

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-20-126

DELBERT A. REED, MAINE STATE CHAMBER OF COMMERCE, and
INDUSTRIAL ENERGY CONSUMER GROUP

Appellants

v.

SECRETARY OF STATE MATTHEW DUNLAP, in his capacity of Secretary of
State for the State of Maine, MAINERS FOR LOCAL POWER PAC, and
NEXTERA ENERGY RESOURCES, LLC

Appellees

On Appeal from Business and Consumer Court
Docket No. BCD-AP-20-02

BRIEF OF APPELLANT DELBERT A. REED

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INTRODUCTION

This case calls upon the Court to safeguard the integrity of Maine’s direct initiative process by enforcing anti-corruption legislation enacted by the Legislature. After the Secretary of State found recent direct initiative campaigns to be plagued by misconduct, the Legislature adopted two statutes in 2018—4 M.R.S. § 954-A and 21-A M.R.S. § 903-E—that prohibit a notary public from both notarizing petition sheets for a direct initiative campaign and serving the interests of that campaign in any other way. By enacting these laws, the Legislature intended to eliminate the conflict of interest that arises where a state official vested with legal authority over a direct initiative, also initiates or promotes the same direct initiative.

The Secretary found Leah Flumerfelt and Brittany Skidmore provided notarial and non-notarial services to the initiative campaign. Nevertheless, the Secretary of State failed to enforce 4 M.R.S. § 954-A and 21-A M.R.S. § 903-E when he validated the signatures each notarized, just as he refused to investigate the fraudulent misconduct present in the campaign. The Court should reverse these errors, reverse the determination by the Secretary of State, and hold the proposed initiative invalid under article IV, part 3, section 18, clause 2 of the Maine Constitution.

STATEMENT OF FACTS

The NECEC Project. The New England Clean Energy Connect Project (“NECEC Project”) is a high voltage direct current transmission line that will bring 1,200 megawatts of clean hydropower from Quebec and into the Maine and Northern

New England power grid. *See NextEra Energy Res., LLC v. Pub. Utils Comm'n*, 2020 ME 34, ¶¶ 1, 3, -- A.3d --. The NECEC Project will lower the cost of electricity in Maine and across the New England region, and remove upwards of 3.6 million metric tons of carbon emissions annually from the Earth's atmosphere by decreasing reliance on fossil fuels. *Id.* ¶ 38 n.6. The Maine Public Utilities Commission ("MPUC") found the NECEC Project to be in the public interest, and approved it in a 100-plus page order recently affirmed by the Court, but out-of-state electric generators that burn fossil fuels oppose the project because it will reduce reliance on the more expensive and dirtier electricity they produce. *Id.* ¶¶ 5 n.5, 10, and 43.

The Petition. In August 2019, opponents of the NECEC Project applied to the Secretary to commence a direct initiative for legislation aimed at blocking the NECEC Project. *See* R.51.¹ The opponents entitled the initiative "An Act to Reject the New England Clean Energy Connect Transmission Project"; as drafted, the legislation would direct the MPUC to reverse its approval of the project, and thereby also reverse the outcome of this Court's final judgment affirming the MPUC order.

Id. On October 18, 2019, the Secretary approved a form petition sheet, and opponents of the project began circulating petitions sheets for signatures. *See* App.284. At the same time, the Secretary issued "Instructions to Petition Organizers

¹ Petitioner will use the citation "App.[page number]" to identify documents set forth in the Appendix, and "R.[item number]" to identify documents that appear only in the Administrative Record. An index of the Administrative Record can be found at App.154.

for Initiative Petitions,” which, without limitation, states a notary public may not both administer a circulator’s oath and serve the campaign in another fashion. App.281.

The Signature Gathering Campaign. Proponents of the Petition sought and obtained signatures on petition sheets between October 2019 and January 2020. *See* R.33 (Secretary’s “Master List of Petitions,” showing dates of petitions sheets). In or around December 2019, Intervenor Mainers for Local Power PAC (“MLP”), a political action committee funded by the out-of-state fossil fuel industry to oppose the NECEC Project, hired an out-of-state political consultant, Revolution Field Strategies (“RFS”), to marshal paid circulators and other individuals to collect signatures in support of the Petition. *See* App.200, 273. MLP hired RFS despite RFS’s checkered history with respect to signature forging. *See* App.202, 251. MLP and RFS’s signature gathering campaign featured a number of troubling irregularities, including violations of Maine notary public law and apparent criminal misconduct, as follows:

Notarial misconduct. RFS hired individuals to notarize petition sheets who violated one or more notarial laws, either by providing non-notarial services to the campaign or by failing to perform basic notarial duties. Specifically:

- Leah Flumerfelt’s father, John Flumerfelt², recruited Flumerfelt to assist

² John Flumerfelt played an active role as a “funder” of the signature gathering campaign who “gave support and encouragement, and provided food and beverages for staff.” App.170. John Flumerfelt also serves as an executive with Calpine, one of the fossil fuel generators opposed to the NECEC Project and an active participant in the regulatory proceedings concerning the Project, and the Principal Officer of Intervenor Mainers for Local Power PAC. *See, e.g.,* Central Maine Power Company Request for Approval of CPCN for the New England Clean Energy Connect Construction of 1,200 MW HVDC Transmission Line from

the signature gathering campaign as a circulator. *See* App.182 at ¶ 3. Flumerfelt agreed to join the signature gathering campaign in that capacity and, to fulfill her obligation, reported for duty “to start work canvassing.” *Id.* at ¶ 4. RFS designated Flumerfelt as a paid circulator in its internal personnel system. *See* App.201 at ¶ 9. After she took these steps to act as a paid circulator, RFS learned Flumerfelt maintained a notary public commission and temporarily tasked her with notarizing petition sheets. *See* App.182 at ¶ 4. Flumerfelt reverted back to providing non-notarial services over the course of January 24-25, 2020. *See id.* at ¶ 11; App.147. On February 3, 2020, after Flumerfelt concluded all of her work on the campaign and after RFS knew it had employed Flumerfelt to provide both notarial and non-notarial services, RFS designated her as a paid circulator in a filing submitted to the Secretary pursuant to 21-A M.R.S. § 903-C. *See* App.273-75. Only after this litigation began did RFS first claim, free of the threat of cross-examination, that it erred when it designated Flumerfelt as a paid circulator. *See* App.201 at ¶ 9. Flumerfelt notarized petition sheets containing 3,997 signatures found valid by the Secretary.³

Quebec-Maine Border to Lewiston (NECEC), MPUC Docket No. 2017-00232, Transcript for Hearing on Stipulation at 73:14-75:15 (March 7, 2019) (Mr. Flumerfelt testifying for Calpine against the NECEC Project); Commission on Gov’t Ethics and Election Practices, 2019 Registration: Political Action Committee, Filing of Mainer for Local Power (Dec. 19, 2019), *available at* <https://www.mainecampaignfinance.com/#/exploreCommitteeDetail/356331>.

³ In connection with his initial determination concerning the validity of the Petition, the Secretary created the “Master List” Excel spreadsheet appearing at R.33, from which the precise number of valid and invalid signatures notarized by each notary public could be quantified. The Secretary did not create a similar “Master List” in connection with his April 1, 2020, determination. Petitioner reviewed the record evidence and determined the number of signatures Flumerfelt and Skidmore notarized and which the Secretary found valid in his April 1, 2020, determination. *See* App.4 (4/6/20 submission). During the proceedings below, no party

- Brittany Skidmore served as the “principal notary” for the campaign between December 17, 2019, and January 23, 2020. App.170. Despite this status, Skidmore failed to follow relevant law when, throughout December 2019, she did not administer the circulator’s oath to each circulator who presented her with a petition, ask each circulator for his or her identification, or keep a log book. *See* App.149, 169. Skidmore simply notarized stacks of petitions sheets, often without the circulator even being present. *See* App.169. Skidmore also undisputedly provided non-notarial services to the campaign in January, by revising and amending petition sheets. *See* App.149, 170. The Secretary invalidated the 1,873 signatures Skidmore notarized through January 2, 2020, but validated 8,479 additional signatures Skidmore notarized.

