

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

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Law Court Docket No. BCD-20-126

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**DELBERT A. REED, *et al.***

**Petitioners – Appellants**

v.

**SECRETARY OF STATE MATTHEW DUNLAP, in his capacity as Secretary  
of State for the State of Maine, *et al.***

**Respondents –Appellees**

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**APPEAL  
FROM THE BUSINESS AND CONSUMER COURT**

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**BRIEF OF APPELLANT  
MAINE STATE CHAMBER OF COMMERCE**

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## STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Maine State Chamber of Commerce (“Chamber”) is Appellant in the Law Court after having been admitted as a party by intervention in the Business Court. The Chamber anticipates that the several other briefs to be filed on both sides of this appeal will set out the facts and procedural history in detail. The Chamber appeals from Determinations of the Secretary (A. 142-52), and the Order of the Business Court upholding those Determinations (A. 8-28), because the controlling constitutional and statutory rules of law require, as a matter of law, invalidation of several unlawfully notarized petitions, so that the constitutionally required minimum number of signatures has not validly been presented to qualify the proposed question for submission to the voters.

The transactional facts relate to the planned construction of a transmission line from the border between Maine and Quebec to a point of connection in Lewiston whereby the hydropower to be transmitted will become available in the New England Energy Grid. The Chamber intervened in the administrative proceedings before the Public Utilities Commission, the Department of Environmental Protection, and the Land Use Planning Commission. The Chamber joined in and supported the stipulation approved by the Public Utilities Commission and upheld by the Law Court. *See NextEra Energy Res., LLC v. Me. P.U.C. et al*, 2020 ME 34, \_\_\_ A.3d \_\_\_\_.

As it became apparent that the project was well on its way to receiving the

necessary regulatory approvals, competing interests began the process to gather and submit enough signatures to place on the ballot a question designed to overrule the PUC decision, notwithstanding its affirmance in this Court.<sup>1</sup>

Petitioner Reed initiated this challenge to the Secretary's Determination on March 13, 2020, after which the Chamber and other parties were permitted to intervene. After denying Petitioner's request to take additional evidence (A. 33-38), the Court remanded the matter to the Secretary for further investigation and, essentially, for reconsideration. On April 1, 2020, the Secretary issued an Amended Determination which, although different in detail, again declared that enough valid signatures had been submitted to qualify the question for presentation to the voters. (A. 144-52.)

After a round of briefing, the Business Court again denied Petitioner's request to take additional evidence (A. 29-32) and upheld the Secretary's Amended Determination on April 13, 2020 (A. 8-28). This Appeal followed.

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<sup>1</sup> Because the Law Court reviews the Secretary's Determinations directly *de novo*, it is not strictly necessary to note a disagreement with the Court's Order but, to avoid any later misunderstanding, the Chamber did not agree that a challenge to the validity of the proposed Question will not be "ripe" until after a vote on the Initiative; the Chamber agrees that it is not before the Court in this Rule 80C proceeding.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Whether the Secretary's interpretation of the controlling statutory law, P.L. 2017, ch. 418, the currently relevant provisions of which are in the revised statutes at 4 M.R.S. § 954-A (2018) and 21-A M.R.S. § 903-E (2018), was legal error.

## **STANDARD OF REVIEW**

The standard of review is for error of law by the Secretary. *McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933. All of the Secretary's findings of fact that demonstrate the Secretary's legal error are unchallenged. The Secretary's refusal to invalidate petitions that were unlawfully notarized does not involve any exercise of any discretion because the statutory law conferred none.

## **SUMMARY OF THE ARGUMENT**

The Secretary's Determination and Amended Determination are erroneous as a matter of law and must be reversed. All of the petitions notarized by Brittany Skidmore and Leah Flumerfelt must be rejected because they were not legally authorized to notarize these petitions due to conflicts of interest in violation of legislation enacted precisely for the purpose of prohibiting their conduct. Multiple long-established

principles, rules, and norms of statutory interpretation require that P.L. 2017, ch. 418 be read and applied in accordance with the plain objective of the legislation. That objective was unambiguously manifested in Chapter 418, which must be read in its entirety, understanding the notarial practices the Legislature acted to prohibit, and in conjunction with associated provisions of Title 21-A and the Maine Constitution.

The Secretary wrongly found the legislation to be ambiguous. If, however, the statute is deemed to be ambiguous, it is settled law that the ambiguity must be resolved so as to give effect to the legislation's objectives.

There is no reason to depart from longstanding and well-established principles, rules, and norms of statutory construction, but even if skeptically or grudgingly or strictly read, it remains clear that the objective of the legislation was to require that the oaths be administered and taken by independent notaries public, and not by campaign participants. The Secretary's reading of the law to allow for some of the people some of the time what the legislature intended to prohibit completely is erroneous as a matter of law. It is entitled to no deference because the Secretary has no discretion about whether to apply the law and his interpretation is at odds with the purpose of the legislation. Because the challenged notarizations were performed by individuals without statutory authorization to do so, the petitions are invalid, and the initiative fails.

## ARGUMENT

### **I. Introduction: Settled Principles and Rules of Statutory Construction Are Applicable to This Review for Legal Error**

The Secretary's interpretation of the relevant statutory provisions is reviewed for errors of law by this Court *de novo*. *McGee*, 2006 ME 50, ¶ 5. The statute on which the challenged decision hinges is P.L. 2017, ch. 418,<sup>2</sup> which is entitled "An Act to Increase Transparency in the Direct Initiative Process." To assist the Court in its analysis, the Public Law is reproduced here in its entirety. It is in the usual legislative format such that the words being added to the pertinent provisions of Title 4 and Title 21-A are underlined. The significance of this presentation will be addressed more fully below.

