeals. That premise cannot be squared with *Olson*'s holding that voters should be presumed to understand the meaning of a technical criminal-law phrase

("Class A crime") defined in a different title of the Maine Revised Statutes.

Initiators suggested that *Olson* was distinguishable because "Class A crime" appeared in the initiative text whereas the phrases challenged here do not. Super. Ct. Reply ("Reply") at 11. But that is merely a function of legislative drafting conventions, which do not require strikethroughs when removing entire subsections from a statute. *See* Drafting Manual at 36. A reasonable voter reading the phrase "21-A MRSA §753-A, sub-§8 . . . is repealed," *see* I.B. 1, § 19, would realize that they needed to read the referenced subsection of statute to understand what the Initiative does. Were it otherwise, initiatives that only repealed statutes would escape the presumption of voter understanding altogether.

Jortner does not suggest otherwise. There the Court found the term "quasi-governmental" to be unintelligible. 2023 ME 25, ¶¶ 24, 26, 293 A.3d 405. But the problem in *Jortner* was not just that the term did not appear in the initiative. Rather, the court found that the term was also inherently ambiguous and would require a voter to refer to an "assortment of other statutes using the term 'quasi-governmental'" to

try to discern its meaning. *Id.* ¶ 24. None of those other statutes themselves defined "quasi-governmental" or even appeared in the same title of the Maine Revised Statutes as the proposed law at issue. *Id.*

Thus, when *Jortner* expressed concerns about requiring voters to "research[] statutes or other sources" to understand a ballot question, *Id.* ¶ 26, it was not considering the situation where the initiative at issue expressly targeted a specific statute for repeal. In that circumstance, and unlike the circumstance in *Jortner*, a voter cannot be said to "understand[]" the proposed initiative, *see* 21-A M.R.S.A. § 905(2), unless they have reviewed *both* the initiative and the statute the initiative repeals.

D. The question's use of a catch-all provision does not render it unintelligible.

Initiators argued that Secretary added "ambiguity and confusion" to the ballot question by including the catch-all phrase "and make other changes to our elections?" Pet. Br. at 16 (quoting *Jortner*, 2023 ME 25, ¶ 27, 293 A.3d 405). The Superior Court correctly rejected this argument, citing the large number of changes proposed by the Initiative and concluding that "[r]easonable voters who understand the Initiative would understand that this language indicates that the ballot question

reflects a non-exhaustive list of the changes to Maine's election laws proposed by the Initiative." A11–12.

Indeed, the catch-all clause directly furthers the Secretary's overall charge to ensure that voters "will understand the subject matter and the choice presented." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605. Contrary to Initiators' argument below, the words "make other changes" have "substantive content." *See* Reply at 12. One of the most notable features of the Initiative is the large number of distinct changes it would make to Maine's voting processes. That the Initiative makes many changes is itself a key aspect of the choice presented to voters and was therefore properly indicated in the ballot question.

That other ballot questions have not contained such clauses is of no help to Initiators. Initiatives, however complex, typically seek one or two specific, discrete policy changes, all of which can be enumerated in a reasonably concise question. *See generally* Maine Legislature, *Citizen Initiated Legislation, 1911–Present*, at https://www.maine.gov/legis/lawlib/lldl/citizeninitiated/ ("*Citizen Initiated Legislation*"). The Initiative, in contrast, evolved from a discrete voter ID proposal into a smorgasbord of loosely related policy changes. *Id.*; *see* A35–67. There

was no roadmap for the Secretary to follow in crafting a ballot question for such a proposal.

Finally, even if Initiators were correct that the catch-all phrase is superfluous, that would not establish that it makes the question unintelligible or misleading. Absent such a showing, the question should be affirmed. *See Jortner*, 2023 ME 25, ¶ 14, 293 A.3d 405.

E. The term "certain" is understandable.

Initiators also argued that the Secretary's use of "certain" in the phrase "certain photo ID" renders the question not understandable. Pet. Br. at 17. The Secretary explained that "certain" was added to the question in response to public comments opining that the question should better reflect that the Initiative's identification requirement excludes common forms of photo ID such as student and tribal ID cards. A33; *see* A83; A115. As the Superior Court correctly concluded, a reasonable voter who understands the Initiative "would understand that 'certain' refers to the forms of identification that the Initiative proposes excluding." A12.