- Wesley Ryan Huckey works for the City of Augusta, but took a second job to work for RFS at the Augusta headquarters of the signature gathering campaign. *See* App.147 at ¶ G, 177. Huckey notarized petition sheets for the campaign, and also provided non-notarial services by ferrying petition sheets from the Augusta city offices to the Augusta office of the signature gathering campaign. *Id.* The Secretary declined to invalidate the signatures Huckey notarized after finding he committed a “de minimis” violation of the statute. App.147.

disputed Petitioner’s totals and Intervenor NextEra Energy Resources, LLC (“NextEra”) acknowledged that Flumerfelt and Skidmore each notarized more valid signatures than the current margin of 3,050 signatures. *See* App.5 (4/7/20 submission by NextEra at 15 n.10).

- David McGovern, Sr. and Michael Underhill each circulated petition sheets for the signature gathering campaign and acted as notaries public, in direct contravention of Section 903-E. *See* App.147 at ¶¶ E-F. The Secretary rightly invalidated the 179 signatures appearing on the petitions sheets they notarized.

Fraud and forgery. Proponents of the Petition submitted plainly forged signatures. Petition sheet no. 743 purports to reflect the names and signatures of Warren Winslow and Nina Fisher. *See* App.268. Neither person signed the petition sheet, however, and both support the NECEC Project and oppose the Petition. *See* App.254-58. The nature of those forgeries reflects a systematic effort to pad the Petition's signature count, as, in both instances, the forger or forgers made an effort to use addresses associated with Winslow and Fisher. *See id.* The same circulator responsible for petition sheet no. 743, Megan St. Peter, also circulated petition sheet no. 8153, which also reflected indicia of forgery. *See* App.250.

Prior to the Secretary's Amended Determination, Petitioner provided the Secretary with information learned from a whistleblower⁴ that an RFS supervisor named Melissa Burnham knew of the fraud associated with the petition sheets St. Peter circulated, but submitted those sheets to local registrars and the Secretary anyway, implicating RFS in a broader scheme. *See* App.231-32. During the proceedings below, MLP appeared to confirm its knowledge of the forged signatures.

⁴ Petitioner offered to provide the Secretary with the whistleblower's name and contact information, but the Secretary never sought the information. *See* App.231-32.

App.5 (4/7/20 MLP submission at 17 n.9 (“Megan St. Peter ... was fired for possible signature fraud.”)). The Secretary refused to investigate any of the foregoing information, and opposed Petitioner’s motions to do the same.

The Secretary’s Review. Proponents of the Petition submitted 15,785 petition sheets containing 82,449 alleged signatures to the Secretary on February 3, 2020. *See* R.45. Pursuant to 21-A M.R.S. § 905, the Secretary then had 30 days to review the petition sheets to determine whether they contained the 63,067 valid signatures required by the Maine Constitution. *See* Me. Const. art IV, pt. 3, § 18, cl. 2 (requiring signatures in number equal to 10% of voters in last gubernatorial election). During the Secretary’s review, the Secretary received information identifying, among other things, notaries, including Skidmore and Flumerfelt, who provided non-notarial services for the signature gathering campaign. *See* App.48-143. The Secretary rendered an initial determination concerning the validity of the Petition on March 4, 2020 (the “Initial Determination”), wherein he found 12,735 signatures invalid and 69,714 valid. *See* App.142. The Secretary stated his inability to consider the information concerning Flumerfelt and Skidmore, and noted his findings did not reflect any judgment with respect to that information. *See* App.143 at n.1.

Initial Superior Court Proceedings. Petitioner commenced this action on March 13, 2020, by filing a petition for review of the Secretary’s decision pursuant to 21-A M.R.S. § 905, M.R. Civ. P. 80C, and the Maine Administrative Procedures Act (“APA”). At the outset of the Superior Court proceedings, Petitioner moved to take

additional evidence through deposition notices and document requests served via subpoena on relevant witnesses, including Skidmore, Flumerfelt, and St. Peter. The Secretary and MLP opposed Petitioner's request to use discovery tools to gather evidence. App.2 (3/21/20 submissions). Although the Secretary supported the Court remanding the proceedings for further consideration, he opposed any requirement that he consider the evidence of fraud. App.2 (3/21/20 submission by Secretary). The Court ruled the Secretary had the "power and obligation to investigate all issues material to the validity of the petitions," and remanded the matter to him for additional fact finding, without specifying the focus of that effort (the "Remand Proceedings"). App.38.

Remand Proceedings. During the Remand Proceedings, Petitioner submitted letters and exhibits to the Secretary detailing evidence on matters then-described both as "extrinsic" to the petition sheets (*e.g.*, evidence concerning non-notarial services by notaries and fraud) and "intrinsic" to the petition sheets (*e.g.*, duplicate signatures). *See* App.163-68, 231-46, 249-68; R.17; R.19; R.25. Petitioner urged the Secretary to use all of the powers at his disposal to thoroughly investigate the validity of the Petition, and the evidence of fraud specifically, by issuing subpoenas and holding evidentiary hearings. *Id.* The Secretary used none of these tools, confining his investigation to voluntary, unsworn interviews and statements from notaries, and refusing to investigate the fraud. The Secretary did not attempt to contact St. Peter, Burnham, or

the RFS principal who submitted an affidavit to the Secretary that studiously avoided addressing any of the evidence of fraud. *See* App.149-50.

The Amended Determination. The Secretary issued his Amended Determination on April 1, 2020. *See* App.144. With respect to notarial misconduct, the Secretary found that both Flumerfelt and Skidmore provided non-notarial services to the petition campaign within the meaning of Section 903-E. *See* App.147-49. The Secretary nonetheless declined to invalidate any of their signatures on this basis because Flumerfelt and Skidmore purportedly provided non-notarial services only after they provided notarial services. *Id.* With respect to fraud, the Secretary invalidated all of the signatures gathered by St. Peter, but—consistent with his refusal to conduct any investigation into fraud—took no further action. *See* App.149-50. Finally, the Secretary invalidated more than a thousand additional signatures that violated Maine law in one respect or another. *See* App.161-62. Whereas the Secretary’s Initial Determination found a margin of 6,647 signatures, his Amended Determination found a margin of 3,050 signatures. *Compare* App.143 *and* App.152.

Subsequent Superior Court Proceedings. Immediately after the Secretary issued the Amended Determination, Petitioner again moved the Superior Court to allow Petitioner to take additional evidence on the issue of fraud. *See* App.4 (4/2/20 Petitioner submission). The Secretary again opposed this request and the Court

denied it. App.29-32. After briefing, the Superior Court affirmed the Secretary's Amended Determination.⁵ App.8-28.

STATEMENT OF ISSUES

This appeal presents the following issues:

1. Whether the Secretary erred as a matter of law by applying an interpretation of Section 903-E that conflicts with the statute's plain language, statutory scheme, and legislative intent, and subsequently by failing to invalidate the signatures Flumerfelt and Skidmore notarized.
2. Whether the Secretary erred as a matter of law by failing to apply his own interpretation of Section 903-E to Flumerfelt, who, prior to administering circulators' oaths to the signature gathering campaign, agreed to provide non-notarial services as a petition circulator, took steps to fulfill that promise, and otherwise demonstrated her allegiance to the campaign.
3. Whether the Secretary abused his discretion, and acted arbitrarily and capriciously, when he refused to conduct any investigation into the undisputed evidence of fraud in the signature gathering campaign.