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<sup>2</sup> L.D. 1865 (128th Legis. 2018).

APPROVED  
JUNE 22, 2018  
BY GOVERNOR

CHAPTER  
418  
PUBLIC LAW

STATE OF MAINE

—  
IN THE YEAR OF OUR LORD  
TWO THOUSAND AND EIGHTEEN

—  
H.P. 1301 - L.D. 1865

**An Act To Increase Transparency in the Direct Initiative Process**

Be it enacted by the People of the State of Maine as follows:

**Sec. 1.** 4 MRSA §954-A, as amended by PL 1999, c. 425, §1, is further amended to read:

**§954-A. Conflict of interest**

A notary public may not perform any notarial act for any person if that person is the notary public's spouse, parent, sibling, child, spouse's parent, spouse's sibling, spouse's child or child's spouse, except that a notary public may solemnize the marriage of the notary public's parent, sibling, child, spouse's parent, spouse's sibling or spouse's child. It is a conflict of interest for a notary public to administer an oath or affirmation to a circulator of a petition for a direct initiative or people's veto referendum under Title 21-A, section 902 if the notary public also provides services that are not notarial acts to initiate or promote that direct initiative or people's veto referendum. This section does not affect or apply to notarial acts performed before August 4, 1988.

**Sec. 2.** 21-A MRSA §903-D, as enacted by PL 2017, c. 277, §5, is repealed.

**Sec. 3.** 21-A MRSA §903-E is enacted to read:

**§903-E. Persons not authorized to administer an oath or affirmation to a petition circulator**

**1. Certain notaries public and others.** A notary public or other person authorized by law to administer oaths or affirmations generally is not authorized to administer an oath or affirmation to the circulator of a petition under section 902 if the notary public or other generally authorized person is:

**A. Providing any other services, regardless of compensation, to initiate the direct initiative or people's veto referendum for which the petition is being circulated. For the purposes of this paragraph, "initiate" has the same meaning as section 1052, subsection 4-B; or**

B. Providing services other than notarial acts, regardless of compensation, to promote the direct initiative or people's veto referendum for which the petition is being circulated.

**Sec. 4. 21-A MRSA §1060-A** is enacted to read:

**§1060-A. Campaign for direct initiative or people's veto; reporting by major contributors**

This section governs the reporting of contributions aggregating in excess of \$100,000 for the purpose of initiating or influencing a campaign for a people's veto referendum under the Constitution of Maine, Article IV, Part Third, Section 17 or a direct initiative of legislation under the Constitution of Maine, Article IV, Part Third, Section 18.

**1. Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Contribution" has the same meaning as set out in section 1052, subsection 3 and also includes but is not limited to:

(1) Funds or anything of value that the contributor specified were given in connection with a campaign for a people's veto referendum or direct initiative campaign;

(2) Funds or anything of value provided in response to a solicitation that would lead the contributor to believe that the contribution would be used specifically for the purpose of initiating or influencing a people's veto referendum or direct initiative campaign; and

(3) Funds or anything of value that can be reasonably determined to have been provided by the contributor for the purpose of initiating or influencing a people's veto referendum or direct initiative campaign when viewed in the context of the contribution and the recipient committee's activities during the campaign.

B. "Major contributor" means a person, other than an individual, that makes one or more contributions aggregating in excess of \$100,000 to a ballot question committee or political action committee for the purpose of initiating or influencing any one people's veto referendum campaign or any one direct initiative campaign.

**2. Notice to major contributor.** Within 5 days of receiving more than \$100,000 in the aggregate from a major contributor, the recipient committee shall provide written notice to the major contributor of the reporting requirement under this section and shall submit a copy of the notice to the commission. If the \$100,000 aggregate amount is exceeded as a result of a contribution received during the last 13 days before an election, the recipient committee shall, within 24 hours of receiving the contribution, provide written notice of the reporting requirement to the major contributor and submit a copy of the notice to the commission. The commission shall prepare a sample written notice for this purpose.

**3. Required reports.** A major contributor shall file a report containing the information required in subsection 4 on or before the next regularly scheduled filing

deadline under section 1059, subsection 2 occurring after the major contributor receives notice of the reporting requirement. If a major contributor has received a notice from a recipient committee or the commission during the last 13 days before an election as required under subsection 2, the major contributor shall file a report within 2 business days of receiving notice from the recipient committee or commission. The commission shall prescribe and prepare forms for these reports and may require major contributors to file reports electronically.

4. Content. In the reports required under subsection 3, a major contributor shall provide:

A. The name of and relevant contact information for the major contributor and the name of a responsible officer of the major contributor;

B. The form of organization and purpose of the major contributor;

C. The amount and date of each contribution from the major contributor to the recipient committee;

D. A certification that the major contributor has not received contributions, in whole or in part, for the purpose of initiating or influencing a people's veto referendum or direct initiative campaign in this State or, if the major contributor has received such contributions, the dates, sources and amounts of any such contributions;

E. The names of the 5 largest sources of funds received by the major contributor during the period beginning 6 months prior to the first contribution made to the recipient committee and ending on the date of the filing of the report. This paragraph does not apply to funds received by the major contributor that are restricted to purposes that are unrelated to a people's veto referendum or direct initiative campaign in the State; and

F. A statement indicating whether the major contributor is exempt from taxation under the United States Internal Revenue Code of 1986 and a list of any governmental jurisdictions within the United States in which the major contributor has filed campaign finance reports during the previous 12 months.