Initiators asserted below the use of "certain" was somehow "partisan meddling." Reply at 13. But providing voters with accurate

information about an important aspect of the proposal—the mechanics of proving identity—is neither partisan nor meddling. Rather, it is helpful information, concisely delivered. Indeed, it may be particularly helpful given Maine's expansive rules for proving identity when registering to vote. *See* 21-A M.R.S.A. § 112-A (expressly allowing use of student IDs, among many other documents, to prove identity). Voters may not anticipate that the ID requirements for voting under the Initiative would be significantly stricter than existing ID requirements for registering to vote.

Precedent also supports the use of "certain" in ballot questions as a method of succinctly indicating that an initiative contains a narrower version of a concept than the text would otherwise suggest. *See, e.g.*, *Citizen Initiated Legislation*, at I.B. 3 (114th Legis. 1990) ("certain holidays"); I.B. 4 (119th Legis. 2000) ("certain horse racing tracks"); I.B. 1 (127th Legis. 2015) ("certain limits and rules"); I.B. 1 (128th Legis. 2017) ("a certain company"). These examples further demonstrate the utility of the term in crafting concise and understandable questions.

F. The question is not too long.

Below, Initiators argued that the ballot question must be rewritten because they believe it does not comply with 21-A M.R.S.A. § 906(6)(B)'s directive that it be, among other things, "concise." Pet. Br. at 18–19. They also implied that its length prevents voters from understanding the question. Reply at 13. Neither argument is persuasive.

As reflected in this Court' precedent, the Legislature set forth the full scope of judicial review of ballot question wording in 21-A M.R.S.A. § 905(2). *Jortner*, 2023 ME 25, ¶ 8, 293 A.3d. The review entails a two-pronged approach where a court must confirm whether the question is "understandable" and "will not mislead" reasonable voters. *Id.* The Legislature's other drafting instructions to the Secretary are "subsume[d]" into this analysis. *Id.* ¶ 8 & n.1.

In other words, courts do not independently review whether the Secretary has comported with 21-A M.R.S.A. § 906(6)(B)'s directive to draft a question "in a clear, concise and direct manner that describes the subject matter . . . as simply as is possible." No doubt a hypothetical ballot question could be drafted to be so excessively long

(or unclear or indirect) that its length renders it unintelligible to a reasonable voter. But contrary to Initiators' argument below, *see* Reply at 14, pointing to a question's length in the abstract is not enough for a challenge to succeed. That is why Initiators did not—and could not—cite any Maine court decision striking down a ballot question based solely on length.

And at no point below did Initiators meaningfully attempt to explain *how* the question's length would render it unintelligible. Any attempt to do so for the first time before this Court is thus waived. The closest Initiators came to making any such argument was an allusion to style guides that generally advise shorter sentences are easier to read than longer sentences. *See* Reply at 13 & n. 7–8. But none of these writing tips are targeted at drafting ballot questions meant to summarize multifaceted legislation. Moreover, none state that a sentence necessarily becomes unintelligible at a specific length.

Assuming *arguendo* that question length is independently relevant to the analysis, Initiators' portrayal of the question as an extreme outlier is flat wrong. It is not even the longest ballot question presented to voters in the past year, let alone in history. *See* P.L. 2023,

ch. 654 (placing 83-word bond question on the November 2024 ballot). Among questions drafted by the Secretary, the 66-word ballot question is comparable in length to others targeting more discrete topics, such as raising the minimum wage (64 words), *see Citizen Initiated Legislation*, I.B. 4 (127th Legis. 2016); establishing a universal home care program (54 words), *id.*, I.B. 3 (128th Legis. 2018); and making a handful of changes to regulations on powerline construction (54 words), *id.,* I.B. 1 (130th Legis. 2021).

This Initiative, in contrast, makes dozens of scattershot changes to Maine's voting laws, of which requiring photo ID when casting a ballot is only one. Limiting drop boxes, adding a new deadline for requesting a ballot, and banning prepaid postage have nothing to do with verifying voters' identity. *See* I.B. 1, §§ 12, 16, 20. Ending ongoing absentee voter status and banning voters from requesting absentee ballots by phone or through immediate family members, I.B. 1, §§ 16–17, 19, while perhaps allowing for separate *additional* opportunities for the government to check ID, does not support the requirement that voters prove their identity *when they cast their ballot.* Given the diversity of issues confronting voters, the Secretary's ability to condense

this initiative into a question of nearly equal length to those above demonstrates the question's concision.