⁵ The Superior Court's order includes dicta that the parties had "agree[d]" that any constitutional challenge to the Initiative "would not be ripe unless the measure is placed on the ballot and approved by Maine voters." App.9. Petitioner objects to and disagrees with that statement, which does not accurately reflect the statements on this issue made to the Court by Petitioner's counsel. Petitioner had no opportunity to seek to correct the Superior Court's error prior to filing the notice of appeal, given statutory deadlines and the limited schedule for the Business and Consumer court during the COVID-19 pandemic. *See* 21-A M.R.S. § 905(3). In any event, this Court will not be called upon to consider constitutional issues regarding the scope of the initiative power if it reverses the Amended Determination and finds the Petition invalid.

SUMMARY OF THE ARGUMENT

The Court should reverse the Amended Determination and invalidate the Petition for the following reasons:

First, the Secretary erred as a matter of law by failing to apply Section 903-E and accordingly invalidate the signatures notarized by Flumerfelt and Skidmore, both of whom undisputedly provided both notarial and non-notarial services to the signature gathering campaign. The Secretary's purported interpretation of Section 903-E does not comport with the plain language of the statute or its overall statutory scheme, contravenes the legislative intent, and ultimately reflects an *ad hoc* approach to enforcement that cannot be reliably applied in the future. As the statute meets all federal and state constitutional requirements by addressing the compelling state interest of preventing notaries from engaging in improper conflicts of interest, the Court should reverse the Secretary's decision.

Second, the Secretary erred as a matter of law by failing to apply his own reading of Section 903-E to the signatures Flumerfelt notarized. The Secretary posits a reading of the statute that would require him to invalidate a notary's signatures where that notary provided non-notarial services before she administered circulators' oaths for the same campaign. But Flumerfelt did exactly that when she agreed to serve as a paid signature gatherer for the campaign, and took steps to act in support of the campaign, before she served as a notary public.

Third, the Secretary abused his discretion and acted arbitrarily and capriciously

by failing to take any steps to investigate the fraudulent signatures submitted by the proponents of the Petition.

ARGUMENT

I. The Court reviews the Secretary’s legal conclusions *de novo* and interprets Maine statutes to give effect to their legislative intent.

A. The Court reviews the Secretary’s decision directly.

Section 905 of Title 21-A governs Petitioner’s challenge to the Secretary’s decision and requires the action to “be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C.” 21-A M.R.S. § 905(2). The Superior Court accordingly applied the standards of Rule 80C and the APA, 5 M.R.S. § 11001 *et seq.*, to review the Secretary’s decision. *See* App.16-17. Under Rule 80C and the APA, reversal or modification of the agency order is appropriate if it is “(1) [i]n violation of constitutional or statutory provisions; (2) [i]n excess of the statutory authority of the agency; (3) [m]ade upon unlawful procedure; (4) [a]ffected by bias or error of law; (5) [u]nsupported by substantial evidence on the whole record; or (6) [a]rbitrary or capricious or characterized by abuse of discretion.” 5 M.R.S. § 11007(4)(C). Thus, the Secretary’s decision is reviewed “for an abuse of discretion, error of law, or findings not supported by the evidence.” *Dyer v. Superintendent of Ins.*, 2013 ME 61, ¶ 11, 69 A.3d 416.

“Questions of law are subject to *de novo* review.” *Doe v. Dep’t of Health & Human Servs.*, 2018 ME 164, ¶ 11, 198 A.3d 782. An agency abuses its discretion if it

“exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and governing law.” *Stein v. Maine Criminal Justice Acad.*, 2014 ME 82, ¶ 16, 95 A.3d 612 (internal quotations omitted). A decision is arbitrary or capricious if it is “willful and unreasoning and without consideration of facts or circumstances.” *Dyer*, 2013 ME 61, ¶ 23, 69 A.3d 416.

The Superior Court acted only as an intermediate appellate court with respect to the Secretary’s decision and thus the Law Court reviews the Secretary’s decision directly, employing the Rule 80C standards set forth above and without deferring to the Superior Court. *See* 21-A M.R.S. § 905(3) (“The standard of review [in the Law Court] shall be the same as for the Superior Court.”); *McGee v. Sec’y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933 (“Because the Superior Court acted as an intermediate appellate court, we directly review the Secretary of State’s decision.”).⁶

B. When interpreting a statute, the Court must carry out the Legislature’s intent.

The central issue in this case concerns the interpretation of Section 903-E and calls on the Court to apply the canons of statutory interpretation outlined in detail in *Dickau v. Vermont Mut. Ins. Co.*, 2014 ME 158, 107 A.3d 361. There, the Court held

⁶ Throughout the proceedings below, MLP urged a radical interpretation of both the Secretary’s and the judiciary’s role under 21-A M.R.S. § 905. MLP argued that the Superior Court and the Secretary violated the Maine Constitution with respect to their authorization of and participation in the Remand Proceedings, and also argued that the Law Court consistently has erred in applying traditional Rule 80C standards of review to proceedings brought under Section 905. The Secretary’s briefing below rejected these novel interpretations of Section 905, as did the Superior Court, and they directly contravene both Section 905 and long-standing Superior Court and Law Court precedent. *See, e.g., Birks v. Dunlap*, No. BCD-AP-16-04, 2016 WL 1715405, at *12 (Me. B.C.D. Apr. 8, 2016) (remanding proceedings to Secretary); *Knutson v. Sec’y of State*, 2008 ME 124, ¶ 8, 954 A.2d 1054 (applying 80C standard to Section 905 proceedings).

that when interpreting a statute the “single goal is to give effect to the Legislature’s intent in enacting the statute.” *Id.* ¶ 19. In pursuing that goal, the Court seeks a plain language interpretation, which “should not be confused with a literal interpretation.” *Id.* ¶ 20. Statutory interpretation does not involve mechanically applying grammatical rules and, indeed, the Court will “ignore the literal meaning of a statute when it thwarts the clear legislative objective.” *Id.* (quoting *Doe v. Reg’l Sch. Unit 26*, 2014 ME 11, ¶ 15, 86 A.3d 600) (emphasis added). Giving life to the Legislature’s intent remains the Court’s sole focus, and it interprets a Maine statute by taking into account the statute’s subject matter, purpose, and the consequence of a particular interpretation. *Id.* ¶ 21. The Court will reject a proposed interpretation of a statute that runs counter to the public’s interest and would be, among other things, illogical or unreasonable. *Id.* The Court has adhered to these principles consistently. *See, e.g., State v. Blum*, 2018 ME 78, ¶ 10, 187 A.3d 566 (same principles).

For a statute to be ambiguous, it must be “reasonably susceptible to different interpretations.” *NextEra Energy Res., LLC*, 2020 ME 34, ¶ 22, --- A.3d ---.

Purported claims of ambiguity do not suffice: “A statute is not ambiguous simply because a court must exercise its function to interpret the statute’s plain meaning.” *Brooks v. Carson*, 2012 ME 97, ¶ 19, 48 A.3d 224. The Court will not defer to an agency’s interpretation of a statute “if the plain language ... compel[s] a contrary result.” *Lippitt v. Bd. of Certification for Geologists & Soil Scientists*, 2014 ME 42, ¶ 17, 88 A.3d 154 (brackets added). Even where a statute is found to be ambiguous in an

administrative law context, the agency’s interpretation of the statute must give way to the Legislature’s intent. *See Houlton Water Co. v. Pub. Utils. Comm’n*, 2014 ME 38, ¶ 33, 87 A.3d 749 (refusing to defer to MPUC’s interpretation of a statute where it ran “completely contrary” to the statute’s goals). Ultimately, the Court “must take pains to avoid an overly simplistic or overly broad” interpretation of a Maine statute, such as might lead to an interpretation that “wreaks havoc on, rather than preserves, the Legislature’s intent.” *Dickau*, 2014 ME 158, ¶ 23, 107 A.3d 361.