The commission may require by rule additional information to be reported consistent with this subsection to facilitate disclosure to citizens of this State of financial activity conducted for the purpose of influencing elections in this State.

5. Noncompliance. The commission may assess a civil penalty against a major contributor that does not file a timely report required under this section. The preliminary penalty is 10% of the total contributions required to be reported, up to a maximum of \$50,000. Within 14 calendar days of receiving notice of the preliminary penalty from the commission, the major contributor may request that the penalty be waived in full or in part. In considering a request for a waiver, the commission shall consider, among other things, any lack of notice to the major contributor of the reporting requirement, the number of days that the report was filed late and the amount of the contributions required to be reported. A major contributor requesting a determination may either appear in person or designate a representative to appear on the major contributor's behalf or submit a sworn statement explaining the mitigating circumstances for consideration by the commission. After a commission meeting, notice of the final determination of the

commission and the penalty, if any, imposed pursuant to this subsection must be sent to the major contributor. If a determination is not requested, the preliminary penalty calculated by the commission is final. The commission shall mail final notice of the penalty to the major contributor. A final determination by the commission may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C. The commission may assess a civil penalty in the same amount against a recipient committee that has not provided written notice of the reporting requirements to the major contributor as required by subsection 2, using the same procedures as set out in this subsection for penalties against the major contributor.

It is a cardinal rule of statutory interpretation that the statute must be read as a whole to learn its intended meaning and to apply it in aid of achieving its objective. That rule is best honored by reading the statute in its entirety at one sitting to fully understand the aggregate meaning of the individual words within it. Any statute is best understood by beginning at the beginning and reading to the end. *See, e.g., K Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988) (“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”) (citing *Bethesda Hosp. Ass’n v. Bowen*, 485 U.S. 399, 403-405 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986)). *See also, Seven Islands Land Co. v. Me. Land Use Regulation Comm’n*, 450 A.2d 475, 480 (Me. 1982) (“The court interprets a statute in light of its evident purpose so that all of its provisions are read in harmony and are effectuated.”); *Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979); *Finks v. Me. State Highway Comm’n*, 328 A.2d 791, 795 (Me. 1974) (“Every statute must be construed in connection with the whole system of which it forms a part and all legislation on the same subject matter must be viewed in its overall entirety in order to reach an harmonious result which we presume the Legislature intended”). Therefore, 21-A M.R.S. § 903-E must not be read in isolation from the other sections of P.L. 2017, ch. 418.

Central to this principle of statutory interpretation, long recognized by this Court and others, is the rule that any statute must be interpreted with due regard for its objective. *See, e.g., FPL Energy Me. Hydro LLC v. Dep’t of Emtl. Prot.*, 2007 ME 97, ¶ 25,

926 A.2d 1197 (“The first step in statutory interpretation is to discern legislative intent from the plain meaning of the statute.”)(citing *DaimlerChrysler Corp. v. Executive Dir., Me. Revenue Servs.*, 2007 ME 62, P9, 922 A.2d 465, 469); *Baker v. Farrand*, 2011 ME 91, ¶ 21, 26 A.3d 806 (“We review the court's interpretation...*de novo* by first examining the plain meaning of the statute within the context of the whole statutory scheme to give effect to the Legislature's intent.”)(citing *HL 1, LLC v. Riverwalk, LLC*, 2011 ME 29, ¶ 17, 15 A.3d 725, 731; *Dickey v. Vermette*, 2008 ME 179, ¶ 5, 960 A.2d 1178). This statute was enacted in response to a legislative consensus that there was a significant problem directly and adversely undermining the integrity of Maine’s elections that needed to be addressed. The Legislature identified a situation that needed to be corrected, a circumstance that needed to be changed, and determined that some behavior of certain persons needed to be either required, or prohibited, or in some way modified or regulated.<sup>3</sup> The Court should therefore apply 21-A § 903-E with the objective of the Legislature in mind, in light of the situation that existed at the time, to prevent the behaviors that the Legislature acted to prohibit.

For these purposes, it is sufficient to point out that between the late 1990s and the date of the enactment of Chapter 418 there were many referendum campaigns,

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<sup>3</sup> The bill that later became the Public Law at issue here passed with an overwhelming, bipartisan majority, 140 to 6 in the house (5 absences), House Rollcall #607, LD 1865 (HP 1301), and by consent in the Senate.

either in the form of legislative initiatives or people’s vetoes.<sup>4</sup> As it became more common for well-funded interest groups to hire individuals to circulate petitions, concerns about irregularities emerged. For example, in a decision of this Court in 1998, the sponsor of that initiative was then and there serving time in prison for her misconduct in that campaign. *Palesky v. Sec’y of State*, 1998 ME 103, ¶ 3, 711 A.2d 129 (“Palesky was convicted of aggravated forgery in August of 1997 as a result of her participation in gathering and submitting the signatures”). The irregularities and conflict of interest concerns that arose during the 2016 and 2017 recreational use of marijuana<sup>5</sup> and a York casino business<sup>6</sup> initiative petitions directly led to the enactment of Chapter 418.