Initiators are also mistaken that the provisions mentioned in the question are "minutiae" that do not deserve to be included. Pet. Br. at 19. The outpouring of concern in the public comments regarding these provisions, *see* R051–388, illustrates that many prospective voters view them as far from "minutiae." And, as an objective matter, prohibiting voters from obtaining absentee ballots for most of the week prior to the election, when many citizens finalize their voting plans, is no minor change. The Initiative's restrictions on how absentee ballots may be requested could significantly impact on elderly or disabled voters unable to easily travel to municipal offices and lacking the technological savvy to submit online forms that will require enhanced identity verification. *See* I.B. 1, § 18. Similarly, banning municipal elections officials from offering pre-paid postage for absentee ballots, I.B. 1, § 20, is a substantial intrusion on home rule, *see* Me. Const. art. VIII, pt. 2, and could well impact voter participation in municipalities that might otherwise provide that service. That individuals may disagree about the subjective magnitude of these effects only underscores the role of

the Secretary's expertise in drafting a ballot question that works best for all Maine voters.

Initiators failed to meet their burden of demonstrating how the ballot question's modest length—which accurately summarizes a multi-faceted legislative proposal—could be unintelligible to reasonable voters, much less those who have "discharged their civic duty to educate themselves about the initiative." Thus, they cannot succeed on appeal. *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605.

G. There is no legal basis to require the Secretary to reorder the question.

Initiators attacked the Secretary's decision to accept the recommendation of several public comments to reorder the final question to place the changes to absentee voting ahead of the requirement that voters show ID when voting in person. Pet. Br. at 20–22. At times they suggested that the ordering of the ballot question violates § 906(6)(B)'s command that the question be drafted in a clear, concise and direct manner. *Id.* at 20. As explained above, *see* Part I.F., *supra*, these are not independent standards under which courts review ballot questions.

At other times Initiators argued that the reordering of the ballot question was "misleading."[2] Reply at 16. Yet Initiators cited no relevant authority for the claim that sequencing alone could either render the ballot question unintelligible or otherwise mislead voters into casting a ballot against their wishes, given the question's text provides accurate, understandable descriptions of the initiative's multiple provisions. Instead, Initiators protested that the ordering of the question "conveys meaning," that the Secretary's order "privileges certain features of the [proposed legislation] and deemphasizes others," and that specifically placing the question's reference to voter ID "dead last" is "[o]f course . . . misleading." *Id.*

Even if Initiators' theory regarding emphasis were accurate (though it is not), they fail to understand what it means for a question to be "misleading" when reviewed under § 905(2). This Court has explained that a question is misleading only if "'a reasonable voter *who understands the proposed legislation*' but is reading the question for the first time . . . would be misled 'into voting contrary to that voter's

[2] Notably, Initiators raised this theory for the first time in their Superior Court reply brief and have therefore failed to properly preserve the argument for this appeal.

wishes.'" *Jortner*, 2023 ME 25, ¶ 13, 293 A.3d 405 (emphasis in original) (quoting 21-A M.R.S.A. § 905(2)). Under this standard, a question containing accurate information about an initiative could not as a matter of law "mislead" merely because of how the information is sequenced.

Caiazzo v. Secretary of State, 2021 ME 42, ¶ 24, 256 A.3d 260, relied on by Initiators below, does not suggest otherwise. *See* Reply at 16. The issue in *Caiazzo* was whether the Secretary was required, against her own wishes and those of the proposal's initiators, to split a single initiative into three separate questions. *Id.* ¶¶ 1, 24. Thus, when *Caizzo* expressed concern about "infring[ing] on the electors' right of direct initiative," *id.* ¶ 24, it did so in the context of a dispute over whether Secretary was required to offer voters the ability to enact something substantively different than the integrated proposal envisioned by the initiators. It had nothing to do with a ballot question's intelligibility or potential to mislead voters. In fact, it was "an ordinary appeal from the final action of a state agent" to which (at the time) § 905 did not apply. *Id.*, ¶¶ 14, 15.

Initiators also relied upon revisionist history to argue that the Initiative's voter ID requirement is the "primary substantive change encapsulated by the Act." Pet. Br. at 21. While their first draft of the Initiative was, in fact, a proposal narrowly focused on requiring voters to show ID at the polls, A36–38, the final proposal was vastly expanded to rewrite large portions of the Maine's absentee voting laws. A44–52. The voter ID–focused title of the Initiative is merely a vestige of Initiators' original draft. A53.

