

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

LAW DOCKET NO. BCD-20-126

DELBERT A. REED,
Petitioner-Appellant

v.

SECRETARY OF STATE MATTHEW DUNLAP,
Respondent-Appellee

and

MAINERS FOR LOCAL POWER PAC, MAINE STATE CHAMBER OF
COMMERCE, NEXTERA ENERGY RESOURCES, LLC and INDUSTRIAL
ENERGY CONSUMER GROUP

Intervenors.

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

BRIEF OF APPELLEE

**MATTHEW DUNLAP, in his capacity as
Secretary of State for the State of Maine**

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CASE HISTORY

Factual History:

In late August 2019, former state senator Thomas Saviello and five other registered Maine voters applied to the Secretary of State (“Secretary”) for approval to circulate a citizen initiative entitled “Resolve to Reject the New England Clean Energy Connect Transmission Project,” pursuant to 21-A M.R.S. § 901. R. 51.¹ The Secretary approved the form of the petition on October 18, 2019. The Secretary’s staff also reviewed the legal requirements with the applicants in person and provided written instructions to the circulators and petition organizers, pursuant to 21-A M.R.S. § 903-A(3). App. 276-283. In December 2019, the applicants hired a company called Revolution Field Strategies to assist in the signature-collection effort. App. 200.

On February 3, 2020, the applicants filed a total of 15,785 completed petition forms containing 82,449 signatures with the Secretary.² By law, 21-A M.R.S. § 905(1), the Secretary had only 30 days in which to review and determine the validity of the petitions, and his office was simultaneously

¹ “R. 51” citations throughout this brief reference the item number in the Index to the Agency Record on Remand, at App. 154.

² This was the deadline for filing with the Secretary in order to qualify the initiative for the November 2020 ballot. *See* Me. Const. art. IV, pt. 3, § 18(1) (petitions must be submitted to Secretary by 5 pm on the 25th day after the convening of the Legislature in second regular session).

preparing to administer the presidential primary election on March 3rd. The review process is labor-intensive and requires multiple steps, as outlined in written instructions to the staff. App. 269-272. These include determining whether the circulator's oath was properly completed before a commissioned notary or licensed attorney;³ checking for duplicate voter signatures; verifying that the voters signed before the circulator took the oath; determining that each of the circulators is a resident of Maine and registered to vote in Maine, as verified by the local registrar; and assessing whether the registrar certified the signatures on the petitions after the circulator took the oath and before the deadline set forth in the Constitution.⁴ Although the Secretary relies on local registrars to verify the registered voter status of each person whose signature appears on each petition, in accordance with the Constitution, the Secretary's staff verifies the registrars' tallies and looks for any indications that someone other than the voter may have signed the voter's name.⁵

³ Over 400 notaries were involved in this petition drive, along with 563 circulators. R. 33, 35.

⁴ Registrars are only allowed to certify petitions that are submitted to them by 5:00 p.m. on the 10th day before the deadline for filing with the Secretary – i.e., by 5:00 p.m. on January 24, 2020. Me. Const. art. IV, pt. 3, § 20.

⁵ The Secretary's process is not aided by any sophisticated technology. To check for duplicates, for example, the staff must enter voter names into an Access database, which staff members on "duplicate detection teams" then manually review to spot where the same names may appear on two different petitions. App. 271. Reed, by contrast, was able to use visual recognition software to identify potential duplicates and other alleged defects on his scanned copies of the petitions.

On February 24 and 27, 2020, during the last week of the review process and shortly before the presidential primary election, counsel for an organization named Clean Energy Matters, which supports the NECEC transmission project and opposes this initiative, submitted letters with numerous attached documents to the Secretary alleging that eight specifically named notaries had provided services, other than administering oaths to circulators, in support of the petition drive and in violation of 21-A M.R.S. § 903-E. App. 48-141. The Secretary did not have an opportunity to investigate the allegations concerning the notaries' activities, or to make findings concerning the validity of their notarial acts, prior to the statutory deadline of March 4, 2020 for issuing a determination of validity. *See* App. 143, n.1. He gathered that information on remand, however, as explained below and as described in his Amended Determination of validity, issued on April 1, 2020. App. 146-49.