A proper interpretation of Chapter 418 begins with an awareness of the mischief to be addressed, the behavior to be prohibited, and the problem to be solved. *See, e.g., Tremblay v. Murphy*, 111 Me. 38, 49 (1913)(An “important rule of construction, to ascertain the evident intention of the Legislature is, that we may look at the object in view, to the remedy to be afforded, and to the mischief intended to be

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<sup>4</sup> Between 1990 and 2018, there were approximately forty-five Citizen Initiatives, though many were resolved without going to the ballot for a vote, and seven people’s vetoes. *See*, Legislative History Collection, *Citizen* (cont.) *Initiated Legislation* 1911-Present, MAINE STATE LEGISLATURE <https://mainelegislature.org/legis/lawlib/lldl/citizeninitiated/index.html> (last updated May 2019); Legislative History Collection, *Maine Laws Suspended by People’s Veto*, MAINE STATE LEGISLATURE <https://www.maine.gov/legis/lawlib/lldl/peoplesveto> (last updated June 2018).

<sup>5</sup> LD 1701, IB 6, (127th Legis. 2017), “An Act To Legalize Marijuana.”

<sup>6</sup> LD 719, IB 1, (128th Legis. 2017), “An Act To Allow Slot Machines or a Casino in York County.”

remedied.”)(internal quotations omitted); *Davis v. State*, 306 A.2d 127, 129-30 (Me. 1973)(“[T]he overriding controlling rule in the construction of statutes...is for the courts to ascertain legislative intent and, once determined, to effectuate the same...The intent and object of the Legislature in enacting the law are to be ascertained and given effect if the language be fairly susceptible of such a construction. Such interpretation of the words used will be adopted as shall appear most reasonable and best suited to accomplish the objects of the statute.”). It is said that ““A thing may be within the letter of the statute and not within its meaning, and within its meaning though not within the letter. The intention of the law-maker is the law.”” *Bangor R. & E. Co. v. Orono*, 109 Me. 292, 299, 84 A. 385, 388 (1912)(citing *Carrigan v. Stillwell*, 99 Me. 434, 59 A. 683 (1905)). In order to ascertain the construction intended by the Legislature, the court ““must look at the object in view, to the remedy to be afforded and to the mischief intended to be remedied.”” *Id.* (citing *Winslow v. Kimball*, 25 Me. 493 (1846)).

One of the most visible and egregious of the problems from the marijuana case was that a single individual, paid by the campaign, and centrally involved in its leadership, notarized an implausibly large number of petitions in circumstances or on dates which cast serious doubt on the notary’s compliance with the most elementary requirements of the notary function. *Birks v. Dunlap*, BCD-AP-16-04 (Bus. & Consumer Ct. Apr. 8, 2016, *Murphy, J.*)(where a single individual was listed as the notary on 5,099 petitions containing 26,779 signatures). In short, the conflict of interest that existed when the notary was otherwise involved in a campaign – along with the notary’s

personal stake in the success of the campaign – called into question the objectivity and reliability of the notarizations. Given the behavior that was being addressed by the 2018 statutory changes, it is improbable that the Legislature intended to designate notarizations by those providing other services for a campaign as a prohibited conflict of interest but then to provide no consequence to the campaign that employed it. The Secretary, in effect, has concluded that the Legislature acted only to reduce, but not to eliminate, the serious problems it had identified as needing the Legislature’s response. There is nothing in the text or context or history of Chapter 418 to justify that interpretation.

A proper approach to statutory construction also implicates consideration of the structure of the law itself. In applying statutory construction principles, courts must “examine the entirety of the statute, ‘giving due weight to design, structure, and purpose as well as to aggregate language.’” *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 22, 107 A.3d 621 (quoting *In re Hart*, 328 F.3d 45, 48 (1st Cir. 2003)). “We reject interpretations that render some language mere surplusage.” *Id.* (citing *Cent. Me. Power Co. v. Devereux Marine, Inc.*, 2013 ME 37, ¶ 8, 68 A.3d 1262).

Here, in a single enactment, the Legislature first added strong conflict of interest language directly addressing the problem of interested or disinterested notaries in the specific context of direct initiative campaigns. Then it included two sections to repeal and replace language that had been enacted only a year earlier in P.L. 2017, ch. 277, § 5, and concluded with a provision concerning reporting of campaign expenditures, which

had become a matter of serious concern during the casino referendum campaign.

The meaning of the specific provisions construed by the Secretary in the present case must be reviewed with a due regard for the fact that the Legislature enacted a comprehensive, synergistic set of solutions to prohibit abuses and to solve problems brought to light by the 2016 and 2017 campaigns.

## **II. The Secretary’s Interpretation and Application of Chapter 418 is Erroneous as a Matter of Law and The Affected Petitions Must be Invalidated as a Matter of Law.**

When an appeal “involves the interpretation of constitutional and statutory provisions,” the Law Court reviews the issues *de novo*. *McGee*, 2006 ME 50, ¶ 5, 896 A.2d 933. When the Superior Court is required to act only in an appellate capacity, as was the case here, the Law Court “review[s] the decision of the Secretary of State directly, reviewing for abuse of discretion, errors of law, or findings not supported by evidence.” *Palesky*, 1998 ME 103, ¶ 9, 711 A.2d 129 (citing *Maine Bankers Ass'n v. Bureau of Banking*, 684 A.2d 1304, 1305-06 (Me. 1996) (“where Superior Court acts as an intermediate appellate court, this Court reviews the agency directly”)).

The Secretary’s Determination hangs on the presence of the single word “is” preceding the colon in the fourth line of 21-A M.R.S. § 903-E(1). The Secretary apparently has extrapolated from what he considers to be an ambiguity of the word “is,” a prudential or discretionary authority to validate the notarial acts in a campaign

that temporally precede the other activities and services of that notary during that same campaign. The Secretary has apparently determined that the Legislature’s objective in crafting this language was only to prohibit notaries from performing notarial acts *after* performing other services, but not to prohibit the notaries from performing notarial acts *before* performing other services.