Similarly, Initiators suggested that the voter ID provision is most important because absentee voting provisions have been subject to more frequent amendment. Pet. Br. at 20–21. If anything, the Initiative's imposition of multiple new restrictions on absentee voting after years of reforms to make the process more accessible render those restrictions *more* noteworthy, not less. Similarly, that the title and summary of the Initiative largely focus on the ID requirement, Pet. Br. at 21, is all the more reason the question should inform voters that the Initiative does more than just requiring voters to show ID at the polls.

But even crediting Initiators' unfounded assertion regarding the Initiative's "primary substantive change," voters will see that change

immediately before voting on the ballot question. While Initiators argue that voters are most likely to focus on the earlier provisions in the series, others could just as easily argue that recency bias will cause voters to focus most on the final provision they read just before they pull the voting lever.

Once again, Initiators' argument serves to underscore the Legislature's prudent choice to limit judicial review to more objective criteria. Reasonable people will disagree—not only about what is the "primary substantive change" in a complex initiative, but also where to place it in the ballot question. Initiators would demand that, as a matter of law, a government official must first identify a multi-faceted Initiative's "primary substantive change" and then identify the optimal location within a ballot question to place the change. Imposing a standard saturated with subjectivity as Initiators demand would fast-track nearly all future initiated ballot questions to this Court's docket to perform such a tedious review.

In sum, Maine law allows Initiators to challenge the wording of a ballot question if it is misleading or unintelligible. It does not allow them to seek to co-author the question to better spotlight aspects of

their proposal that they think voters will particularly like or that Initiators subjectively find important. The Superior Court was correct to turn back such an attempt, and this Court should do the same.

II. Alternatively, Initiators failed to preserve their objections.

Although this Court can certainly follow the Superior Court's path and affirm the Secretary's question on the merits, there are also ample legal grounds to reject Initiators' appeal on a threshold issue. It is undisputed that the Initiators were not among the hundreds of Maine citizens who submitted public comments on the ballot question. *See* 21-A M.R.S.A. § 905-A; R051–388. Thus, even if Initiators' objections to the ballot question had merit—and, as shown in Part I, they do not—those objections would still fail because Initiators did not give the Secretary any opportunity to consider and potentially address them.

A. Initiators were required to submit their objections in the public comment process.

The requirement that persons wishing to challenge agency action in court must first raise those objections to the agency is bedrock Maine law. As this Court has explained many times, "[g]enerally, plaintiffs in a Rule 80C proceeding for review of final agency action are expected to raise any objections they have before the agency in order to preserve

these issues for appeal. Issues not raised at the administrative level are deemed unpreserved for appellate review." *Hale-Rice v. Maine State Ret. Sys.*, 1997 ME 64, ¶ 10 n.2, 691 A.2d 1232 (quoting *New England Whitewater Ctr. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 58 (Me. 1988) ("*New England Whitewater*")).[3]

The preservation requirement is not limited to adjudicatory proceedings. In *New England Whitewater*, the petitioners challenged an agency decision allocating usage of certain Maine rivers among whitewater rafting companies. 550 A.2d at 57. The agency had accepted written comments and held a public hearing, but it was not a "full-fledged adjudicatory hearing." *Id.* at 59. The petitioners, who failed to participate in the comment process, contended that the preservation rule should not apply because "they had no adequate forum in which to raise" their objections. *Id.* This Court rejected this argument, reasoning that "the plaintiffs were able to comment on the process at the hearing and submit written comments to the Department

[3] *Accord Off. of the Pub. Advoc. v. Pub. Utilities Comm'n*, 2024 ME 11, ¶ 25, 314 A.3d 116; *Carrier v. Sec'y of State*, 2012 ME 142, ¶ 18, 60 A.3d 1241; *Forest Ecology Network v. Land Use Regul. Comm'n*, 2012 ME 36, ¶ 24, 39 A.3d 74; *Hale v. Petit*, 438 A.2d 226, 232 (Me. 1981); *see Getz v. Walsh*, 2014 ME 103, ¶ 2, 102 A.3d 756; *Clark v. Hancock Cnty. Comm'rs*, 2014 ME 33, ¶ 22, 87 A.3d 712.

after the hearing." *Id.* This Court further explained that the lack of a formal factfinding process at the agency level was irrelevant, given the purposes of the administrative exhaustion requirement:

> The rule requiring that an issue be raised before the administrative agency in order for it to be preserved on appeal is not specifically based on a need for factfinding. Rather, it is based on simple fairness to those who are engaged in the tasks of administration, and to litigants and ensures that the agency and not the courts has the first opportunity to pass upon the claims of the litigants.

