

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-20-126

DELBERT A. REED
Petitioner-Appellant,

v.

SECRETARY OF STATE MATTHEW DUNLAP,
Respondent-Appellee,

and

MAINERS FOR LOCAL POWER, *et al.*
Intervenors.

ON APPEAL
FROM THE BUSINESS AND CONSUMER COURT
(KENNEBEC COUNTY)

BRIEF OF APPELLEE MAINERS FOR LOCAL POWER

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

During 2019 and into 2020, Intervenor-Appellee Mainers for Local Power (“MLP”) and other groups, including a number of volunteer organizations comprised of Maine voters, organized to collect the constitutionally mandated number of signatures needed to legislatively initiate the Resolve To Reject The New England Clean Energy Connect Transmission Project (the “Resolve”). *See generally* (A. 142.) On February 3, 2020, these groups submitted 82,449 signatures to the Secretary of State. (A. 142.) On February 24 and 27, 2020, Petitioner Reed’s counsel, on behalf of their other client, Clean Energy Matters, submitted letters to the Secretary raising what were, in their view, potential issues that could lead the Secretary to invalidate signatures. (A. 48-54, 111-113.) On March 4, 2020, the Secretary validated the petition for initiated legislation, finding that groups supporting the Resolve had submitted 69,714 valid signatures, which was 6,647 more signatures than the constitutionally mandated minimum. (A. 143.)

Reed filed a Petition in the Superior Court on March 13, 2020 seeking review of the Secretary’s decision. (A. 39-46.) Reed’s counsel also immediately began serving subpoenas, in violation of Rule 80C(j), which does not permit discovery absent leave of court, Rule 80C(e), and various provisions of Rules 30 and 45. (A. 32.) The Superior Court correctly quashed those subpoenas and denied Reed’s motion to conduct discovery, choosing instead to remand the matter to the Secretary

for additional fact-finding. (A. 33-38.) On remand, the Secretary investigated every issue that Reed alleged might lead to the invalidation of signatures, including: taking statements from and conducting follow-up interviews with nine notaries alleged to have conducted non-notarial acts in connection with the Resolve; reviewing Reed’s allegations of fraud; and conducting yet another thorough review of signatures that Reed alleged required invalidation for a host of other reasons. (A. 144-150.) After completing this review, the Secretary issued an amended determination on April 1, 2020 in which he once again affirmed his validity determination. (A. 152.) The Secretary found that proponents of the Resolve had submitted 66,117 valid signatures, or 3,050 more signatures than required to advance the Resolve. (A. 152.) After the remand, Reed again moved for discovery, arguing that he—not the Secretary—should be permitted to determine what ought to be investigated and how. (A. 29-30.) The Superior Court again denied his motion. (A. 29-32.) On April 13, 2020, the Superior Court affirmed the Secretary’s determination of validity. (A. 28.) Petitioner-Appellant Reed and Intervenors-Appellants Maine State Chamber of Commerce and Industrial Energy Consumer Group timely appealed.

STATEMENT OF THE ISSUES FOR REVIEW

The issues for review are: (1) whether the Secretary of State erred as a matter of law or abused his discretion in determining the validity of the petition for the

Resolve; and (2) whether the Superior Court erred in denying Petitioner Reed's motions to conduct his own investigation through compelled discovery.

SUMMARY OF THE ARGUMENT

The Secretary of State has now twice declared valid the petition for the Resolve, and the Superior Court affirmed his determination in a carefully reasoned judgment. Applying the deferential standard of review required by 21-A M.R.S. § 905 and the Maine Constitution, the Superior Court held that Reed and the supporting Intervenors “failed to meet their burden of persuasion,” and that “the Secretary of State did not err as a matter of law or abuse his discretion” in his determination. (A. 21.) As the “Constitutional Officer who has been granted plenary authority to determine the validity of petitions filed in a Citizens’ Initiative,” the Secretary’s findings mandate “substantial deference.” (A. 21.) Accordingly, MLP respectfully requests that this Court affirm the decisions rendered by the Secretary and the Superior Court, and facilitate Maine voters’ absolute right to directly legislate by ensuring the Resolve proceeds to the November ballot as the people of Maine have said that it must.

However, if this Court finds that the Secretary abused his discretion in failing to conduct additional investigation or interpret the applicable statutes in the manner advanced by Appellants, then this Court must nevertheless affirm the validity of the

petition for the Resolve because those same statutes violate the state and federal Constitutions and cannot be a basis on which to invalidate signatures.

Finally, this Court, like the Superior Court, should find that arguments on the underlying merits of the Resolve would not be ripe unless or until it becomes law, notwithstanding Petitioner Reed's allegation of error in this statement of the Superior Court. *See* (Reed Notice of App. n.1.)

ARGUMENT

I. Standard of Review

This Court has not yet opined in detail on the constitutional and statutory provisions that here establish the standard of judicial review, which suggest a more deferential standard than a typical review of an agency decision.¹ *See* 21-A M.R.S. § 905; Me. Const. art. IV, pt. 3, § 22. Pursuant to Me. Const. art IV, pt. 3, § 22,

[The] direct initiative . . . shall be governed by the provisions of this Constitution and of the general law, supplemented by such reasonable action as may be necessary to render the preceding sections self executing. . . . The Legislature may enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of

¹ Prior to the 1975 amendments to the Maine Constitution, almost all aspects of this process were unreviewable by the courts on appeal. Other branches of government could, and did, ask for advisory opinions from the Justices under Me. Const. art. VI, § 3. The Judiciary Committee of the Legislature would issue validity determinations for initiative petitions; and the Governor and the Secretary would do so for referendum petitions. *See* Report of the Judiciary Committee on the Initiative and Referendum Process, at 8-9 (Dec. 1974), *available at* http://lldc.mainelegislature.org/Open/Rpts/kf4881_z99m22_1974.pdf (“1974 Report of Jud. Comm.”) (report of the Judiciary Committee concerning Amendment CXXVII to the Maine Constitution). Even the Governor's failure to perform a mandatory constitutional duty under these provisions could not be redressed in the courts. *See Kelley v. Curtis*, 287 A. 2d 426, 429-430 (Me. 1972). No voter had any right of appeal in this process until the 1975 Constitutional amendment.

written petitions. . . . Such laws shall include provision for judicial review of any determination, to be completed within 100 days from the date of filing of a written petition in the office of the Secretary of State.

Consistent with these provisions, and the constitutional history, 21-A M.R.S. § 905 constrains this Court’s standard of review in several ways: “the standard of review shall be the same” in both the Law Court and the Superior Court, *id.* § 905(3); “the Secretary of State shall determine the validity of the petition,” *id.* § 905(1); judicial review is limited to “questions of law,” *id.* § 905(3); and this action is reviewed under “Rule 80C, except as modified by this section,”² *id.* § 905(2).

Under the Maine Constitution, the Secretary of State is the constitutional officer with plenary power to “investigate and determine the validity of petitions.” *Me. Taxpayers Action Network v. Sec’y of State*, 2002 ME 64, ¶ 12 n.8, 795 A.2d 75 (citing *In re Opinion of the Justices*, 116 Me. 557, 580-82, 103 A. 761, 771-72 (1917)).³ To show an abuse of discretion, any appellant has the burden of demonstrating that a decision-maker “exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and the governing law.” *Forest Ecology Network v. Land Use Regulation Comm’n*, 2012 ME

² In addition to these express limitations, Section 905 provides for a 70-day judicial review period, implying a more limited review than a typical Rule 80C appeal that spends a combined 340 days in briefing before the Superior Court and this Court in excess of any time for either court to render a decision.