Perhaps the most obvious point is that the text of the statute does not say that only when a person who is a notary public has performed some other campaign service does that person then become subsequently disqualified from performing notarial functions. Chapter 418 textually confers upon the Secretary of State no discretion or authority of any kind to permit some notaries to perform some non-notarial services at certain times while invalidating petitions of other notaries who perform other non-notarial services at different times. The Secretary’s interpretation is textually and facially implausible. The statute is not ambiguous. The Legislature’s objective was to simplify, clarify and strengthen the requirements for notarial eligibility. The Secretary’s ad hoc interpretation is at odds with all three objectives. Reading all the words with an awareness of the structure and objective of the law leaves no ambiguity. The statute, read properly, has no alternative meaning. Without an alternative meaning there is no ambiguity for the Secretary or the Law Court to resolve.

After the word “is” in the new Section 903-E, comes Subsection A, which begins “Providing any other services, regardless of compensation, to initiate....” 21-A M.R.S. § 903-E(1), (1)(A). The word “any” is on the very next line, between “is providing” and

“services.” It is especially improper to view a single word in isolation as creating an ambiguity when the postulated ambiguity is textually eliminated by another word in the same sentence. The word “any” does not mean “some.” The word “any,” in any reasonable interpretation of prohibitory language, is the algebraic linguistic equivalent of “all.” The obvious point of this specific law with respect to these campaigns is to require notaries to be disinterested public officials. The importance of this particular constitutional requirement is different from the less stringent approach to notaries officiating at family weddings and such. The legislative objective cannot be achieved operationally if the Secretary’s interpretation is upheld.

It becomes even more clear that the sentence is unambiguous when it is read in the broader context of the entire Public Law. New language was simultaneously added to 4 M.R.S. § 954-A in P.L. 207, ch. 418 § 1. That complementary provision was left unanalyzed, although mentioned in a footnote, in the Secretary’s Amended Determination. It deserves considerably more attention and respect. The language added to 4 M.R.S. § 954-A is as follows:

“It is a conflict of interest for a notary public to administer an oath or affirmation to a circulator of a petition for a direct initiative or people’s veto referendum under Title 21-A, Section 902 if the notary public also provides services that are not notarial acts to initiate or promote that direct initiative or people’s veto referendum.”

Absolutely absent from that language is any explicit temporal or chronological condition or exception. The chronological reference in that language, and even in

Section 903-E, is to the “referendum.” A referendum is not a moment in time. It is a series of activities over a defined period that begins when the first filing is made by the promoters of the initiative and ends when the signatures have all been fully filed and the deadline for filing or amending any filings has passed. There is no other sensible interpretation of fewer than a dozen lines of text that all appear on the very same page of Chapter 418, separated only by headings.

Chapter 418, in enacting the new Section 903-E, cross references to the definition of “initiate” in 21-A M.R.S. § 1052(4-B)(2011). It includes “the collection of signatures and related activities....” The point is reinforced by the definition of “campaign” in 21-A M.R.S. § 1052(1) as a “course of activities...to initiate [any referendum].” The word “is” in a section that references § 1052 cannot mean anything but the entire “course of activities.”

Should there be any remaining doubt about that, the Court should note that Chapter 418 repealed the former 21-A M.R.S. § 903-D (2017) as enacted only a year earlier. Even the most cursory reading of the repealed Section 903-D, in conjunction with the newly enacted Section 903-E, makes clear that the Legislature abandoned the former effort and chose new language simplifying and clarifying the requirement that no notary may do anything other than notarize at any point during the run of any initiative or people’s veto referendum campaign. The notary – and the campaign that employs the notary’s services – should know all of this before the first petition is circulated. At the outset, the notary needs to decide whether to refrain from notarial

work associated with the campaign and to become politically active instead, or to refrain from political work entirely and perform the important public function with which the notary is entrusted – to protect the rights of all the people of Maine to the integrity of their elections, even referendum elections.

In addition to the insight this clarifying change provides, important additional evidence as to the meaning of Chapter 418 may also be derived from 21-A M.R.S. § 902 (2017). Both Section 1 and Section 2 of Chapter 418 reference that provision. It is the implementing legislation for the requirements of the Constitution that signatures be verified. It sets forth the significant procedural steps that must be observed by the notary, a public official, for the protection of the public, i.e., steps that must be taken to protect all “the people.”

The principle is not only to read Chapter 418 in its entirety with a view to its objective and its own structure and purpose but to read it in conjunction (*in pari materia*) with other previously enacted legislation that relates to the subject matter of initiative or people’s veto referenda. That implicates underlying statutes like Section 902, explicitly mentioned in two sections of Chapter 418, and even prior enactments that have been repealed, like Section 903-D. Both in their own way demand rejection of the Secretary’s analysis. This is not a new idea but has been settled in Maine for more than 160 years.

“That in the construction of statutes, it is proper to have regard to all the statutes enacted in *pari materia*, cannot be denied; and, often an existing statute will be much better

understood, by examining it, in the light of preceding statutes upon the same subject, although they may have been repealed. We should also keep in view the mischiefs which the statutes were designed to prevent.”

*Mercer v. Bingham*, 42 Me. 289, 290 (1856).

However, if the Court does consider it necessary or appropriate to resolve an ambiguity, it is important to resolve it in favor of fulfilling the objective of the legislation, not undermining it or contravening it. This principle is also long settled.