These standards apply equally in the context of a direct initiative. The State must “protect[] the integrity of the initiative process” to ensure the process is not undermined by fraud and remains meaningful. *Hart v. Sec’y of State*, 1998 ME 189, ¶ 13, 715 A.2d 165. The Legislature thus has “considerable leeway in the regulation of the initiative process.” *Me. Taxpayers Action Network (“MTAN”) v. Sec’y of State*, 2002 ME 64, ¶ 8, 795 A.2d 75; *see also* Me. Const. art. IV, pt. 3, § 22. Traditional canons of interpretation therefore apply to statutes regulating the direct initiative process. *See, e.g., McGee*, 2006 ME 50, ¶ 18, 896 A.2d 933 (interpreting statute according to its plain language). The Court never has adopted the notion that legislation regulating an initiative must be construed narrowly.⁷ *See id.* (citing, but not adopting, language from Michigan case). Nor should it, given that laws protecting the integrity of the initiative

⁷ By contrast, the Court construes constitutional provisions, rather than statutes, “liberally” so as “to facilitate, rather than handicap, the people’s exercise of their sovereign power to legislate.” *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983). Constitutional provisions are subject to such interpretive principles because, unlike statutes, “they are expected to last over time and are cumbersome to amend.” *Id.*

process in fact *promote* the people’s exercise of that right by preventing fraud and enhancing legitimacy of direct initiatives.

II. The Secretary erred when he adopted an unreasonable interpretation of Section 903-E that contravenes the clear legislative intent.

Section 903-E prohibits a notary public from both administering circulators’ oaths for a signature gathering campaign and also “providing any other services, regardless of compensation, to initiate the direct initiative” or “providing services other than notarial acts, regardless of compensation, to promote the direct initiative.” The Secretary correctly found that Flumerfelt and Skidmore acted as notaries for the campaign by administering circulators’ oaths and also provided the campaign non-notarial services. The Court need go no further to find a violation of Section 903-E. The plain language, statutory scheme, and legislative history show the Secretary erred when he failed to interpret and apply Section 903-E in this fashion.

A. Notaries public serve a crucial role in the direct initiative process.

The Maine Constitution, in Article IV, Part Third, Sections 18 through 22, prescribes the direct initiative process, including by granting powers to the Legislature to regulate and administer that process. *See* Me. Const. art. IV, pt. 3, § 22 (“The Legislature may enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions.”). In practice, the process unfolds as follows: signature gathering campaigns deploy petition circulators to take petition sheets out to street corners and obtain wet ink signatures from Maine

voters. The campaigns and their circulators are largely on their honor to gather signatures lawfully, as no election official is present to monitor compliance with the numerous constitutional and statutory provisions governing the process. *See, e.g.*, 21-A M.R.S. § 902 (incorporating requirements of 21-A M.R.S. § 354 that only the voter may affix his or her signature). The Maine Constitution thus requires each circulator to swear an oath “as to the authenticity of the signatures” and “that to the best of the circulator’s knowledge and belief each signature is the signature of the person whose name it purports to be.” Me. Const. art. IV, pt. 3, § 20.

To give the circulator’s oath the force of law, the Maine Constitution requires it “to be sworn to in the presence of a person authorized by law to administer oaths.” *Id.* The Legislature has granted such authority to notaries public. *See* 21-A M.R.S. § 902 (“[t]he circulator of a petition must sign the petition and verify by oath or affirmation before a notary public ... that the circulator personally witnessed all of the signatures”). The office of notary public is established by Chapter 19 of Title 4—the same title that regulates the judiciary, lawyers, referees, and guardians ad litem—and entrusted with “powers usually reserved for a court, such as the authority to administer oaths.” Michael L. Clozen and G. Grant Dizon III, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. Rev. 873, 873 (1992). To ensure notaries public discharge their duties free of conflicts of interest, Maine imposes various restrictions on notarial conduct, such as prohibiting

notaries from performing notarial acts for family members or in the context of certain financial relationships. *See* 4 M.R.S. §§ 954-954-A.

The notary public thus serves a crucial role in Maine’s direct initiative process as the only public official who interacts directly with petition circulators and demands they attest to the authenticity of the signatures they gather.

B. The history and statutory scheme of Section 903-E demonstrate the Legislature’s intent to eliminate conflicts of interest.

In 2018, consistent with the State’s compelling interest in preventing notarial misconduct, the Legislature enacted L.D. 1865, “An Act to Increase Transparency in the Direct Initiative Process,” which enacted Section 903-E and added additional complementary conflict of interest provisions to 4 M.R.S. § 954-A. L.D. 1865’s history shows the Legislature’s intent to eliminate the conflict that arises where a notary performs both notarial and non-notarial duties for the same petition campaign.

L.D. 1865 resulted from recent episodes of misconduct identified in the direct initiative process. In 2016, the Secretary refused to validate petitions for direct initiatives submitted for marijuana legalization and a York County casino because of improper notarial conduct. *See Birks v. Dunlap*, BCD-AP-16-04, 2016 WL 1715405, at *2 (Bus. & Consumer Ct. Apr. 8, 2016); *Greenlaw v. Dunlap*, BCD-AP-16-05 (Bus. & Consumer Ct. Apr. 7, 2016). In both instances, the Secretary invalidated a significant number of signatures notarized by Stavros Mendros, whose firm also had been hired by proponents of both initiatives to collect signatures. *See id.* The Secretary

determined Mendros was not performing his duties as a notary: “It was clear just by looking at the documents that somebody had a stack of petitions and somebody was just notarizing them.” Matt Byrne and Steve Mistler, *York County casino campaign appeals decision preventing ballot question*, Portland Press Herald, Mar. 11, 2016.

In response to the Mendros controversy, the Legislature in 2017 enacted broad legislation to prevent notaries from providing notarial and non-notarial services to the same campaign. *See* P.L. 2017, ch. 277 § 5. The 2017 legislation prohibited a notary public from, among other things, “providing services or offering assistance to a ballot question committee ... for any purpose other than notarial acts.” 21-A M.R.S. § 903-D (2017), *repealed by* P.L. 2017, ch. 418, § 2. The Secretary opposed the breadth of the 2017 law, and, in 2018, submitted a bill that proposed to delete the words “or offering assistance” from the language of then-Section 903-D. *See* L.D. 1726, § 19 (128th Legis. 2018). The Secretary objected to the phrase “offering assistance” because it swept in notaries who provided non-notarial services on a purely volunteer basis, unlike Mendros, who had been paid. *An Act to Amend the Laws Governing Elections: Hearing on L.D. 1726* Before the J. Standing Comm. on Veterans & Legal Affrs., 128th Legis. (2018) (testimony of Julie Flynn, Deputy Secretary of State). The Secretary also questioned the phrase “providing services,” which he argued was overly broad and would exclude notaries from any other aspect of the signature gathering campaign. *Id.*

The Legislature not only declined to enact the Secretary’s proposed legislation,⁸ it instead adopted *even broader* legislation that expanded on the prohibitions in Section 903-D. The new bill, L.D. 1865, repealed 21-A M.R.S. § 903-D and replaced it with Section 903-E. *See* P.L. 2017, ch. 418. By doing so, the Legislature stripped notaries of the authority to notarize petition sheets if they provided any other services to the signature gathering campaign, whether on a paid or a volunteer basis. *See* 21-A M.R.S. § 903-E (inclusion of the words “regardless of compensation”). Section 903-E removed the previous language in Section 903-D barring notaries from notarizing petitions only if they work for a petition organization (Section 903-D(A)), work for a ballot question committee (Section 903-D(B)) or hold a position of authority in the ballot question committee organizing the direct initiative (Section 903-D(C)). L.D. 1865 also added complementary language to 4 M.R.S. § 954-A making it a conflict of interest for notaries to notarize petition sheets for initiative campaigns for which they also provided non-notarial acts. *See* 4 M.R.S. § 954-A (“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 ... if the notary public also provides services that are not notarial acts to initiate or promote that direct initiative ...”).