Id. at 60 (cleaned up).

New England Whitewater is controlling here. The Secretary held a statutorily mandated public comment period that resulted in robust participation by the public. *See* R051–388. Even though the draft question contained nearly all of the features to which Initiators now object, Initiators inexplicably failed to participate in that process. As a result, the Secretary was not given "the first opportunity to pass upon the claims of the litigants." *New England Whitewater*, 550 A2d at 60 (citing *Hennesey v. SEC*, 285 F.2d 511, 515 (3d Cir. 1961)).

B. Initiators' arguments against a preservation requirement should be rejected.

In their reply below, Initiators offered an array of theories as to why this case should receive a special exemption from the preservation requirement. None are persuasive.

1. *A statutory right of action does not exempt parties from preserving objections.*

Initiators claimed that they were not obligated to preserve objections because they have an express right of action, *see* 21-A M.R.S.A. §§ 901(8) & 905-A, to challenge the ballot question. Reply at 2. But a statutory right of action, while a necessary predicate to suit, does not dispense with the separate requirement to preserve objections at the agency level. This Court routinely enforces the preservation requirement when aggrieved petitioners exercise their undisputed statutory right of action to appeal "final agency action" under 5 M.R.S.A. § 11001(1). *See, e.g. Seider v. Bd. of Examiners of Psychologists*, 2000 ME 206, ¶ 39, 762 A.2d 551 (rejecting some claims for failure to preserve while deciding others).

2. *The preservation rule is not limited to adjudicatory and nearly adjudicatory proceedings.*

Initiators argued that preservation should not be required in "notice and comment proceedings open to the public at large." Reply at 3. But such a rule would limit *New England Whitewater* virtually to its facts. Contrary to Initiators' assertion, *id.* at 4, the process at issue in *New England Whitewater* had no "hallmarks of a formal adjudicatory process." *Id.* As the decision notes, the agency was not required to (1) provide notice to interested parties, (2) follow intervention rules, (3) accept testimony or evidence, or (4) allow cross-examination. *See New England Whitewater*, 550 A.2d at 61. Indeed, the only procedural right that the outfitters in *New England Whitewater* enjoyed that Initiators did not was the ability to offer oral—as opposed to just written—public comments. *Id.* at 58. That inconsequential difference provides no basis to distinguish *New England Whitewater*'s holding.

Indeed, whatever the minor differences in process, *New England Whitewater*'s rationale applies with equal force here. It concluded that the petitioner's decision to raise belated objections only "when they discovered the results of the Department's process were not to their liking," was contrary to "orderly procedure and good administration"

and "unfair to those who are engaged in the tasks of administration." *Id.* at 60–61 (cleaned up). Initiators here engaged in the same conduct and produced the same harms.

Initiators' reliance on federal caselaw, and in particular, a plurality opinion by Justice Thomas expressing skepticism toward judicially created exhaustion requirements, Reply at 4 (citing *Sims v. Apfel*, 530 U.S. 103, 109 (2000)), cannot supplant *New England Whitewater*, a controlling decision of this Court. And in any event, multiple federal courts of appeal have recognized that the preservation requirement applies to non-adjudicatory public comment processes. *See, e.g.*, *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 475–88 (9th Cir. 2023) (public comment process on logging project); *Miami-Dade Cnty. v. EPA,* 529 F.3d 1049, 1058 n.8 (11th Cir. 2008) (notice-and-comment rulemaking); *Tex Tin Corp. v. EPA*, 935 F.2d 1321, 1323 (D.C. Cir. 1991) (same).