If the language of the statute was “susceptible of a different construction, in determining which is to prevail, the court[s] are bound, if the language will fairly admit of it, to adopt that which will best effectuate the general design of the statutes, and remedy the mischiefs which they were intended to prevent. Such construction must prevail, even if the strict letter of the statute would lead to a different result.”

*Mercer*, 42 Me. at 293. And, notwithstanding modern concepts of deference to administrative interpretations, the principle remains that an administrative interpretation is entitled to no deference if the statute, as here, compels a different result from the one chosen by the agency. See *Houlton Water Company v. PUC*, 2014 ME 38, ¶ 32, 87 A.3d 749.

The Maine Constitution charges notaries, whose authority is conferred solely by statute, with the solemn responsibility to see and hear the circulators’ oath or affirmation that each signature is the signature of the person whose name it purports to be and that each signature for a disabled voter was made by the authorized signer in the presence and at the direction of the disabled voter.

In short, the Secretary was wrong to think that it was up to him to determine what the meaning of “is” is. A proper professional reading of all of Chapter 418 in conjunction with an awareness of its purpose and in conjunction the important provisions of 21-A M.R.S. § 902 and the Constitution of Maine, art. IV, pt. 3, § 20 leaves no ambiguity about the meaning of the Legislature’s response to the scandalous circumstances of recent campaigns. The Legislature made it a conflict of interest for a person acting as a notary to have any role in the campaign except as a disinterested public official.

In accordance with long-settled and well-respected principles of statutory interpretation, to ascertain the meaning of the legislation, to enable the objective of the Legislature to be operationalized in the world, all of the signatures on all of the petitions notarized by Brittany Skidmore and Leah Flumerfelt should be invalidated as a matter of law. Once the law is properly applied to the petitions they notarized, it is a record fact that the number of signatures on the affected petitions is large enough to preclude as a matter of law the Secretary’s Amended Determination that enough valid signatures were submitted.

### **III. The Maine Constitution Created a Framework for Citizen’s Initiatives that Invites Legislative Implementation**

Given the compressed schedule with simultaneous briefs and no replies, issues that might normally be left to a reply need some mention in this submission given the reasonable expectation that some of the points below or all of them will be introduced by the Secretary or the supporters of the initiative.

#### ***a. The Right of “The People” Is Not “Absolute.”***

At some point, perhaps in *McGee*, 2006 ME 50, 896 A.2d 933, the right of a small minority of the electorate to initiate legislation by petition, subject to a vote at referendum, has come to be termed “absolute.” It ought to be obvious that the right is not and could not be absolute if the word “absolute” is to be taken literally. If the right were absolute, there would be no review of the petitions at all. There would be no disqualifications for forgeries or illegitimate notarizations or any of the other irregularities the Secretary has often, including in this case, employed to scrutinize petitions and reject thousands of signatures.

Indeed, the Law Court has regularly approved and applied legislation placing or detailing requirements for the direct initiative process to ensure the reliability of the results and to protect the integrity of the process. For example, in *Palesky*, the Law Court ruled that the Secretary properly invalidated petitions when petition circulators did not take an oath in the presence of the notary whose name appeared on the petitions

or any other authorized person. *Palesky*, 1998 ME 103, ¶ 11, 711 A.2d 129 (citing *Opinion of the Justices*, 116 Me. 557, 569, 103 A. 761, 767 (1917)("The constitution itself prescribes these . . . indispensable accompaniments of a valid petition, and a petition which lacks these requirements is invalid and cannot be counted")). Similarly, the *Palesky* court also found that it was appropriate to invalidate petition signatures that were not an approved form because the forms were required both by Me. Const. art. IV, pt. 3, § 20 and by 21-A M.R.S. § 901 (Supp. 1997). *Palesky*, 1998 ME 103, ¶ 12, 711 A.2d 129. As in this case, the statute designates certain criteria for the validation of the petition document. It must include the name, address, and signature of five voters and "must contain the full text of the proposed law and a summary that explains the purpose and intent of the direct initiative." 21-A M.R.S. § 903. This is valid despite the Constitution making no mention of a summary requirement or even an address requirement for those signing the petitions. *See* Me. Const. art. IV, pt. 3, § 18(2)("The date each signature was made shall be written next to the signature on the petition.").

The right of a small minority of the registered voters to trigger a statewide vote on a legislative proposal is important and must be treated with respect. As to that there is no disagreement. The point in this appeal, and in any other appeal like it, is that the Constitution is important and the legislation implementing the constitutional conditions is important. The Constitution does not make the right of "the people" absolute. The legislation that the Secretary has erroneously interpreted is not subject to any special handling. The conventional rules of statutory interpretation discussed above apply to

this statute like any other statute.

That said, even if the legislation is read skeptically or grudgingly, there is no rationale for concluding that the objective of the legislation is to reaffirm the rights of campaign activists to notarize the petitions. That is what the statute was enacted to stop. Nothing in the Maine Constitution precludes this legislation; and indeed, this statute assures that the Constitution is not flouted.