⁸ The Secretary’s bill “died” between the House and Senate, but only after the Veterans and Legal Affairs Committee stripped the Secretary’s proposed changes to the notary law from the legislation. *See* Comm. Amend. A to L.D. 1726, No. H-683 (128th Legis. 2018); Comm. Amend. B to L.D. 1726, No. H-684 §§ 11, 12 (128th Legis. 2018).

C. Section 903-E prohibits a notary providing both notarial and non-notarial services to the same signature gathering campaign.

Section 903-E prohibits a notary public from “providing any other services, regardless of compensation, to initiate the direct initiative” or “providing services other than notarial acts, regardless of compensation, to promote the direct initiative” if that notary public also performs notarial acts with respect to the same campaign. The Secretary erred as a matter of law when he failed to apply this plain language and invalidate the signatures notarized by Flumerfelt and Skidmore.

The Secretary acknowledged Flumerfelt and Skidmore provided non-notarial services to the signature gathering campaign, but concluded the statute did not apply because they did not perform “any services other than as a notary until after [they] had finished administering oaths to circulators on the petitions.” App.148 (emphasis in original; brackets added). The statute includes no temporal limitation, however, and is most naturally read to bar notaries from providing non-notarial services *at any point* while “the petition is being circulated.” 21-A M.R.S. § 903-E. In short, the Secretary’s decision rests on an unstated limitation that does not appear in the plain language of the statute.

Consistent with the legislative history set forth above, the statute’s broad terms and statutory scheme reflect the breadth of its intent to prevent notaries from providing notarial and non-notarial services to the same direct initiative campaign. Section 903-E prohibits notaries from providing “any other services ... to initiate the

direct initiative” or “other services other than notarial acts ... to promote the direct initiative.” Courts routinely give the word “any” an “expansive meaning.” *Babb v. Wilkie*, No. 18-882, --- S.Ct. ---, 2020 WL 1668281, at *4 n.3 (U.S. Apr. 6, 2020) (“We have repeatedly explained that the word ‘any’ has an expansive meaning.”) (internal quotations omitted). Similarly, the statute’s incorporated definition of “initiate”—i.e., “the collection of signatures *and related activities*”—similarly shows the Legislature’s intent to regulate the entire field of activities related to advancing a direct initiative during the period before the Secretary’s review. *See* 21-A M.R.S. § 903-E(1)(A) (incorporating definition of “initiate” from 21-A M.R.S. § 1052(4-B)). Section 903-E again shows its breadth by prohibiting notaries from serving a signature gathering campaign even on a volunteer basis. *Id.* at §§ 903-E(1)(A) and (B) (“regardless of compensation” language).

Section 903-E’s sister statute, 4 M.R.S. § 954-A, reveals the same broad intent, making it a conflict of interest for a notary to “administer an oath ... to a circulator” if the same notary also “provides services that are not notarial acts” to the same campaign. *See State v. Blum*, 2018 ME 78, ¶ 10, 187 A.3d 566 (“In addition to the plain language of the statute, and the common meaning of the words within that statute, we must also consider its location and context.”). Like Section 903-E, the plain language of 4 M.R.S. § 954-A contains no temporal limitation and broadly prohibits notaries from providing notarial and non-notarial services to the same signature campaign.

The only reasonable interpretation of Section 903-E required the Secretary to invalidate the signatures Flumerfelt and Skidmore notarized as each provided notarial and non-notarial services to the direct initiative campaign.

D. The Secretary’s interpretation of Section 903-E suffers from fatal textual and practical defects, and defies the Legislature’s intent.

During the proceedings below, the Secretary grounded his interpretation of Section 903-E on the statute’s use of the present participle “is providing.” App.5 (4/7/20 Secretary submission). The Secretary’s present tense interpretation of these words, however, reflects the sort of overly literal approach the Court has rejected, particularly where it contravenes the clear legislative intent. *See Dickan*, 2014 ME 158, ¶ 20, 107 A.3d 621 (the Court will “ignore the literal meaning of a statute when it thwarts the clear legislative objective”). And despite claiming the present tense reading of Section 903-E most closely conforms to the statute’s plain language, the Secretary simultaneously backs away from this reading by disclaiming “that his interpretation of section 903-E means that the notary must, literally, be providing other services at the same exact moment as the notary is administering the oath to circulators.” App.5 (4/7/20 Secretary submission at 8). Instead, the Secretary argues the statute prohibits a notary from notarizing petition sheets only where the notary *previously* provided non-notarial services—a formulation unmoored from a present tense reading of the statute—or where the notary “is continuing to perform” such services—a formulation the Secretary failed to define. *Id.* Does “is continuing to

perform” mean past performance plus an intention to perform in the future? If so, such a rule would require a wholly impractical inquiry into a notary’s future intentions.

The Secretary’s unduly literal reading of “is providing” also fails to account for 4 M.R.S. § 954-A, which does not use that phrase but, rather, deems a conflict of interest to arise where a notary “provides” notarial and non-notarial services to the same campaign. As Flumerfelt and Skidmore each undisputedly “provide[d]” notarial and non-notarial services to the same campaign, they violated the plain terms of 4 M.R.S. § 954-A. It cannot be that the Legislature, having adopted both provisions in the same legislation, intended the same conduct to be permissible under Section 903-E but an ethical violation under 4 M.R.S. § 954-A. The Superior Court observed this conflict but failed to resolve it, and it cannot be resolved in a manner consistent with the Secretary’s interpretation of the statute. *See* App.19.

The Secretary also has argued that “compliance can only be determined based on facts known and existing at th[e] time” signatures are gathered or notarized such that, under Petitioner’s interpretation, valid notarial acts would be undone by subsequent non-notarial conduct. App.5 (4/7/20 Secretary submission at 8). The Superior Court relied heavily on this reasoning below. *See* App.21. As discussed *infra* Section IV, no constitutional limitation prevents the Legislature from enacting a statute that regulates notarial conflicts of interest, and neither the Secretary nor the

Superior Court identified any canon of statutory construction that compels the Court to avoid Petitioner's interpretation.⁹

More importantly, this argument completely ignores both the legal framework and actual practice governing the Secretary's review of signatures. The Secretary determines the validity of signatures only after they are collected and submitted to him and in light of the entire administrative record. *See* 21-A M.R.S. § 905(1) (requiring Secretary to "determine the validity of the petition and issue a written decision"). The law does not conceive of a running tally of "valid" signatures that accrues in real time. Indeed, with respect to notaries, the Secretary has the power to "invalidate a petition if the Secretary of State is unable to verify the notarization of that petition." *Id.*

In this very case the Secretary exercised his authority to invalidate hundreds of signatures due to facts that arose only after signatures were collected. For instance, the Secretary invalidated more than 700 signatures collected by circulators who later failed to file required affidavits with the Secretary. *See* App. 151 at ¶ D; 21-A M.R.S. § 903-A (requiring circulator affidavit "at the time the petition is filed"). The Secretary did not invalidate these signatures due to any defect that arose at the time each circulator collected them, but only after the signatures were submitted and upon the Secretary's review of the entire administrative record. In doing so, the Secretary

⁹ In fact, the Secretary cited no authority at all for this argument. The Superior Court cited only a 19th century case concerning the federal perjury statute, which measured criminal perjury by whether the defendant made false statements to one, such as a notary public, who was authorized to administer oaths. *See* App.19. The case does not address any issues related to those at hand.

undoubtedly invalidated hundreds of signatures from bona fide Maine voters who complied with all other provisions of the Maine code. The Secretary similarly invalidated more than 150 signatures collected by Megan St. Peter because evidence of fraud cast her honesty into question. Again, the Secretary made this decision long after the signatures were collected and his decision similarly served to invalidate otherwise bona fide signatures. This approach falls well within the Secretary's "plenary power to investigate and determine the validity of petitions," *Birks*, No. BCD-AP-16-04, 2016 WL 1715405, at *3 (Bus. & Consumer Ct. Apr. 8, 2016), and shows there would be nothing unlawful or impractical about the Secretary invalidating signatures because of notarial conduct that took place after signatures were collected.