Finally, Initiators' complaint that applying a preservation requirement requires them to be "psychic[s] able to predict the possible changes that could be made in the proposal when the [question] is finally promulgated," Reply at 5 (quoting *City of Seabrook v. EPA*, 659

F.2d 1349, 1361 (5th Cir. 1980)), does not reflect reality. Their objection to the phrase "seniors and people with disabilities," Pet. Br. at 12–14, was apparent from the draft question, which used the same phrase in the same context. A76. Their objection to "ongoing absentee voter status," Pet. Br. at 15–16, was apparent because the draft question used the similar phrase "ongoing absentee voting," which Initiators conceded was at least equally objectionable to them. *See id.* at 16 (arguing final question did not "fix the intelligibility problem" with the phrase). Their objection to the catch-all phrase "make other changes to our elections," *Id.* at 16–17, was apparent from the draft question, which used the same phrase in the same spot. A76. Their objection to the question's length and alleged "redundancies and unnecessary clauses," Pet. Br. at 18–20, was apparent from the draft question, which was only nine words shorter and contained the same phrases the Initiators find objectionable.

While the reordering of clauses in the final question may have given Initiators a new argument in support of their objection that the question fails to "accurately represent the [Initiative's] subject matter," *Id.* at 20, their brief below made clear that this objection is rooted in the

question's inclusion of what they called "a mound of comparatively minor changes" in which the Secretary was "bur[ying] the lede." *Id.* at 20, 21. Initiators could have raised that concern based on the draft question, which contained all but one of those alleged "minor changes." *Id.*

That leaves just one objection potentially not apparent from the draft question: Initiators' argument that the Secretary's use of the common and informative qualifier "certain" in changing "show ID" to "show certain photo ID" is not understandable. Initiators could have anticipated something like this change had they sought and reviewed the public comments, which are public records. But even assuming they were not required to do so, the Court should not excuse a failure to preserve when the initiators of a ballot question submit no comments at all on the ballot question for their own initiative. Such a complete failure is more akin to failure to exhaust administrative remedies than a mere failure to preserve a specific objection. *See generally Cushing v. Smith*, 457 A.2d 816, 821 (Me. 1983).

3. *Ballot question drafting does not fall into the "questions of law" exception.*

Initiators also argued below that preservation is not required because judicial review of ballot questions falls into an exception for certain pure questions of law. Reply at 5.

The very case Initiators rely upon for this argument, *Churchill v. S.A.D. No. 49 Tchrs. Ass'n*, 380 A.2d 186, 190 (Me. 1977), illustrates why this exception should not apply. There the Court considered whether parties claiming that a provision of a collective bargaining agreement (CBA) violated state law had to first raise their argument to an arbitrator who had no special expertise or authority to decide that question. This Court concluded that exhaustion was not required for multiple reasons, including that the legality of the CBA provision was a question "solely of law, wherein the special expertise of the administrative agency would be of no significant benefit." *Churchill*, 380 A.2d at 190 (citing *Stanton v. Tr. of St. Joseph's Coll.*, 233 A.2d 718, 724 (Me. 1967)).

Here, in contrast, the Initiators' objections are not threshold legal questions on which the Secretary has no specialized knowledge. Rather, Initiators are attacking the very act the Constitution and the

Legislature have entrusted to her expertise: the drafting of a ballot question. *See Reed v. Sec'y of State*, 2020 ME 57, ¶ 18, 232 A.3d 202 (recognizing the Secretary as having expertise in administering "the laws pertaining to the direct initiative process"). And, while judicial review of ballot questions may be independent, it is also limited to specific characteristics, *see* 21-A M.R.S.A. § 905(2), resulting in an overall framework of significant agency discretion cabined by independent but narrow judicial review.

Thus, even if the proper drafting of a ballot question could be characterized as a legal question, it is a legal question that the Secretary has both the expertise and constitutional and statutory authority to answer in the first instance. *See MAG-T, L.P. v. Travis Cent. Appraisal Dist.*, 161 S.W.3d 617, 635 (Tex. App. 2005) (declining to apply question-of-law exception where the issue raised was "dedicated to the [agency] to decide"); *Murphy v. Adm'r of Div. of Pers. Admin.*, 386 N.E.2d 211, 214 (Mass. 1979) (exception applies to questions of law "which have not been committed to agency discretion"). Unlike the situation in *Churchill*, it surely would have been "of significant benefit" to the reviewing courts, 380 A.2d at 190, for the

Secretary to have had the first opportunity to address Initiators' wide-ranging objections in her written decision.