***b. The Maine Legislature has Authority to Restrict Who May Notarize Documents, Including Petitions***

It is within the Legislature’s purview to confer notarial authority and to set the parameters of that authorization. “It is universally held that a notary public has no such authority [to administer oaths] at common law. If he has such authority, it must be by statute.” *Holbrook v. Libby*, 113 Me. 389, 391, 94 A. 482, 483 (1915). The Maine Constitution dictates that a notary has a significant role in the initiative process but does not set the requirements and limitations of who may serve as a notary, because that authority is left to the Legislature’s delegative power. *See, id.*

The history of notaries is informative to the Court’s analysis here because the role of an American notary has always been to serve an objective verifier of information. For example, in colonial times notaries served an invaluable commercial function because both sides of a transaction “depended on them to be honest third parties in

reporting damage or loss to a ship's cargo.” Notary History, NATIONAL NOTARY ASSOCIATION, <https://www.nationalnotary.org/knowledge-center/about-notaries/notary-history> (last visited April 20, 2020). That tradition continues today, with a notary's impartiality being “universally expected.” Michael L. Closten & Trevor J. Orsinger, *Family Ties That Bind, and Disqualify: Toward Elimination of Family-Based Conflicts of Interest in the Provision of Notarial Services*, 36 Val. U.L. Rev. 505, 506 (2002)(internal citations omitted). The statute at issue carries forward that duty of objectivity because it prohibits a person serving as that third-party neutral from also providing other services that would call that objectivity into question.

Of course, legislative enactments assuring the integrity of the Constitutional principles must not unduly or impermissibly burden the exercise of the right to petition. *McGee*, 2006 ME 50, ¶ 23, 896 A.2d 933. This case is distinguishable from *McGee* because the Constitution itself requires the petitions to be signed by someone authorized to notarize. In *McGee*, the Law Court ruled that the Legislature could not impose any time rules that would have the effect of shortening the time for collecting and presenting signatures under the Maine Constitution. *See id.* ¶ 23(“To be sure, the Constitution does not explicitly *prohibit* or *allow* the establishment of a deadline.”)(*emphasis added*). The time limit reviewed in *McGee* was deemed an abridgment of the Constitutional right because it could have the effect of reducing the duration of the opportunity to together signatures. Here, however, the Constitution itself disqualifies petitions not notarized by an authorized person. The Legislature may,

indeed must, set the terms of the notary's authority and has done so in Chapter 418. The *McGee* Court expressly acknowledged that Section 18 of the constitutional text "reserves to the people the right to legislate by direct initiative *if the constitutional conditions are satisfied.*" *Id.* (emphasis added). This case is about the Secretary's failure to respect the statutory implementation of an essential constitutional condition.

Not insignificantly, in this very campaign, the Secretary has invalidated petitions on which there were forged signatures as to which the circulator gave a false oath to the notary. This does not mean that the notary's full independence does not matter. It underscores how important the notary's full independence is.

#### **IV. The Secretary's Power to Validate Petitions is Judicially Reviewable for Legal Error.**

Like the word "absolute," the word "plenary" has come to be all too casually used to overstate or exaggerate the authority of the Secretary or discourage effective judicial review of the Secretary's legal errors. The Secretary's authority is indeed broad and as a matter of primary jurisdiction is exclusive. It reaches to every aspect of the integrity of the process. The Law Court has held that the Secretary of State "has 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 *Opinion of the Justices*, 116 Me. 557, 580-82, 103 A. 761, 771-72 (1917)). It is a truism that it is the Secretary and no other State official who makes these determinations

with respect to the important, but not absolute, right of a small minority of the voters to put a question on the ballot. In many circumstances, but not this one, the Secretary has broad discretion and, when an exercise of discretion is under review, a deferential standard of review is obviously in order. Errors of law are not reviewed with the deference afforded discretionary rulings because the secretary has no discretion to ignore or misapply the law.

Review for error of law is what it says it is: review for error of law. Mischaracterizations of the Secretary's authority as "plenary" and the right of a small minority of the electorate as "absolute" introduce what has come to be recognized as a substantial error in framing the question. *See* DANIEL KAHNEMAN, *Frames and Reality*, *in* THINKING, FAST AND SLOW, 363-74 (Farrar, Straus and Giroux 2011).

It is an error to frame the inquiry before the Court as whether the Appellants can overcome the Secretary's "plenary" authority and/or somehow undermine the "absolute" right of the voters to put questions on the ballot. The correct framing of the question before the Court is whether the Maine Constitution and the implementing legislation, concerning a fundamental matter of ballot integrity, have been respected by the Secretary. The Maine Constitution requires that a notary take the oath of every circulator. In the fulfillment of that Constitutional requirement, Chapter 418 clearly determines that a notary with a conflict of interest is not a qualified person. The Skidmore and Flumerfelt petitions must be rejected as a matter of statutory and constitutional law.

## V. The Maine Constitution Does Not Violate the Federal Constitution in Prescribing Procedural Conditions for Initiative Petitions

Significantly, the Secretary has raised no constitutional questions. Proponents of the initiative, however, have contended that it violates the First Amendment of the U.S. Constitution for the State of Maine to require integrity in its notaries. This is so, apparently, because requiring notaries to comply with reasonable professional conditions in their exercise of their public responsibilities is somehow limiting the free speech of the Maine voters who want this question on the ballot.

First, Chapter 418 does not restrict or even speak to the exercise of the constitutionally protected liberty of advocacy or speech on the part of any supporter of these petitions or this initiative. All these process rules are content-neutral and silence nobody. A statute requiring integrity in the notarization process is not a constitutionally impermissible limitation on any signer's freedom to speak, and not only because it is utterly unconnected to any content-based motive, purpose, or effect. Therefore, strict scrutiny does not apply. The rigorousness of the inquiry depends upon the extent to which a challenged regulation burdens First Amendment rights. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). *See Me. Taxpayers Action Network*, 2002 ME 64, ¶ 20, 795 A.2d 75. Here there is no burden on the signers or others behind this Initiative.