The Secretary also argued below that Petitioner's interpretation of Section 903-E does not serve the legislative purpose of preventing conflicts of interest because a notary who first notarizes *and then* volunteers cannot be presumed to suffer the same bias as a notary who notarizes *only after* she volunteers. The Secretary's assumption is without basis, however, and opens the door for future signature gathering campaigns to flagrantly undermine the statute by promising notaries compensated non-notarial work to be performed only after the completion of their notarial duties, even later the same day. The Secretary acknowledged such an arrangement would defeat the purpose of the statute, but did not acknowledge his interpretation of Section 903-E allows such arrangements while Petitioner's interpretation prevents it completely. App.5 (4/7/20 Secretary submission at 9 n.4).

The Secretary's reading of Section 903-E is no coherent interpretation at all, but rather an *ad hoc* decision fitted only to the specific facts of this case, and which cannot be applied reliably in the future. Indeed, the Secretary's approach constitutes a reversal from the Secretary's own promulgated guidance which expresses none of the temporal limitations the Secretary employed in this case. App.281. These defects, coupled with the clear legislative intent, render the Secretary's interpretation unreasonable, strip it of any potential deference, and defeat any claim as to the statute's ambiguity. *See Dickau*, 2014 ME 158, ¶ 21, 107 A.3d 361 (rejecting "unreasonable" interpretations that undermine "practical operation and potential consequences"); *NextEra Energy Res., LLC*, 2020 ME 34, ¶ 22, --- A.3d --- (statutes are ambiguous only where susceptible to more than one reasonable interpretation).

E. Proper application of Section 903-E requires the invalidation of all of the signatures notarized by Flumerfelt and Skidmore.

Flumerfelt and Skidmore undisputedly provided notarial and non-notarial services to the direct initiative campaign, such that, under Petitioner's interpretation of Section 903-E, all of the signatures they notarized must be invalidated. Each notary individually, let alone combined, notarized more signatures than the current margin of 3,050. *See supra* n.3. Section 903-E thus requires the invalidation of more signatures than the current margin and reversal of the Secretary's Amended Determination.

III. Flumerfelt violated Section 903-E even under the Secretary's interpretation of the statute.

Petitioner should prevail even if the Court adopts the Secretary's interpretation

of Section 903-E because Flumerfelt provided non-notarial services intended to “initiate” or “promote” the Petition *before* she administered circulators’ oaths. The record evidence makes those facts clear, but the Secretary erred as a matter of law when he failed to apply his interpretation of Section 903-E to these facts.

The Secretary’s Amended Determination avoids discussing the most significant, and dispositive, facts concerning Flumerfelt’s non-notarial support for the campaign. John Flumerfelt assisted in “fund[ing]” the campaign, supported the campaign staff with food and refreshments, and recruited his daughter to join the campaign as a circulator. App.170. Flumerfelt agreed to serve as a paid circulator for RFS and reported for work to fulfill her promised obligations. *See* App.182 at ¶¶ 3-4. In accordance with their agreement, RFS identified her as a paid circulator in its internal personnel system. *See* App.201. Although RFS switched gears and temporarily tasked Flumerfelt with service as a notary, she returned to providing non-notarial services as soon as she completed her notarial duties, consistent with her demonstrated desire to initiate or promote the Petition. *See* App.182 at ¶ 5. After the campaign ended, RFS filed a document with the Secretary, as required by Maine law, identifying Flumerfelt as a paid circulator. *See* App.273-75.

Flumerfelt’s promise to serve as a paid circulator, her acceptance of a promise of pay in exchange for providing that service, and the affirmative steps she took to fulfill her promise constitute non-notarial services to “initiate” or “promote” the Petition under Section 903-E. As Flumerfelt took these actions before she served as a

notary, she violated even the Secretary's interpretation of Section 903-E, which, as discussed above, turns solely on whether the notary provided non-notarial services first. To exclude Flumerfelt from the reach of even the Secretary's version of the statute again would frustrate purpose of Section 903-E—to avoid the conflict of interest that arises when a notary both administers circulators' oaths and helps in the campaign in other ways. Flumerfelt's actions demonstrate her to be the sort of notary public the Legislature wished to strip of notarial authority—one with a demonstrated allegiance to the campaign over which she also was to exercise impartial oversight.¹⁰

The Secretary's decision with respect to Flumerfelt appears to read some sort of materiality requirement concerning the pre-notarial assistance a notary can provide a signature gathering campaign. But the statute includes no materiality requirement and does not distinguish between one who serves a signature gathering campaign for a brief period and one who serves it for months before providing notarial services. In this regard, as with the Secretary's overall interpretation of Section 903-E, his decision to carve Flumerfelt out of his interpretation of the statute lacks coherent standards. Although the Secretary seeks to read a materiality standard into Section 903-E, he never has articulated the nature or amount of conduct that would violate his reading of the statute. Whatever the Secretary's approach may be, it cannot accord with

¹⁰ The Superior Court considered this analysis of Flumerfelt's actions to involve the same sort of inquiry into Flumerfelt's mental state that Petitioner has argued would be an impractical aspect of the Secretary's approach. *See supra* p.24; App.22. But whether with respect to Flumerfelt or otherwise, Petitioner's approach involves no inquiry into mental state whatsoever—only analysis of whether a notary actually has provided non-notarial services to a signature gathering campaign, as Flumerfelt did.

Section 903-E if it allows a notary public to promise to act as a paid circulator, take steps to fulfill that obligation, and then shift to serving as a purportedly disinterested notary before reverting back to providing the campaign with non-notarial services.

There can be no doubt as to Flumerfelt's allegiances before she began administering circulators' oaths. She agreed to assist in initiating and promoting the Petition and took steps to do so. Section 903-E does not allow her to serve as a notary under these circumstances. The Court should invalidate her signatures and, in doing so, reverse the Amended Determination.

IV. Section 903-E comports with the Constitutions of both the United States and Maine, and need not be narrowly construed.

In the proceedings below, MLP and NextEra raised purported constitutional concerns regarding Section 903-E. This is a red herring: Section 903-E fully accords with both the First Amendment of the U.S. Constitution and the Maine Constitution, and need not be narrowly construed to avoid any constitutional infirmity. To find otherwise would unnecessarily constrain the authority of the Legislature to enact reasonable regulations ensuring the integrity of Maine's electoral process, including the Legislature's ability to provide a meaningful notarization requirement. Refusing to enforce the plain text of Section 903-E therefore would undermine, rather than protect, the people's right to pursue a direct initiative.

A. Section 903-E does not violate the First Amendment.

Section 903-E comports with the First Amendment because it does not

meaningfully restrict petition circulation activities. Section 903-E is accordingly subject to deferential scrutiny because it reasonably regulates the election work of public officials, but would survive even strict scrutiny because it serves the state’s compelling interest in maintaining the integrity of Maine’s electoral process.