Nor should the proper drafting of a ballot question be considered a question "solely of law." *Id.* While drafting of a ballot question will rarely if ever require formal factfinding, it does require the Secretary to make a discretionary determination based on an array of legal and non-legal considerations. *See, e.g.*, A33 (discussing "readability" and "informational benefits"). Thus, unlike the question of whether a CBA provision is legal, the question of how to formulate a ballot question does not have a single correct answer that can be divined through pure legal analysis. It follows that all of the policy reasons for applying a preservation requirement—including fairness to the agency, respect for the statutory framework, and judicial economy—adhere.

4. *Initiators have not shown bias.*

Initiators also attempted to excuse their failure to preserve by arguing that the Secretary would have been biased against any comments they submitted. Reply at 6. Initiators have an uphill battle to demonstrate actionable bias. They would need to overcome "a presumption of honesty and integrity, which is only rebutted by a

showing of some substantial countervailing reason to conclude that a decisionmaker is actually biased with respect to factual issues being adjudicated." *Beal v. Town of Stockton Springs*, 2017 ME 6, ¶ 19, 153 A.3d 768; *accord Friends of Maine's Mountains v. Bd. of Env'tl. Prot.*, 2013 ME 25, ¶ 23, 61 A.3d 689.

Initiators claim bias based on alleged statements by the Secretary expressing policy disagreements with voter ID laws in general and aspects of the Initiative in particular. But none of these statements can be properly considered by the Court, as they are not part of the administrative record. *See* 5 M.R.S.A. § 11006(1) ("Judicial review shall be confined to the record upon which the agency decision was based, except as otherwise provided by this section."); *see Palesky v. Sec'y of State*, 1998 ME 103, ¶ 8, 711 A.2d 129 (requiring petitioners in appeals under 21-A M.R.S.A. § 905 to comply with M.R. Civ. P. 80C(e) to add evidence to the record).

Even if the Court could consider this non-record material, it falls well short of establishing bias. It is hardly surprising that the State's chief election official has policy views on voting procedures. Indeed, it would be strange if she did not. But "[a] preconceived position on law,

policy or legislative facts" does not establish impermissible bias. *New England Tel. & Tel. Co. v. Pub. Utilities Comm'n*, 448 A.2d 272, 280 (Me. 1982). Rather, proponents of bias must establish "prejudgment on the specific facts" presented to the agency. *Id.*

That would mean establishing not that the Secretary has policy views on the best way to conduct elections, but that she had prejudged specifically how the ballot question for this Initiative should be worded, so that it would have been futile for Initiators to have raised objections to that wording. The statements cited by Initiators, even if cognizable, do not come close to making such a showing.

Moreover, the administrative record properly before the Court affirmatively demonstrates the Secretary's impartiality. The Secretary's written decision rejects multiple proposed changes that would have made the question more objectionable from Initiators' perspective. *See, e.g.*, A31 (rejecting requests to make the question longer by describing all of the Initiative's provisions); A33 (rejecting requests to describe predicted impacts of the Initiative or motives of the Initiators). She also agreed to clarify (though not to Initiators' satisfaction) the portion of the ballot question describing the Initiative's changes to ongoing absentee

voter status. *Id.* Those are not the actions of someone who would not have fairly considered Initiators' objections.

5. *The Secretary did not actually consider Initiators' objections.*

Lastly, Initiators argued that there was no need for them to preserve their objections because the Secretary in fact considered "the issues" Initiators raised. Reply at 7. By this, Initiators mean that the Secretary considered public comments advocating for changes to the question that would have *exacerbated* some of Initiators' objections. For example, while commenters did criticize the phrase "make other changes to our elections," they did so in the context of advocating for a much longer question—an argument directly contrary to Initiators' position that the question is too long. *E.g.*, A78; A109; A110; A116. That is a far cry from the situation in Initiators' proffered caselaw, Reply at 8, in which similar public comments by parties on the same side of an issue as plaintiffs gave the agency a "fair opportunity" to address the plaintiffs' objections. *See Portland Gen. Elec. Co. v.*

Bonneville Power Admin., 501 F.3d 1009, 1024 (9th Cir. 2007). The public comments here gave the Secretary no similar opportunity.[4]

Conclusion

The Court should affirm the decision of the Superior Court.

Respectfully submitted,

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[4] Nor do all of Initiators' objections fall within "issues" addressed in the decision letter even at the highest level of generality. No commenter, for example, discussed that the ongoing absentee voter program was set to expand in 2026.

CERTIFICATE OF SERVICE

I, Jonathan R. Bolton, hereby certify that the foregoing Brief of the Secretary of State was served upon counsel of record as follows

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