Procedural History:

On March 4, 2020, the Secretary issued his decision, concluding that the petitions contained 6,447 valid signatures more than the constitutional threshold of 63,067 signatures (10% of the total votes cast in the most recent gubernatorial election) to qualify the initiative for submission to the

Legislature and to the voters at the November 2020 general election. App. 142 (Initial Determination of Validity).

On March 13, 2020, Delbert Reed (“Reed”) filed a Rule 80C petition challenging the Secretary’s determination, pursuant to 21-A M.R.S. § 905(2). App. 39.⁶ Mainers for Local Power, a political action committee formed to support this initiative, promptly moved to intervene and was granted intervenor status. App. 7.⁷

On March 17, before the record was filed and without first obtaining leave of court to take discovery, counsel for Reed began serving deposition and document subpoenas on the eight notaries, seeking to question them under oath.⁸ After Mainers for Local Power objected, the court held a conference of counsel on March 20, 2020, and indicated that Reed could not proceed in this manner without authorization. App. 7. Later that day, Reed filed a motion to take additional evidence and to conduct discovery, pursuant to Rule 80C(e) & (j) and 5 M.R.S. § 11006(1). He asked the court to authorize

⁶ In early March, shortly after the Secretary’s initial determination was issued, counsel for Reed scanned copies of all 15,785 petition forms in the Secretary’s office.

⁷ NextEra Energy Resources, LLC, a company that also supports the initiative, was granted intervenor status at the same time. App. 3. Subsequently, two other entities opposed to the initiative intervened – Industrial Consumer Energy Group (“IECG”) and the Maine State Chamber of Commerce (“MSCC”). App. 3 & 4.

⁸ Copies of the subpoenas are attached as exhibits 1-8 to Mainers for Local Power’s Motion to Quash, dated March 20, 2020. App. 2.

him to conduct discovery, first, and then remand the matter to the Secretary for consideration of the additional evidence. Pet. Mot. for Add. Evid., dated March 20, 2020.

In addition to seeking depositions of the eight notaries to determine if they had engaged in non-notarial activities that disqualified them from administering oaths to circulators, pursuant to 21-A M.R.S. § 903-E, Reed alleged in his motion that a particular circulator (Megan St. Peter) had forged two voter names on a single petition (#743). He attached supporting affidavits of two voters who attested that they had not lived at the addresses listed on the petition for many years, or not at all. App. 259-261. Both voter signatures had been rejected by the local registrar as “not registered” and thus were not counted by the Secretary in his initial determination. App. 266.

The Secretary supported Reed’s request for a remand for the purpose of taking additional evidence that was clearly material to the Secretary’s determination. If certain notaries were disqualified under 21-A M.R.S. § 903-E, that would invalidate several thousand signatures and thereby reverse the determination. The Secretary opposed the motion to take discovery, however, and urged the court to allow evidence to be gathered by the Secretary instead, consistent with the Constitution, the governing statutes, and past practice. Resp. Mem. In Opp. To Pet. Mot. for Add. Evid., dated March 21, 2020.

On March 23, 2020, the Business and Consumer Court (Murphy, J.) (“BCD”)⁹ granted Reed’s motion and remanded the matter to the Secretary for the taking of additional evidence pertaining to the notaries, “fully defer[ring] to the Secretary’s discretion regarding which additional evidence to pursue,” including whether or to what extent to pursue evidence of apparent forgery by the specific named circulator. App. 37 & n. 2. The court denied Reed’s motion to take discovery and ordered cancellation of the depositions and prompt withdrawal of the subpoenas. App. 38. The BCD retained jurisdiction, pursuant to 21-A M.R.S. § 905(2), and set a deadline of April 1, 2020, for the Secretary to report a new determination. App. 38.