³ Accordingly, separation of powers principles here reinforce the “general rule forbidding inquiry into the mental processes of an administrative decisionmaker.” *Carl L. Cutler Co., Inc. v. State Purchasing Agent*, 472 A.2d 913, 918 (Me. 1984).

36, ¶ 28, 39 A.3d 74. This Court has recognized that, here, the governing law grants the Secretary broader discretion than in his reviews of nomination petitions under 21-A M.R.S. § 354. *See Knutson v. Sec’y of State*, 2008 ME 124, ¶ 20 & n.7, 954 A.2d 1054. It is the appellants’ burden to persuade the Court that the Secretary has abused this considerable discretion. *See Doe v. Dep’t of Health & Human Servs.*, 2018 ME 164, ¶ 11, 198 A.3d 782. They must show that “no competent evidence” supports the Secretary’s validity determination. *Seider v. Bd. of Exam’res of Psychologists*, 2000 ME 206, ¶ 9, 762 A.2d 551.

The Court reviews *de novo* issues of law, including the interpretation of constitutional and statutory provisions. *McGee v. Sec’y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933. For ambiguous statutes, this Court applies “the rule of construction that prefers interpretations of statutes that do not raise constitutional problems.” *Id.* ¶ 18. “Where there is doubt as to the meaning of legislation regulating the reserved right of initiative, that doubt is to be resolved in favor of the people's exercise of the right.” *Id.* (quoting with approval *Ferency v. Sec’y of State*, 297 N.W.2d 544, 550 (Mich. 1980)). In reviewing any applicable statute, the Court asks: “(1) did the Legislature have the authority to enact statutes creating procedures related to the initiative process; (2) if so, is the statute inconsistent on its face with the Constitution; and (3) if not, does the statute otherwise create an abridgment of or undue burden upon the people's constitutional right of initiative.” *McGee*, 2006 ME

50, ¶ 19, 896 A.2d 933. Likewise, where, as here, the Secretary implements the election statutes and the notary statutes, this Court defers to the Secretary's reasonable interpretation of any ambiguous statutory provisions. *Forest Ecology Network*, 2012 ME 36, ¶ 53, 39 A.3d 91.

II. The Secretary Neither Abused His Discretion, Nor Erred as a Matter of Law

This Court can, and should, affirm the Secretary's decision on the same grounds as the Superior Court, or on any of the following grounds.

A. This Court and the Secretary are constrained by the constitutional and statutory limitations on their authority.

Only the Secretary has the authority to determine the validity of ballot initiatives, and he has 30 days in which to do so. Me. Const. art. IV, pt. 3, §§ 18, 20, 22; 21-A M.R.S. § 905(1). Here, the Secretary did just that, rendering his determination on March 4, 2020 that the petition was valid and that the people had directly initiated the Resolve within the legislative powers of the Maine Constitution.

Pursuant to the Constitution, when the Secretary makes a determination of validity, that decision turns on his finding of two critical facts:

1. The number of signatures required to determine the petition to be valid (here, 63,067); and
2. That the submitted number of constitutionally valid signatures exceeds that number.

When, as here, the Secretary does not invalidate the petition on the substantive grounds articulated in Me. Const. art. IV, pt. 3, §§ 18, 20, then the Constitution is “self-executing” and the petition must proceed to the legislature. *Id.* § 22.

Once the Secretary issues a validity determination—as he did here, foregoing additional investigation of allegations presented late in the process—any subsequent investigation by the Secretary is an *ad hoc* proceeding. *See* Me. Const. art. IV, pt. 3, §§ 18, 20, 22; 21-A M.R.S. § 905. The investigation is *ad hoc* because the Secretary lacks constitutional or statutory authority for additional investigation of the petition for initiated legislation once he issues a validity determination. *See id.*

Here, pursuant to the Superior Court’s March 23 Order, the Secretary conducted additional investigation and modified some ancillary factual summaries. Critically, he did not change either of the two necessary factual findings (*i.e.*, the requisite number of signatures and that it had been reached), nor did he modify his conclusion. The Secretary issued an amended decision on April 1, reaffirming the validity determination after reviewing all the signatures not once, but twice, and assessing—and debunking—Reed’s numerous claims of error and impropriety.

Because the Secretary’s *ad hoc* investigation did not result in a reversal of the validity determination, this Court could affirm the Secretary’s decision without addressing whether it was error for the Superior Court to remand the matter to the Secretary absent the requisite Rule 80C(e) showing by Reed or any other party.

However, while this Court has not had occasion to reach this issue, the Superior Court has previously persuasively reasoned that the Secretary's discretion to conduct additional investigations does not extend beyond his statutorily allotted 30 days. *See Webster v. Dunlap*, No. AP-09-55 (Me. Sup. Ct., Ken. Cty., Dec. 21, 2009). Nor should mootness prevent this Court from reviewing this issue, which presents a situation capable of repetition but evading review. *See id.* at 3-4; *accord Campaign for Sensible Transp. v. Me. Tpk. Auth.*, 658 A.2d 213, 215-16 (Me. 1995). As the Superior Court in *Webster* explained, “[i]nterpreting the Constitution to permit an executive officer to ignore procedures enacted by the Legislature pursuant to Sections 17[, 18] and 22 by virtue of an implied independent executive authority to review petitions would run afoul” of the strict separation of powers embodied in Me. Const. art. III, § 2. No. AP-09-55, slip op. at 10. It would disrespect the “default rule” that the failure of the Secretary to make any determination would leave the provisions of Section 18 as “self executing.” *See Me. Const. art. IV, pt. 3, § 22*. This preference for a default rule that defers matters to the voters comports with the Law Court's holding that all such provisions “must be liberally construed to facilitate, rather than handicap, the people's exercise of their sovereign power to legislate.” *McGee*, 2006 ME 50, ¶ 2, 896 A.2d 933 (quoting *Allen v. Quinn*, 459 A.2d 109 (Me. 1983)).

Here, the Superior Court distinguished the *Webster* decision on its facts, noting that in *Webster* the Secretary failed to issue *any* determination within the 30 day statutory period. (A. 11, n.3). But that distinction is immaterial: if the Secretary had taken no action whatsoever prior to March 4, 2020, then the self-executing provisions of the Constitution in Article IV, Part 3, Section 22 would have taken effect and the Resolve would have proceeded to the Legislature. In light of these self-executing provisions, it is nonsensical to assume that the act of issuing a validity determination would confer on the Secretary additional investigatory authority outside the statutory 30-day limit simply because his original decision is subject to judicial review. When the Secretary determined that a validity determination could—and should— issue on March 4, notwithstanding the unresolved allegations presented late in the process, it should have ended the Secretary’s investigatory role.⁴

Put simply, the Secretary cannot override this default rule outside of the timelines of his authority under Section 905, and neither can this Court. *See* Me. Const. art. III, § 2. If the Court were to reverse the Secretary solely on the results of this *ad hoc* investigation, it would violate this Constitutional framework. This Court should instead affirm the Secretary’s determination.