Because there is no burden on any proponent, it is not necessary to detail the multiple precedents that reject the constitutional arguments advanced. Nevertheless,

the following illustrate the weight of authority. Section 903-E does not limit or restrict the “number of voices who will convey the initiative proponents’ message.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 194 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)), nor does it significantly limit the number of people who may serve in a signature gathering campaign, and therefore does not “limit the size of the audience the proponents can reach.” *Hart v. Sec’y of State*, 1998 ME 189, ¶ 11, 715 A.2d 165, 168. Moreover, there is a compelling state interest in ensuring the integrity of the initiative process. *Doe v. Reed*, 561 U.S. 186, 197 (2010). “The State’s interest in preserving the integrity of the electoral process is undoubtedly important,” and therefore the State has “considerable leeway to protect the integrity and reliability of the initiative process.” *Id.* This interest is not hypothetical. The Legislature enacted Chapter 418 in response to many recent incidents of questionable or seriously improper notary activities.

Alternatively, if it is the notaries who are complaining about their own constitutional liberties, there are two responses. The first is that no one has either a fundamental right or any obligation to be a notary. Seeking and accepting appointment to perform this important public function may reasonably come with certain judicious restrictions on one’s other activities. Election officials or other public officials can be subject to some neutral and general speech restrictions. For example, election officials at polling places cannot wear any campaign buttons. 21-A M.R.S. § 682 (2019). Notaries are not subject to all the ethical rules and norms that limit political activities

or organizational affiliations of judges. For example, consider M. Code Jud. Conduct R. 3.6 (making it impermissible for a judge to affiliate with a discriminatory organization, which is a First Amendment liberty of any other citizen). But a notary's independence may reasonably be required in the performance of official election-related work.

The second point is that any burden on any notary is too ephemeral and optional to be deemed constitutionally excessive under the circumstances. Any notary may elect to participate vigorously in any initiative petition campaign, but not notarize petitions. Any notary may elect to notarize petitions but otherwise abstain from participating in the campaign in any way. This choice is much too trivial a "burden" to justify the enthusiastic constitutional arguments presented in the filings. It is surely not a great enough burden on any liberty to nullify reasonable state laws regulating only notaries in this minor and conditional manner to protect the integrity of the constitutional initiative process.

**VI. The Secretary's Legal Error is Sufficient to Disqualify the Petitions But it is Not the Only Reason.**

The Chamber has chosen to focus its attention on the Secretary's error of law which, as a matter of law, disqualifies this Initiative from being submitted to the voters under the Maine Constitution's provisions for initiated legislation. The acknowledged

forgeries and fraud, and the Secretary's recognition or not of those issues, notwithstanding his "plenary" authority, are additional reasons to reject the Secretary's Amended Determination. By focusing its energy on the legal error, the Chamber does not mean to imply any lack of agreement with the Petitioner or IECG concerning other issues. Indeed, because there is a solid foundation for rejecting the Secretary's Amended Determination in his error of law, this is an opportunity for the Court to make a strong statement with respect to forged signatures, and insufficient or incomplete investigations after it has been made clear that forgeries and fraud have occurred.

## **CONCLUSION**

The Maine Constitution provides for the direct initiation of legislation subject to certain procedural conditions and requirements. That is an important right that is entitled to great respect, but it must be exercised in accordance with the requirements and conditions of the Constitution as implemented by the Legislature in statutory law. It is more important than ever to be clear-eyed and sure-footed in the neutral and straightforward interpretation of the legal requirements, and their application to the facts as disclosed by the evidence. It is now common for well-funded interest groups, often dominated by interests far away from Maine, to seek to enact legislation favorable to their economic wellbeing by the initiative process in the Maine Constitution. It is

neither necessary nor appropriate for the Secretary or any reviewing Court to be naïve about the proliferation of such initiatives. Vocabulary about the “absolute” right of “the people” needs to be retired or at least moderated to recognize that there never has been a petition signed by all the people. The requirement is for a number of currently registered voters equal to only ten percent of the votes cast in the last gubernatorial election to *properly* sign a *legally valid* petition. The rest of “the people” including, significantly, those who have refused to sign, or who would not have signed if asked, and who often troop to the polls to defeat these questions, are entitled to the neutral and effective application of the law. It is no casual or cost-free or friction-free act of administrative or judicial generosity to put on a ballot a question which is not legally entitled to be there. These campaigns cost money. They take civic energy away from other issues. It is acknowledged that the Chamber is opposed to the objective of this initiative, but the more important point for the Chamber is that these laws must always be scrupulously respected and enforced.

Cited above are many multiple well-reasoned opinions of the Law Court and other Courts concerning the proper professional interpretation of legislative language to ascertain the meaning of a statute to achieve its objective. Those well-settled principles, rules, and norms of proper statutory interpretation on this record require that the Secretary’s Amended Determination be rejected because the notaries violated the law and therefore violated the constitutional condition necessary to put this question on the ballot.

The Secretary's undoubted and broad discretion has nothing to do with this issue. There is no occasion for deferential review of the Secretary's interpretation of this statute because he has no specialized expertise in statutory construction and the statute does not implicate technical or scientific matters as to which the secretary knows more than the judges. An evenhanded application of the settled principles of statutory interpretation to the words, the structure, the context, and the history of this legislation, in light of its clear objective, refutes the premise of any ambiguity and precludes any recourse to any deference to the Secretary in resolving it. Deference is due to the Constitutional requirement of disinterested notaries and the legislation faithfully implementing that requirement. Respect for the constitutional requirement and the Legislature's reinforcement of it leaves no alternative but to reverse the Secretary's Amended Determination.

Respectfully submitted this 23<sup>rd</sup> day of April 2020.



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