1. Laws that only incidentally burden free speech are subject to deferential, rather than strict, scrutiny.

Two vital interests are implicated in any First Amendment challenge to election laws: voters’ political speech and the State’s obligation to maintain, fair, honest, and orderly election processes. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

Accordingly, when assessing a First Amendment claim, a court must consider “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments,” as well as the “precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* at 789; *see also Crafts v. Quinn*, 482 A.2d 825, 830-31 (Me. 1984) (citing *Anderson*).

First Amendment claims in the election law context are thus subject to a “sliding scale” of scrutiny. *Libertarian Party of N.H. v. Gardner*, 638 F.3d 6, 14 (1st Cir. 2011). “[S]evere restrictions” trigger strict scrutiny.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (internal quotation marks omitted). “But when a state election law provision imposes only reasonable, nondiscriminatory restrictions,” then “the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (internal quotation marks omitted). *See Libertarian Party*, 638 F.3d at 14 (citing

Burdick); *MTAN*, 2002 ME 64, ¶ 20, 795 A.2d 75 (same). The Law Court consistently has followed this sliding scale approach in the context of direct initiatives. *Compare Wyman v. Sec’y of State*, 625 A.2d 307, 311 (Me. 1993) (applying strict scrutiny where Secretary’s refusal to provide initiative forms was a “complete bar” to a citizen initiative), *and MTAN*, 2002 ME 64, ¶ 20, 795 A.2d 75 (applying “reasonableness” standard to requirement that circulator provide true identity).

Because Section 903-E is reasonable and serves a compelling state interest, it should be upheld using a deferential standard of review under *Burdick*’s sliding scale.

2. Section 903-E regulates the conduct of a state official and does not burden protected political speech.

Section 903-E does not regulate the circulation of petitions, but instead regulates notaries in the performance of their election-related duties as state officials. The law merely prevents a notary from performing the constitutionally required function of administering oaths to petition circulators if the notary *also* assists in initiating or promoting the direct initiative while the petition is being circulated. This regulation is reasonable, and does not burden protected speech.

The Legislature created the office of notary public under Title 4, which governs the judiciary, and notaries carry out their duties as authorized by the State. 4 M.R.S. § 951 (notaries may administer oaths as “authorized by the laws of this State”). When called to administer oaths to circulators, notaries perform a crucial role in Maine’s election processes. *See MTAN*, 2002 ME 64, ¶ 13, 795 A.2d 75 (noting constitutional

significance of notary's role in petition process). The conduct of elections, in turn, is an exclusively public function. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

Notaries therefore serve as state officials performing a public function in overseeing Maine's elections and may be regulated as such. *See also In re Boyle*, 91 A.3d 260, 264 (Pa. Commw. Ct. 2014) (discussing Pennsylvania law prohibiting a notary from notarizing petitions relating to candidacies in which he had a "direct" or "pecuniary" interest, but finding no violation by the notary).

As a regulation of public officials' performance of election-related duties, Section 903-E does not limit protected speech; it only prohibits notaries who have a conflict of interest from also administering circulators' oaths. In this sense, the role of notaries is analogous to that of poll watchers: both perform state functions in ensuring the integrity of elections.¹¹ And courts consistently have found poll watching is not expressive speech. *See Republican Party of Pa. v. Cortes*, 218 F. Supp. 3d 396, 415-16 (E.D. Pa. 2016) (poll watching is a state function delegated by the state, and is not an expressive activity); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364 (S.D.N.Y. 2007) ("poll watching . . . has no distinct First Amendment protection"); *Turner v. Cooper*, 583 F. Supp. 1160, 1162 (N.D. Ill. 1983) (finding "no authority" for the "proposition that [plaintiff] had a first amendment right to act as a pollwatcher"). For the same reason, no First Amendment protection attaches to the election-related work

¹¹ The State similarly regulates the political activity of civil servants. *See* 5 M.R.S. § 7056-A.

performed by notaries and, thus, Section 903-E does not burden political speech at all, much less severely.¹²

Nor can a burden on speech be shown by analogy to regulations that curtail the number of individuals available to work as circulators. Certainly, courts have invalidated overly burdensome circulator regulations. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999) (striking down requirements that, *inter alia*, circulators be registered voters and wear badges); *Meyer v. Grant*, 486 U.S. 414, 416 (1988) (striking down prohibition on payment of circulators); *On Our Terms '97 PAC v. Sec'y of State*, 101 F. Supp. 2d 19, 19 (D. Me. 1999) (same). These cases, however, stand only for the proposition that a state may not so limit the pool of circulators that it substantially restricts the “number of voices who will convey the initiative proponents’ message,” *Buckley*, 525 U.S. at 194 (quoting *Meyer*, 486 U.S. at 422), at least where the state cannot demonstrate that the law advances a compelling interest, *id.* at 203-04; *Meyer*, 486 U.S. at 422-23, 427-28.

Unlike *Meyer*, *Buckley*, and their progeny, proponents of the initiative have not made any showing that Section 903-E substantially limited their ability to advocate for the Petition. Proponents in this case present a facial challenge, which is disfavored, because such challenges “rest on speculation” and “threaten to short circuit the

¹² Because Section 903-E does not regulate protected political speech, there is no basis to conclude it constitutes viewpoint discrimination. Section 903-E does not prohibit notaries from speaking out for, but not against, an initiative; it regulates notaries providing non-expressive notarial services.

democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-51 (2008); see *In re Guardianship of Chamberlain*, 2015 ME 76, ¶¶ 9-10, 118 A.3d 229. Having created no evidentiary record, the proponents have not established that Section 903-E significantly curtails the number of available circulators, see *Buckley*, 525 U.S. at 194, or meaningfully “limit[s] the size of the audience the proponents can reach,” *Hart*, 1998 ME 189, ¶ 11, 715 A.2d 165.¹³

There is thus no basis for this Court to conclude that Section 903-E meaningfully limits protected speech. It instead should analyze the law as a reasonable election regulation. *Id.* (Maine’s circulator residency requirement only minimally burdened speech); *MTAN*, 2002 ME 64, ¶ 20, 795 A.2d 75 (requirement that circulator identify themselves in their oath was a “reasonable” restriction).¹⁴

3. Section 903-E serves a compelling state interest in maintaining the integrity of the petition process.

Section 903-E does not burden political speech and advances the compelling state interest of ensuring notaries’ impartiality, as identified by the Legislature

¹³ The same failure of proof led a court to uphold Maine’s requirement that circulators be registered voters post-*Buckley*. See *Initiative & Referendum Inst. v. Sec’y of State*, No. CV-98-104, 1999 WL 33117172, at *14-15 (D. Me. Apr. 23, 1999) (rejecting First Amendment challenge); see also *MTAN*, 2002 ME 64, ¶¶ 26-28, 795 A.2d 75 (Dana, J., concurring) (lack of evidence to support First Amendment challenge to voter registration law).

¹⁴ See *Maslow v. Bd. of Elections*, 658 F.3d 291, 296 (2d Cir. 2011) (requiring nomination petition circulators be members of the nominee’s party imposed “little or no burden” on First Amendment rights); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616 (8th Cir. 2001) (residency requirement for circulators did not “unduly restrict speech”); *Palesky v. Sec’y of State*, 1998 ME 103, ¶ 12, 711 A.2d 129, 133 (requiring circulators use approved form was a “minimal burden”).

following specific incidents that threatened the integrity of the direct initiative process.