⁴ This is particularly true where, as here, Clean Energy Matters, a Political Action Committee funded primarily by Central Maine Power, represented by Reed’s counsel, waited until February 27 to submit information obtained from its private investigator in January, leaving the Secretary no time to investigate during the statutory review period. *See* (A. 111-113.) If late-presentation of vague allegations is held sufficient to extend the window for raising new issues for investigation, it will inspire similar delay tactics in the future.

B. The Superior Court correctly determined that the Secretary's interpretation of the notary provisions is reasonable.

In 2018, the Legislature passed two new statutory provisions circumscribing notaries' role in Maine ballot initiatives as grounds to reverse the Secretary: 21-A M.R.S. § 903-E and 4 M.R.S. § 954-A. Appellants contend that the Secretary and the Superior Court erred in reading these new provisions in the present tense to apply at the time each circulator swears an oath. Appellants instead argue the phrase "is providing" should capture any non-notarial services provided up until submission to the Secretary.⁵ But there is no doubt that the Secretary's reading is the only reasonable interpretation of these statutes: if a circulator swears an oath before an authorized notary, the statutes nowhere suggest that a notary's future act could retroactively invalidate that duly sworn oath. As the Superior Court held, "the language 'is providing any other services' is the express language in Section[] 903-E and no language in the Section is directed to any future act of the notary." (A. 21.)

The statutory text is plain: a notary either is—or is not—authorized to administer an oath at the time it is given. An oath duly sworn remains so, and "[n]owhere in these Sections does the Legislature directly express an intention to

⁵ This unpersuasive argument would stretch the phrase "is providing" beyond its plain meaning effectively replacing it to instead read "will provide any time before the hour of 5:00 p.m. on or before the 50th day after the date of convening of the Legislature in the first regular session or on or before the 25th day after the date of convening of the Legislature in second regular session, except not later than 18 months after the date the petition form was furnished or approved by the Secretary of State." *See* Me. Const. art. IV, pt. 3, § 18(1) (for the period of a petition campaign).

nullify the oath of the circulator, and [Reed’s interpretation⁶] would run roughshod over the constitutional rights of the circulator who has no control over the future actions of the notary.” (A. 21.) Were it otherwise, petition opponents might be tempted to take the vast sums they would otherwise devote to an army of lawyers, and instead offer payment to each disinterested notary to circulate a single petition. If this could nullify all petitions otherwise circulated in good faith and previously sworn before notaries who the circulators (correctly) believed were authorized to administer oaths at the time, such would be a lawful—and less expensive—opposition strategy to defeat any signature gathering campaign.

C. The Secretary’s application of the notary provisions to the facts is reasonable.

In Reed’s view, notaries must be tied to their desks, moving only to sign or stamp a petition. If they perform *any* other action, Reed contends such action nullifies all oaths sworn before them in connection with the ballot initiative. *See* (Reed 80C Br. 10-11 (claiming that the language of the statute is not limited to “certain services” and that it “subsumes *all* of the various activities ... involved in a direct initiative campaign”).) Not so. Under the plain language of the relevant

⁶ Reed looks to 4 M.R.S. § 954-A for additional support, but the Superior Court properly found this statute serves too different a purpose to aid in any interpretation of 21-A M.R.S. § 903-E. (A. 19.) Moreover, the absurdity of Reed’s position is illustrated in the other provisions of the very statute he cites: if a notary performs a notarial act for an individual, but then marries that person within a few months thereafter, that familial relation does not retroactively render unlawful the previous notarial act or create a retroactive conflict of interest. 4 M.R.S. § 954-A. So too here.

statutes, notaries are prohibited only from performing services that initiate or promote the direct initiative. 21-A M.R.S. § 903-E; 4 M.R.S. § 954-A.

First, neither notarial statute “define[s] what is meant by the term ‘services,’ and, in such situations, the Law Court has indicated that it is appropriate to look at the context of the ‘provision at issue’ when determining what the undefined language entails.” (A. 23 (citing *Knutson*, 2008 ME 12 ¶ 12, 954 A.2d 1054).) Here, the non-notarial acts are not “services” the Legislature sought to eradicate with these statutes.

The non-notarial services allegedly performed are as follows:

- 1) Notary Leah Flumerfelt delivered petitions to town clerks in seven town halls and performed some organization and cleaning work.⁷ She engaged in these acts only after administering her last oath. (A. 147-148.)
- 2) Notary Wesley Huckey brought some validated petitions from the clerk’s office in Augusta, where he works, to Revolution Field Strategies’ office. He did so once. (A. 147.)
- 3) Notary Brittany Skidmore administered oaths to circulators until January 24, 2020, after which she spent some time checking over the petitions and helping to fill in the circulator’s name and number on the petition forms. (A. 148-149.)

As the Superior Court correctly held, “Mr. Huckey’s act of delivering petitions does not fall within any reasonable definition of ‘service’ toward initiating or promoting

⁷ Reed argued that Ms. Flumerfelt should be disqualified entirely because a ministerial error resulted in the inclusion of her name in a list of circulators, but the Superior Court properly found this argument to be “unpersuasive,” noting that “there is simply no evidence in the record to support Mr. Reed’s assertion that [Ms. Flumerfelt] ever acted as a circulator.” (A. 22.)

the initiative.”⁸ (A. 23.) Neither do the allegedly non-notarial acts performed by Ms. Flumerfelt and Ms. Skidmore. It is inconceivable that the Legislature intended “services” to encompass moving already notarized petitions from Point A to Point B or cleaning a campaign office. Quite simply, these are not “services” at all within the meaning of 21-A M.R.S.A. § 903-E and 4 M.R.S. § 954-A.

Second, even assuming, *arguendo*, that these are “services” encompassed by the notarial statutes, there is no violation because the services did not initiate or promote the Resolve.⁹ As the First Circuit previously observed, in contrast to the term “influencing,” “terms employed by the statutes here—such as ‘promoting,’ ‘opposition,’ ‘defeat,’ and ‘support,’ Me. Rev. Stat. tit. 21–A, §§ 1019–B(3)(B), 1052(4)(A)(1), (5)(A)(5)—are more plainly result-oriented, focusing on advocacy for or against a particular candidacy.” *Nat’l Org. for Marriage v. McKee*, 649 F.3d

⁸ Moreover, with respect to Mr. Huckey, “[g]iven that the initiative campaign was already entitled to receive the petitions from the City Clerk’s Office, and that Mr. Huckey is an agent of the City Clerk’s Office, his act of delivering those petitions to the campaign office cannot be construed as a ‘service’ to initiate or promote the campaign.” (A. 24.) This interpretation is supported by the constitutional history. During the development of Amendment CLXXI, a draft proposed to strike the language stating that after reviewing petitions municipal officials must “return them to” the circulators, and instead proposed requiring only that the officials “notify” the circulators “to retrieve the certified petition forms.” Comm. Amend. A. to L.D. 2033, No. S-513 (122nd Legis. 2006). However, this proposal was rejected so as to “maintain[] the provision in the Constitution of Maine requiring the officials to return certified petitions to circulators.” Sen. Amend. A to L.D. 2033, No. S-544, Summary (122nd Legis. 2006).

⁹ The Secretary discarded signatures notarized by David McGovern and Michael Underhill, both of whom circulated petitions. (A. 147.) Because the notary statutes are unconstitutional, this was error, albeit harmless in that it affected an insufficient number of signatures to invalidate the Resolve. However, the distinction drawn between the actions of Mr. McGovern and Mr. Underhill, and the actions of Ms. Flumerfelt, Ms. Skidmore and Mr. Huckey, (A. 147-149), is a reasonable line for the Secretary to draw.

34, 65 (1st Cir. 2011). The Court went on to explain that what encompasses “initiating” a petition is likewise very limited, finding to “initiate” means “to begin, set going, or originate.” *Id.* at 67 (citations omitted). Here, moving already notarized papers from one place to another is not result-oriented advocacy. Indeed, it is a common notarial function. As notary Melissa Letarte explained, the last time she visited the Jay town office was to deliver a marriage certificate that she had notarized. (A. 146.) Just as her delivery of that certificate did not annul the marriage, nor should the act of a notary moving papers annul the previously sworn oaths of circulators. The alleged “services” performed by these notaries did not initiate or promote the Resolve, and they do not constitute a violation of the relevant statutes.

Third, the governing statutes are aimed at ensuring public confidence in the ballot initiative, and the back office, ministerial tasks performed by these notaries do not implicate that concern. Where, as here, the people have an “absolute right” to directly legislate, the Secretary could not invalidate petitions for what are, at most, purely technical missteps. Doing so would put the Secretary in the unenviable position of telling Maine voters that they will not be able to vote on the Resolve come November because a notary transported petitions from a city hall or because another notary helped to clean an office. It is inconceivable that Maine citizens’ constitutional rights could be trampled in this fashion.

Finally, even if these simple tasks count as “initiating” or “promoting” the initiative—which they do not—there is no conflict of interest until the actual act of initiating or promoting occurs. *See supra* Section II.B. As the Secretary found, Ms. Flumerfelt and Ms. Skidmore did not perform any non-notarial acts until *after* they finished notarizing petitions.¹⁰ (A. 148-149.) Ms. Flumerfelt’s and Ms. Skidmore’s alleged conflicts of interest therefore do not present a basis to invalidate any signatures collected by circulators who duly swore before them.

D. The Secretary, in accordance with his plenary authority, determined that there were no further indicia of fraud and no additional investigation was required.

Reed argues that his allegations of fraud in the signature collection process mandate investigation by the Secretary. As the Superior Court held, “this is precisely what the Secretary did.” (A. 25.) Reed further claims that the Secretary erred because “there were additional measures that the Secretary ‘could have taken’ when conducting his investigation.” (A. 25 (citing Reed 80C Reply Br. 9).) As the Superior Court correctly found, this characterization displays a tenuous grasp of the actual facts and of the manner in which Section 905 proceedings operate. The relevant question is not what Reed himself, or even a different Secretary, might have done.

¹⁰ Mr. Huckey did not transport petitions from the Augusta city hall until on or around January 17, 2020, but that is no matter because doing so did not give rise to any conflict of interest. (A. 24.) To the extent the Court determines this act of transporting documents did give rise to such a conflict, it did not arise until January 17, 2020 at the earliest.

(A. 26.) Rather, the relevant assessment is “whether, given the facts, circumstances and governing law, the Secretary’s actions were within the bounds of reasonable choices available to him.” (A. 36 (citing *Forest Ecology Network*, 2012 ME 36, ¶ 28, 39 A.3d 74).) To inquire further into the reasons why Secretary Dunlap did or did not take a particular additional investigatory action in this case would be to impermissibly inquire into the thought processes of the decision maker. *See Carl L. Cutler Co.*, 472 A.2d at 918.

Here, the Secretary clearly acted within the bounds of reasonable choices available to him, particularly where “some of the additional evidence [Reed] points to only raises the ‘possibility of fraud.’”¹¹ (A. 26 (quoting Reed 80C Br. 18) (emphasis added).) The Superior Court properly determined that “the Secretary’s choice not to further pursue Reed’s allegations of fraud was reasonable.” (A. 27.) Notwithstanding arguments to the contrary, this is the only possible conclusion

¹¹ Before the Superior Court, Reed continued to slander Revolution Field Strategies (“RFS”), the organization MLP hired to assist with signature collection efforts, in an attempt to distract the court with allegedly fraudulent behavior by Megan St. Peter, a circulator hired by RFS. (Reed 80C Brief at 17-18.) But, as the record shows, RFS actually took compliance seriously, including by: meeting with the Secretary’s office to ensure compliance with relevant rules and regulations (A. 201); providing a thorough training guide to all its circulators (A. 204-209); informing notaries of the relevant statutes to ensure compliance (A. 149, 201); and following robust quality control measures during the signature gathering process designed to detect and avoid fraud (A. 202). Additionally, the Superior Court reply briefs of Reed and IECG erroneously allege that MLP admitted in its 80C brief the irrelevant fact that Megan St. Peter was fired because of fraud. However, appellate briefs cannot establish facts by admission because review is expressly limited to the record before the agency. Moreover, MLP’s reference to this alleged fact was drawn from the underlying letter submitted by Reed to the Secretary first making this irrelevant allegation in the record. (A. 232.)

consistent with precedential case law, which further underscores that the Secretary executed his duties exactly as required. For example, in *Me. Taxpayers Action Network*, the Secretary invalidated signatures submitted by a circulator who had stolen someone’s identity and used it in connection with his circulation efforts. 2002 ME 64, ¶ 1, 795 A.2d 75. The Court declined to reverse the Secretary, holding that the “Secretary had ample authority and reason to question the authenticity of the signatures obtained by the circulator . . . and ultimately to invalidate the petitions circulated by this imposter.” *Id.* ¶ 8. Likewise, in *Palesky v. Sec’y of State*, the Secretary initially rejected more than half of the submitted signatures on the basis of forgeries. 1998 ME 103, ¶ 3, 711 A.2d 129. On remand, the Secretary took evidence in the form of statements and documents and issued an amended decision invalidating additional signatures, a determination which the Court affirmed. *Id.* ¶ 14.

The Court’s holdings in these cases stand for the unsurprising proposition that the Secretary may invalidate signatures where there is evidence that they were fraudulent. Nothing in *Me. Taxpayers*, *Palesky*, or any other case¹² suggests that the

¹² Prior to the Constitutional amendments placing authority in the Secretary, similar principles were applied. *See In re Opinion of the Justices*, 124 Me. 453, 126 A. 354, 359, 366 (1924) (where a candidate alleged that fraudulent votes were wrongly counted the Justices opined “[t]he entire vote is not to be rejected, for by so doing honest and law-abiding electors would be disenfranchised . . . we think the Governor and Council would be justified in deducting that proven number [of spurious ballots] from the total as given to that candidate.”); *In re Opinion of the Justices*, 116 Me. 557, 103 A. 761, 772 (1917) (in investigating fraud, the Governor has “the power in his own

Secretary here shirked any duty. The Secretary investigated every claim Reed had in his arsenal. He took his responsibility seriously: he assessed the petitions not once, but twice; he took additional evidence from nine notaries; he invalidated signatures from Ms. St. Peter; and he scoured the record to consider Reed's claims and invalidate signatures where appropriate. (A. 144-152.) The law requires no more, and the Court must now defer to the Secretary's determination and affirm the result.