The Court has held the State’s “interest in protecting the integrity of the initiative process” is “compelling.” *Hart*, 1998 ME 189, ¶ 13, 715 A.2d 165. *See also Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (“A State indisputably has a compelling interest in preserving the integrity of its election process.”). The State’s compelling interest in maintaining electoral integrity includes “efforts to root out fraud” and also “extends ... more generally to promoting transparency and accountability in the electoral process,” because such efforts prevent fraudulent outcomes and loss of public trust. *John Doe No. 1 v. Reed*, 561 U.S. 186, 198 (2010). The State’s compelling interest in maintaining the integrity of the initiative process therefore gives it extensive authority to oversee that process. “[T]here must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” *MTAN*, 2002 ME 64, ¶ 8, 795 A.2d 75 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Section 903-E directly advances this compelling state interest. As discussed above, notaries play a crucial constitutional role in ensuring the integrity of the direct initiative process, *see MTAN*, 2002 ME 64, ¶ 13, 795 A.2d 75 (circulator’s oath “is of such importance that the Constitution requires that it be sworn in the presence of a notary public”), and, by regulating notarial conduct, the Legislature sought to root out the conflicts of interest that have plagued the process in the past, *see Birks*, 2016 WL 1715405. In short, Section 903-E serves to give meaning to the constitutional

requirement of a circulator’s oath by ensuring the oath is administered by an impartial notary public. And Section 903-E is narrowly tailored to serve this compelling interest. The law does not prevent notaries from providing non-notarial services to initiative campaigns, it only prohibits notaries from performing notarial and non-notarial services *for the same campaign*. This is a direct, rather than overly broad, approach to preventing notarial conflicts of interest.

Because Section 903-E is narrowly tailored to advance a compelling state interest, it meets the applicable First Amendment standard. *See, e.g., Initiative & Referendum Inst.*, 241 F.3d at 616 (upholding residency requirement in light of the “compelling interest in preventing fraud”); *MTAN*, 2002 ME 64, ¶ 20, 795 A.2d 75 (upholding requirement that circulators correctly identify themselves because it protected the initiative process); *Hart*, 1998 ME 189, ¶ 13, 715 A.2d 165 (upholding residency requirement because it “enhance[d] the integrity of the initiative process”).

B. Section 903-E does not violate the Maine Constitution.

Section 903-E also accords with the Maine Constitution. “There is no question that the Legislature is authorized by the Constitution to enact laws ‘for applying’ the direct initiative right of the people and ‘to establish procedures for determination of the validity of written petitions,’” as long as those laws are “‘not inconsistent with the Constitution.’” *McGee*, 2006 ME 50, ¶ 20, 896 A.2d 933 (quoting Me. Const. art. IV, pt. 3, § 22). Section 903-E is just such a law. The Constitution states that “[t]he oath of the circulator must be sworn to in the presence of a *person authorized by law to*

administer oaths” and thus recognizes the Legislature may decide *who* is authorized to administer oaths, precisely as Section 903-E does. Me. Const. art. IV, pt. 3, § 20 (emphasis added). The Secretary thus has “plenary authority” to enforce the statute as part of the Constitution’s “statutory overlay.” *MTAN*, 2002 ME 64, ¶ 12 & n.8, 795 A.2d 75.¹⁵

V. The Secretary abused his discretion when he failed to conduct any investigation into clear evidence of fraud.

As the Superior Court held, the Secretary had “the power *and obligation* to investigate all issues material to the validity of the petitions.” App.38 (emphasis added). *See also MTAN*, 2002 ME 64, ¶ 12 n.8, 795 A.2d 75 (Secretary has “plenary” power to investigate petitions); *id.* ¶ 25 n.11 (Dana, J., concurring) (noting that “fraud opens all doors” for investigation); *In re Opinion of the Justices*, 126 A. 354, 364, 124 Me. 453 (1924) (it is “the duty” of election officials “to make all necessary investigation” into fraud). The Secretary abused his discretion and acted arbitrarily and capriciously, however, when he refused to conduct any investigation whatsoever into the fraud in the campaign.¹⁶ *See* App.149-50.

¹⁵ Section 903-E is therefore easily distinguishable from the law addressed in *McGee*, which involved a statutory petition circulation deadline that directly conflicted with the “signature-age provision of the Constitution.” 2006 ME 50, ¶ 33, 896 A.2d 933. No such conflict exists here.

¹⁶ The Court need not re-weigh the merits of the record evidence or substitute its judgment for that of the Secretary to find his inaction to be arbitrary and an abuse of discretion. An agency decision must be reversed where it is unsupported in the record. *Hannum v. Bd. of Envtl. Prot.*, 2003 ME 123, ¶ 15, 832 A.2d 765. Here, the only evidence in the record actually contradicts the Secretary.

The Secretary justified his refusal to investigate by stating Petitioner had pointed to evidence of fraud by only one circulator and had “not pointed to any other indications of fraud.” App.150. But the direct evidence of forgery on petition sheet no. 743, standing alone, was enough to require investigation. Further, the Secretary’s assertion contravenes the record: Petitioner *did* provide other evidence of fraud, despite being precluded from pursuing compulsory testimony on the issue. *See* App.163-68, 231-46, 249-53. In any event, Petitioner cannot be faulted for not developing a full record of the fraud given the absence of any tools to compel discovery—tools the Secretary urged the Superior Court to deny. The Secretary also stated that no municipal officials reported suspected violations of the law. *See* App.150 (citing 21-A M.R.S. § 902-A). But the absence of such reports is no evidence at all. If the Secretary disclaimed having sufficient resources to investigate fraud, despite having the full power of the Attorney General’s office at his disposal, then town clerks certainly have no meaningful investigative capability.

Fraud undisputedly occurred here. The Secretary invalidated nearly 200 signatures because of forgery apparent on the face of St. Peter’s petitions. *See* App.149-50. Indeed, the forgeries provide indicia of systemic irregularities—*e.g.*, the use of addresses loosely associated with the names of the purported voters, rather than completely unrelated addresses. *See* App.254 at ¶ 4; App.257 at ¶¶ 3-4. But there was no need to rely on the direct evidence of forgery alone, as Petitioner also called the Secretary’s attention to information from an RFS whistleblower that Melissa

Burnham, an RFS supervisor, knew of forgeries associated with St. Peter's petitions. *See* App.231-32. Indeed, MLP admitted below that "Megan St. Peter . . . was fired for possible signature fraud." App.5 (4/7/20 MLP submission at 17 n.9). Yet, apparently aware of the fraud, RFS submitted the signatures anyway—providing further evidence of RFS's involvement in a broader scheme.

The compelling evidence of fraud stands in stark contrast to the Secretary's refusal to conduct an investigation whatsoever. He did not question St. Peter, under oath or otherwise, concerning her experiences with or knowledge of the forged signatures, or otherwise probe whether the forgeries were part of a broader scheme directed by others.¹⁷ The Secretary never sought to speak with Ms. Burnham, who is alleged to have at least permitted the submission of forged signatures, the RFS whistleblower who claimed knowledge of these activities, or any other RFS employee to investigate whether other RFS staff participated in fraudulent efforts.

The Secretary abused his discretion, and acted arbitrarily and capriciously, when he failed to ask even basic questions about the nature and the extent of the fraud.

CONCLUSION

The Court should reverse the Amended Determination and adjudge the Petition invalid.

¹⁷ While the Secretary asserted below lack of time and the "likely futility" of seeking to question St. Peter, these assertions do not withstand scrutiny. The Secretary could have requested the assistance of personnel from the Attorney General's office or the Kennebec County District Attorney's office, for instance. But the Secretary made no such effort, in contrast to his investigation of notarial misconduct.

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CERTIFICATE OF SERVICE

I, Nolan L. Reichl, Esq., hereby certify that a copy of this Brief of Appellant was served upon counsel for all parties. Pursuant to agreement between the parties, service was made by email only. Service was made on April 23, 2020 to the addresses below:

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