E. Reed's factual allegations are wrong and without merit.

In briefing before the Superior Court, Reed identified hundreds of signatures that he contended the Secretary should have invalidated. If he again raises these issues, this Court should pay them no heed because (a) the number of signatures Reed seeks to invalidate would not be enough to change the outcome of the Secretary's determination, *see* (A. 27 (declining to address the validity of these signatures)), and (b) they do not suffer the defects he claims. For example, Reed claimed duplicate signatures exist on Sheet 8356 at rows 12 and 13, (Reed 80C Br. 22-23, ex. G.), but the names there are of Rose Mary McCormick and Ross McCormick and clearly belong to different individuals. Similar errors abounded in Reed's list of purportedly invalid signatures, and this Court should defer to the expertise of the Secretary, who has now twice reviewed these signatures.

discretion to ascertain the truth"). Here, as there, the Secretary's approach is consistent with his official duties and was not an abuse of his discretion.

Reed further argued to the Superior Court that the Secretary erred by “fill[ing] in the blank” for certain dates if the signatures were “within a series or at the beginning of a petition where the following dates on signatures were valid,” claiming that the Secretary lacks authority to make such inferences. (Reed 80C Br. 25.) Maine courts, however, hold otherwise. This Court has stated that “at every step of the initiative process, the Secretary is charged with making decisions ... [which] is the very essence of discretion.” *McGee*, 2006 ME 50, ¶ 57, 896 A.2d 933. The Superior Court has likewise applied this principle in an analogous context to find that the Secretary “exercised acceptable judgment” in considering “factors such as obvious mistakes in a date and other dates appearing on the [veto] petition.” *Johnson v. Dunlap*, No. AP-09-56, 2009 WL 6631827 (Me. Sup. Ct., Dec. 23, 2009).

Reed outlined a number of categories where he believes the Secretary should have invalidated signatures based on the date the voter wrote in (or failed to write in) on the petition. These categories included: (1) “Signature rows with date entries that post-date the circulator’s oath”; (2) “Signatures collected before the circulator became registered to vote”; and (3) “Signatures on petition sheets that cannot be verified as filed on time.” (Reed 80C Br. 23-24.) There is no basis on which to invalidate these signatures, however, and the Secretary determined that the voter likely wrote the incorrect date for many of the signatures in the above-listed categories. *See* (Sec’y 80C Br. 16-17.) For example, a number of individuals who

signed the petition in January made the common mistake of writing the previous year (“2019” or “19”) instead of the current year (“2020” or “20”). (Reed 80C Br. 23-24, ex. H-J.) It is illogical to presume, as Reed does, that the voter signed the petition before it was initiated, and it is clear that many voters mistakenly wrote “19” when the signatures are viewed in a series. In other instances where the signature post-dates the circulator’s oath, the Secretary similarly determined that voters inadvertently wrote the wrong date where the surrounding signatures all reflected an earlier date. (Sec’y 80C Br. 16-17.) It was well within the Secretary’s discretion to make this judgment call and to facilitate Maine voters’ exercise of their absolute right to legislate.

F. The Superior Court correctly refused to allow parties to engage in discovery, but erred in its remand for additional investigation.

A voter seeking judicial review of the Secretary is not entitled to any trial of the facts, and the Court’s review is confined to the administrative record. *Palesky*, 1998 ME 103, ¶¶ 5-9, 711 A.2d 129; 5 M.R.S. § 11006(1); M.R. Civ. P. 80C(d). Judicial review of the Secretary’s decision is limited to “questions of law.” 21-A M.R.S. § 905(2), (3). Generally, Rule 80C permits a party to file a motion requesting that the court order the taking of additional evidence before the agency, including a request to engage in discovery. *See* M.R. Civ. P. 80C(e), (j); 5 M.R.S. § 11006(1)(B). However, the movant must also include a “detailed statement, in the nature of an

offer of proof, of the evidence intended to be taken” sufficient to show that the taking of additional evidence is appropriate. M.R. Civ. P. 80C(e).

Despite these straightforward rules, after filing his petition—and without filing a motion to take additional evidence—Reed issued subpoenas to eight notaries who administered oaths to petition circulators. (A. 33-34.) Reed’s subpoenas were undoubtedly aimed at engaging in discovery and “develop[ing] evidence” without Court authorization, *see* (A. 37.), notwithstanding that Reed was not entitled to a trial and “the principal purpose of the subpoena *duces tecum* is to facilitate and to expedite the trial, not expand the discovery rights of the parties.” *State v. Watson*, 1999 ME 41, ¶ 5, 726 A.2d 214 (internal citations omitted). MLP moved to quash these unlawfully and improperly issued subpoenas,¹³ and Reed subsequently filed a motion take additional evidence and engage in discovery. *See* (A. 2.) Reed made no offer of proof with his motion, arguing instead that his proposed “discovery initiatives ... satisfy the offer of proof requirement” because testimony from the subpoenaed individuals could be “potentially dispositive of the matter” and might identify other individuals “who may have relevant information concerning forged

¹³ M.R. Civ. P. 80C(j) prohibits the taking of any discovery, absent a court order. Therefore, issuance of the subpoenas was also a violation of Rule 80C(j). Remarkably, at a time of national pandemic—when the Court system was requiring special motions for civil proceedings to even be heard—Reed’s subpoenas were demanding the in-person appearance of eight different notaries at his attorney’s office in less than one week’s time. These tactics would be unlawful at any time, but were particularly egregious given the circumstances during which they were deployed.

signatures.” (Reed Mot. Add. Evid. 4-5.) In other words, rather than make an offer of proof, Reed moved to engage in a fishing expedition in hopes of finding information to support his unfounded theory of fraud. This is wholly insufficient to warrant the taking of additional evidence, which “require[s] a prima facie showing of the ‘alleged irregularities in procedure’ before section 11006(1)(A) is triggered [a]s mandated by the language of Rule 80C(e).” *Carl L. Cutler Co.*, 472 A.2d at 918 (finding “bare allegation[s], on information and belief, . . . is not a sufficient showing to entitle [petitioner] to an evidentiary hearing and to conduct discovery of the [agency] administrator”). While correctly denying Reed’s request to conduct discovery, the Superior Court nevertheless remanded the matter to the Secretary for the taking of additional evidence that did not yet exist, and for which no requisite Rule 80C(e) showing had ever been made. (A. 37.)¹⁴

The Superior Court erred in so doing. First, as discussed *supra* in Section II.A, the Secretary does not have the authority to conduct additional fact finding outside the 30-day window authorized by statute, and any resulting investigation is *ad hoc*. 21-A M.R.S. § 905(1). Second, Reed’s motion was based on speculation alone, and that is no basis on which to order additional fact finding. *See Ryan v. Town of*

¹⁴ The Superior Court was correct to avoid usurping or directing the exercise of the Secretary’s discretion, before or after remand. *See Casco N. Bank, N.A. v. Bd. of Trs. of Van Buren Hosp. Dist.*, 601 A.2d 1085, 1087 (Me. 1992) (The courts will not “in any way control the outcome of the deliberative process” absent the agency’s “complete refusal to act”); *Lingley v. Me. Workers’ Comp. Bd.*, 2003 ME 32, ¶ 9, 819 A.2d 327 (“[A] refusal to take a requested action is not identical to a refusal to act.”).

Camden, 582 A.2d 973, 975 (Me. 1990) (“vague, unsubstantiated allegations” insufficient to support the taking of additional evidence). Finally, no party raised a “question of law” relating to the Secretary’s authority to issue its initial March 4 determination without investigating these same allegations. 21-A M.R.S. § 905(3). This Court could affirm the Secretary’s determination without deciding these issues, but should still decide them because they are capable of repetition, yet evade judicial review. *See supra* Section II.A.

III. If the Court Does Not Affirm the Secretary’s Decision on Narrower Grounds, the Court Must Find Notarial Statutes Unconstitutional and Overturn Secretary’s Overbroad Signature Invalidation

Like the Superior Court, this Court could affirm the Secretary on the exercise of his discretion on narrow statutory grounds. However, if the Court finds the Secretary abused his discretion or erred as a matter of law, the Court must find unconstitutional and invalidate the relevant statutes and declare valid any signatures invalidated by the Secretary on the basis of those statutes.

A. Recently enacted statutes governing notaries are unconstitutional.

The Court should find the new notary provisions unconstitutional because they are substantive—not procedural—requirements that burden the absolute right of direct legislation and because they impose unconstitutional restrictions on those same notaries’ First Amendment rights. *See Wyman v. Sec’y of State*, 625 A.2d 307, 311 (Me. 1993).

1. The new notary statutes unconstitutionally abridge Maine citizens' absolute right to directly legislate, and fail strict scrutiny.

Maine citizens have had the constitutional right to legislate through direct initiatives such as the Resolve for more than 100 years. Const. Res. 1907, ch. 121 (effective Jan. 6, 1909). This Court has “recognized the importance of the right of initiative, and . . . that the right of the people to initiate and seek to enact legislation is an absolute right.” *McGee*, 2006 ME 50, ¶ 21, 896 A.2d 933. Recognizing the significance of this “absolute right,” this Court has held that Section 18 “must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate.” *Allen*, 459 A.2d 1098 at 1102-03. Courts apply strict scrutiny when reviewing statutes that regulate the ballot initiative process to ensure they do not unduly burden this absolute right, requiring the State’s action be narrowly tailored to serve a compelling state interest.” *Rideout v. Riendeau*, 2000 ME 198, ¶ 19, 761 A.2d 291.

Here, 21-A M.R.S. § 903-E(1)’s requirement that a notary refrain from initiating or promoting an initiative is not narrowly tailored. Instead, it imposes broad, vague, and impermissible limits on notaries’ fundamental rights to speak freely and directly legislate. *See Wyman*, 625 A.2d at 311 (“Although the right to invoke an initiative is a state-created right, it does not follow that the state is free to impose limitations on that right without satisfying the dictates of the first amendment.”); *City of Portland v. Jacobsky*, 496 A.2d 646, 649 (Me. 1985) (“a

statute may be void for vagueness when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning. . . . [D]ue process requires that the law provide reasonable and intelligible standards to guide the future conduct of our people.”). Although Maine has a compelling interest in ensuring the integrity of its ballot initiative process, Section 903-E fails to advance that interest through a narrowly tailored, clear restriction on notaries’ right to engage in the political process.

2. The new notary statutes unconstitutionally impose substantive requirements not constitutionally authorized “procedures.”

“The Legislature may enact laws not inconsistent with the Constitution to establish *procedures* for determination of the validity of written petitions.” Me. Const. art. IV, pt. 3, § 22 (emphasis added). The Constitution nowhere authorizes additional *substantive* requirements.

The constitutional history shows that substantive requirements must be accomplished by constitutional amendment. Prior to Amendment CXXVII to the Maine Constitution, the Judiciary Committee issued a report stating that “[t]he committee considered more than twenty proposals to change the initiative and referendum process.” *See* 1974 Report of Jud. Comm. at 11. The “first suggestion was that . . . the basic principles of the initiative and referendum should be stated in the Constitution, but that the mechanics of the process should be in the statutes so that changes and improvements could be made more easily, by the Legislature.”

Id. at 11-12. The Committee generally agreed with this concept, but concluded “that the most important mechanical aspect of the process should be kept in the Constitution so that the people’s rights could not be abridged by hasty or ill-considered action of the Legislature in amending the process.” *Id.* at 12. Accordingly, certain substantive requirements were proposed as amendments to Article IV, Part 3, Section 20 of the Maine Constitution, *id.* at 19, and enacted as part of Amendment CXXVII, *see* Const. Res. 1975, ch. 2, § 20 (effective Nov. 24, 1975). One such new substantive requirement was that “the oath of the circulator must be sworn to in the presence of a person authorized by law to administer oaths.” *Id.*

In contrast, the Committee specifically rejected proposal number 11 that “[t]he whole notary public and justice of the peace system should be reformed.” 1974 Report of Jud. Comm. at 20. More specifically, proposal 11 regarding notaries recommended that “[t]he appointment process should be tightened. Many are appointed solely to work in campaigns. There should be more attention paid to their qualifications.” *Id.* In rejecting these recommendations, the Committee stated that “such changes were beyond the scope of th[e] study” and “at least some of the alleged problems do not appear to exist.” *Id.* Accordingly, no additional amendments regarding notaries were recommended or made to the Maine Constitution. *See id.* at app. A; Const. Res. 1975, ch. 2. Nonetheless, the notary provision at issue here seek

to statutorily impose certain portions of the substantive provisions there rejected for constitutional amendment.

Additional substantive provisions were likewise added in 2006, when Amendment CLXXI was adopted. *See* Const. Res. 2005, ch. 2 (effective Nov. 27, 2006). That amendment added the new substantive requirement that “[s]ignatures on petitions not submitted to the appropriate local or state officials by [the statutory] deadlines may not be certified.” *Id.* § 20. This constitutional history makes clear that substantive requirements that could invalidate signatures must be found in the Constitution, not imposed by a statute. As the Justices recently opined, a statute is unconstitutional where one outcome would occur under the self-executing provision in the Constitution, yet a different outcome would result by statute. *Opinion of the Justices*, 2017 ME 100, ¶¶ 66-68, 162 A.3d 188. Similar reasoning led the *McGee* Court to find that substantive requirements could not be added to the initiative process by statute. *McGee*, 2006 ME 50, ¶¶ 22-35, 896 A.2d 933.

So too for the new notary provisions, particularly with the interpretation advanced by Reed that would effectively append a new phrase by statute (“and who remains so by refraining from otherwise supporting the petition until the petition is filed with the Secretary of State”) to the existing sentence in the Constitution that “[t]he oath of the circulator must be sworn to in the presence of a person authorized by law to administer oaths.” Me. Const. art. IV, pt. 3, § 20. Reed provides no

authority for Constitutional amendment by statute. And it cannot be that circulators must find and swear before notaries who promise to abridge their rights to speak freely or directly legislate for the entire period of the petition where the Constitution does not so require.

Moreover, the direct legislation provisions of the Constitution are self-executing. Me. Const. art. IV, pt. 3, § 22. Where the Resolve would be sent to the people, “according to the Maine Constitution as it currently exists,” but a different result would occur “[a]ccording to the [statute]” as read by Reed, the statute must yield to “the Maine Constitution as it currently exists.” *Opinion of the Justices*, 2017 ME, ¶ 66, 162 A.3d 188. A statute cannot add a prohibition on non-notarial acts during the entire initiative period. The Court must either affirm the Secretary on narrower grounds or hold the new notary provisions unconstitutional on their face.

3. The new notary statutes unconstitutionally limit speech and are not narrowly tailored to any permissible purpose.

The new notary provisions impose unconstitutional restrictions on important First Amendment rights. This Court and the United States Supreme Court have both held that petition circulation is “core political speech.” *Me. Taxpayers Action Network*, 2002 ME, ¶ 8, 795 A.2d 75; *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). In this context, First Amendment protection is “at its zenith.” *Id.* Although states may protect the integrity of the ballot initiative process, they must also “guard

against undue hindrances to political conversations and the exchange of ideas.” *Id.* at 192. Where a “law would burden an absolute right, such as the right to initiative . . . strict scrutiny requires that the State’s action be narrowly tailored to serve a compelling state interest.” *Birks v Dunlap*, No. BCD-AP-16-04, 2016 WL 1715405, at *6 (Bus. & Consumer Ct. Apr. 08, 2016, *Murphy, J.*) (quoting *Rideout*, 2000 ME 198, ¶ 19, 761 A.2d 291).

The new notary provisions are not narrowly tailored to the State’s interest in the integrity of the ballot initiative process and impermissibly violate notaries’ “right to participate in the public debate through political expression and political association.” *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 203 (2014). First, as described above, Reed’s reading of the new notary provisions would weaponize them to *undermine* the integrity of the process by using minor ministerial acts of notaries to retroactively invalidate the duly sworn oaths of circulators. Second, there is no reason a notary who initiates or promotes a petition is more likely than an uninterested notary to certify improper or fraudulent signatures.

Notaries are licensed professionals regulated by the Secretary, are entrusted with a critical public function, and have their own reputations to protect. In an analogous context, the Supreme Court held that it was “not prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to

accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot.” *Buckley*, 525 U.S. at 204 (quoting *Meyer*, 486 U.S. at 426). The same is true for notaries, who are interested in upholding their reputations, and in avoiding potential discipline by the Secretary. Notaries who initiate or promote a petition are thus no more likely than other notaries to accept false signatures or to otherwise undermine the integrity of the process.

In briefing before the Superior Court, Reed argued that Section 903-E does not improperly limit speech because notaries can simply choose at the beginning of a ballot initiative campaign whether they will speak in favor of that campaign or instead serve as a silent, disinterested notary. *See* (Reed 80C Reply Br. 5-7.) This argument incorrectly assumes, however, that all notaries providing services to a campaign are for-hire notaries who are aware of and knowingly make this choice. Several of the notaries to whom Reed unlawfully issued subpoenas were not for-hire notaries who made an active choice to notarize, rather than circulate, petitions; instead, they worked at credit unions that also offered customers notarial services at no charge, and, in connection with their jobs, having little familiarity with the subject matter of the Resolve, they notarized petitions for volunteer circulators who asked them to do so. *See* (A. 146, ¶¶ 6(B-D).) If one or more of these notaries had later entered the public square, learned about the Resolve, and decided to speak in favor of it, Petitioner Reed’s interpretation of the statute would have foreclosed them from

doing so. Their “choice” to provide free notarizations in the normal course of fulfilling their unrelated job duties would, in Reed’s view, either (a) forever preclude them from performing *any* other services with respect to the campaign, or (b) result in the invalidation of any circulators’ oaths duly sworn before them if they eventually chose to participate in the campaign in a non-notarial capacity.

This is not a choice at all, and is a needless intrusion on First Amendment rights of for-hire notaries and unaffiliated notaries alike. This is particularly true where the Legislature and the Secretary can monitor potential notarial conflicts of interest without chilling speech. In the analogous campaign finance context, the Supreme Court has held that “[a]ny regulation must instead target what [it has] called “quid pro quo” corruption or its appearance.” *McCutcheon*, 572 U.S. at 192. In *McCutcheon*, the Court held that limits on the amount a person can spend on an election impermissibly chilled speech, *id.* at 194, noting the availability of less restrictive options, such as “[d]isclosure requirements,” which “burden speech, but—unlike the aggregate limits—[] do not impose a ceiling on speech.” *Id.* at 223. So too here. Maine has notarial and circulator disclosure requirements that enable it to investigate issues without removing a privilege of a notary’s profession (administering oaths to petition gatherers) for exercising core political speech.¹⁵

¹⁵ Reed’s unorthodox tactic of issuing subpoenas to a notary simply for performing notarial duties relevant to an initiative should likewise be seen for what it is—a thinly veiled attempt to chill the participation of a notary in the initiative process in any capacity, here, and in the future.

4. The new notary statutes unconstitutionally discriminate based on viewpoint.

As written, the new notary statutes also constitute impermissible viewpoint discrimination. The statutes allow a notary to lawfully notarize petitions and still speak out publicly *against* an initiative. The opposite is not true: a notary cannot notarize petitions *and promote* the initiative. In his opening brief in the Superior Court criticizing the Secretary's interpretation, Reed posed a hypothetical of a notary, authorized at one time to notarize signatures, who might later provide "significant services like serving as a spokesperson or managing the campaign." (Reed 80C Br. 13.) In Reed's view, Section 903-E restricts notaries from performing these "significant services" if he or she also performs an authorized duty of his or her profession, the notarization of ballot initiative petitions. Reed subsequently argued in his reply brief that Section 903-E only "restricts notaries from providing non-expressive notarial service if they also assist the initiative campaign." (Reed 80C Reply Br. 6, n.7.) Not so: Reed's own hypothetical demonstrates that, in his reading of the statute, Section 903-E prohibits notaries from expressive functions like serving as a spokesperson or managing the campaign, but not from expressive functions like speaking out against a campaign.

Restricting notaries' speech in this way is impermissible because, "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 828 (1995). There can be no more politically expressive action than serving as a “spokesperson” for a campaign. Yet, Reed’s own attorneys who were in January of this year engaged in self-described “opposition research” to investigate and undermine the campaign, would still have been qualified as notaries, despite their obvious bias. This is textbook viewpoint discrimination. If the notary provisions were truly meant to ensure that political viewpoints do not undermine faith in notarial services, then the statute must be viewpoint neutral. *See, e.g., R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

B. The Secretary improperly invalidated signatures notarized by Ms. Skidmore.

The Secretary erred by invalidating signatures notarized by Ms. Skidmore before January 2, 2020 because she did “not administer the oath to circulators in an authorized manner.” (A. 149.) As an initial matter, this finding is overbroad: the record reflects that some circulators properly signed in Ms. Skidmore’s presence during this time, *see* (A. 149), and the Secretary should not have invalidated every petition notarized by Ms. Skidmore before January 2 on this basis. More importantly, the Secretary’s strict application of this requirement “is unreasonable and abridges the Constitutional right to initiative.” *Birks*, 2016 WL 1715405, at *9. In *Birks*, the Superior Court held unconstitutional the Secretary’s interpretation of a statute as requiring a notary’s signature on a petition to “match” the signature on his or her commission, and overturned the Secretary’s decision to invalidate whole petitions

on that basis. *Id.* at **9-12. The Court held that “[a] determination by the Secretary of State invalidating all petitions signed by a particular Notary for signature variance detected on a number of petitions and therefore, the inability to determine whether the circulator's oath was performed, is arbitrary, capricious and inconsistent with the Constitutional right to the direct initiative.” *Id.* at *12.

The situation here is analogous: the Secretary’s overly stringent interpretation of the oath requirements, particularly where there is no evidence that Ms. Skidmore engaged in fraudulent behavior of any sort, resulted in the improper invalidation of signatures and burdened the citizens’ right of initiative without a corresponding compelling state interest justifying that burden. Ms. Skidmore substantially complied with the oath requirements, and the Court should declare valid the 1,873 signatures invalidated by the Secretary on this basis. (A. 149.)

C. Maine’s requirement that circulators be registered voters is unconstitutional.

If the Court invalidates sufficient signatures to bring the total below the threshold, it would need to add back any signatures invalidated because the circulator was not yet a registered voter. Maine’s laws requiring that petition circulators be registered voters violate the United States Constitution. *See Me. Const. art. IV, pt. 3, § 20; 21-A M.S.R. § 903-A(4)(C).* In *Buckley*, the Supreme Court found that an amendment to the Colorado constitution and a related statute requiring circulators to be registered voters violated the First Amendment because they “cut[]

down the number of message carriers in the ballot-access arena without impelling cause.” The Court wrote that the registration requirement “decrease[d] the pool of potential circulators” and “limit[ed] the number of voices who will convey [the initiative proponents’] message.” *Id.* (citations omitted). So too here: the number of individuals available to circulate petitions is undoubtedly curtailed by Maine’s registration requirement. The Supreme Court further held that the relative ease of registering to vote was no matter, because that ease “does not lift the burden on speech at petition circulation time” and because, for some, “the choice not to register [to vote] implicates political thought and expression.” *Id.* at 194-195. Finally, the Court noted that Colorado, like Maine, required circulators to submit affidavits with their address, which attestation “has an immediacy, and corresponding reliability, that a voter’s registration may lack” should the Secretary need to contact a circulator.¹⁶ *Id.* at 196; *see also* 21-A M.R.S. § 903-A(4).

Where state and federal law clash, the United States Constitution reigns supreme. U.S. Const. art. VI, cl. 2. Here, the Supreme Court has expressly held that voter registration requirements for petition circulators are unconstitutional. In light of *Buckley*, Maine’s requirement that circulators be registered voters is unconstitutional, in no small part because it limits the number of individuals

¹⁶ The *Buckley* Court declined to address whether residency requirements themselves are unconstitutional because the question was not before it. 525 U.S. at 197.

available to serve as circulators; record evidence of this self-evident effect is not required for the Constitutional analysis and any subsequent opinions to the contrary were wrongly decided. *See, e.g., Initiative & Referendum Inst. v. Sec'y of State*, No. CIV-98-104-B-C, 1999 WL 33117172, at **14-15 (D. Me. Apr. 23, 1999) (Maine voter registration requirement acceptable); *Me. Taxpayers Action Network*, 2002 ME 64, ¶¶ 26-29, 795 A.2d 75 (in concurring opinion, Justice Dana said he would uphold registration requirement, absent record evidence that it caused the results discussed in *Buckley*). Accordingly, any signatures invalidated by the Secretary on these grounds should be counted toward the total number of valid signatures.¹⁷

IV. The Policy or Subject Matter of the Resolve is Not Ripe for Review Before It Becomes Law

Each of the merits briefs submitted to the Superior Court by opponents of the Resolve suggested that the Secretary's decision should be overturned because the Resolve is not good public policy. *See* (Reed 80C Br. 2-3, 13 & n.6, 17; Me. Chamber Comm. Br. 7; IECG 80C Br. 9-13.) And Reed's notice of appeal expressly alleges it was error for the Superior Court to suggest that the merits of the Resolve are not ripe prior to the Resolve becoming law. *See* (Reed Notice of App. n.1). This

¹⁷ Any error here of the Secretary is harmless unless the Court holds the Secretary abused his discretion. Based on the Secretary's April 1, 2020 determination, he invalidated 6,260 signatures "because they were not certified by the registrar as belonging to a registered voter in that municipality" and 713 signatures "because the circulator collected signatures prior to becoming registered to vote in the State of Maine." (A. 151.)

Court, like the Superior Court should find that the merits of the Resolve are not ripe before the Resolve becomes law. *See* (A. 9).

Moreover the claims of harm or chaos stemming from the Resolve advanced by parties to this case are baseless. The idea that investment in Maine will cease if businesses see that a petition can be made to the Legislature after exhaustion of the administrative process before the Maine Public Utilities Commission (“MPUC”) is entirely misplaced. Longstanding Maine statutes expressly *require* exhaustion of the MPUC process before application to the Legislature, 35-A M.R.S. § 1323, and further expressly authorize the rescinding of any MPUC order, *id.* § 1321.¹⁸ Furthermore, this Court recently stated that it “must conclude that” the statutory public need standard used by the MPUC in issuing a Certificate of Public Convenience and Necessity (“CPCN”) is ambiguous and is “essentially a general standard of meeting the public interest.” *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶¶ 25-26, -- A.3d --. Accordingly, only the Legislature can resolve that ambiguity, and Maine voters *are* the experts when it comes to the “general standard of meeting the public interest,” particularly as applied to the

¹⁸ The claims that the Maine Department of Environmental Protection and the Maine Land Use Planning Commission have expertise that the public does not are similarly misplaced. Nothing about those administrative agencies has any relation whatsoever to the “subject matter of the petition” at issue here. 21-A M.R.S. § 905(2). Nor has chaos resulted in the three decades since the Law Court upheld retroactive citizen’s initiatives targeting such development. *See City of Portland v. Fisherman’s Wharf Assoc. II*, 541 A.2d 160 (Me. 1988).

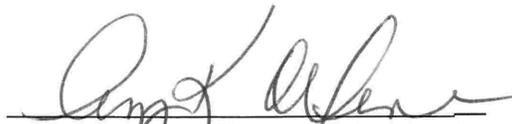
CPCN that is the subject of the instant petition. *Accord Auburn Water Dist. v. Pub. Utils. Comm'n*, 156 Me. 222, 225–26, 163 A.2d 743, 744–45 (1960) (“It is well understood that the regulation of public utilities is a function of the Legislature. The regulation of public utilities lies with the Legislature and not with the Executive or Judiciary. ... The Legislature thus placed in the hands of its agents, namely, the [Public Utilities] Commission, broad powers of regulation and control of public utilities. The power of the Legislature was not, however, surrendered, but delegated.”). The broad and ambiguous standard of “meeting the public interest’ as applied to a CPCN for this type of project is not a technical determination that must be left to the experts, but is instead the quintessence of a legislative determination best accomplished by a public vote.

CONCLUSION

For the foregoing reasons, Intervenor MLP respectfully requests that the Court affirm the Secretary’s determination that the Resolve is valid.

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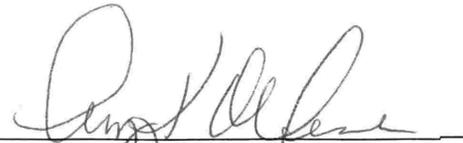
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