In briefing on the motion to take additional evidence, and immediately thereafter in a letter to the Secretary on remand (App. 250-252), Reed characterized his appeal as alleging two types of errors in the Secretary’s determination: 1) those “extrinsic” to the petitions, such as issues regarding the notaries’ qualifications to administer circulator oaths and, and 2) those “intrinsic” to the petitions, where Reed claimed the Secretary erroneously counted as valid voter signatures, such as duplicates, that should have been invalidated. The Secretary’s office notified the parties on March 24, 2020, that

⁹ The case was transferred to the Business and Consumer Docket from the Superior Court on March 23, 2020. App. 7.

it would be gathering additional information pertaining to the alleged extrinsic errors regarding notaries, and requested that the parties submit specific information supporting any allegations of intrinsic errors (e.g., by identifying which signature lines on which petitions contained alleged duplicates) by the close of business on March 25th in order to permit the Secretary to evaluate that information on remand. App. 247-48.

The Secretary received a plethora of filings from Reed during the period from March 24 – 31, 2020, including seven letters and emails with approximately 25 charts and exhibits detailing and depicting several categories of alleged intrinsic errors, as well as recommending to the Secretary how he should explore evidence pertaining to the alleged extrinsic errors. *See, e.g.*, R. 25, Exhibits A-N; R. 6, 17, 19, 23, 24, and 28. In a letter on March 25th, Reed’s counsel raised new allegations about the activities of yet another notary, Wesley Ryan Huckey; identified one more petition with apparent forgeries by the same circulator previously identified; and raised concerns about six petitions that he alleged showed altered dates. App. 231-46.¹⁰ Both Reed and Intervenor IECG submitted letters urging the Secretary to hold evidentiary hearings at which counsel for these parties would be

¹⁰ Mainers for Local Power also submitted a letter to the Secretary on March 25th with attachments relating to the registered voter status of 16 circulators whose petitions they alleged were improperly invalidated. R. 26.

permitted to cross-examine witnesses. App. 249; R. 20. They urged the Secretary to question each of the notaries “at length and under oath” and recommended that he also subpoena representatives of Mainers for Local Power and Revolution Field Strategies for questioning under oath. App. 251-252. The Secretary did not agree to these requests, in accordance with the BCD’s remand order and based on an understanding that contested hearings are not authorized by statute or by the Constitution as part of the petition review process.¹¹

During the limited time available, the Secretary’s staff obtained statements and documents from the nine notaries in question and conducted interviews with several of them. App. 163-199. The staff conducted a painstaking review of hundreds of pages of charts, exhibits, and arguments submitted by Reed regarding duplicate signatures and other alleged errors intrinsic to the petitions. They examined the allegations of fraud by the petition circulator and reviewed the petitions with allegedly altered dates. *See* App. 161, R. 3 & R. 25. Accomplishing all of this in slightly more than a week was a challenge, given limited staff and added pressures associated with the current public health state of emergency.

¹¹ The BCD held that “the review of citizen initiative petitions by the Secretary is not an adjudicatory proceeding, and does not include a right to hearing by those supporting or opposing the petition.” App. 37.

On April 1, 2020, the Secretary issued and filed with the BCD an Amended Determination of Validity. The determination invalidated more than 3,500 additional signatures for a variety of reasons, but found that the petition remained valid because it still contained 3,050 valid signatures above the threshold of 63,067 to qualify for the ballot. App. 144-152.

In his Amended Determination, the Secretary made detailed findings regarding each of the nine notaries that Reed alleged had engaged in activities rendering them ineligible to administer oaths to circulators. App. 146-149, ¶ 6. The Secretary specifically addressed the allegations of fraud, and decided to invalidate all of the petitions circulated by the circulator who appeared to have forged voter signatures, on the grounds that her oath could not be relied upon. App. 149-150, ¶¶ 8 & 10.

Reed responded the next day (April 2) by filing a second motion to take additional evidence – this time before the court, pursuant to 5 M.R.S. § 11006(1)(A). He argued that the Secretary had “failed or refused to act” in response to allegations of fraud and, in particular, had failed to conduct evidentiary hearings to develop further evidence. Pet. Second Mot. to Take Add. Evid., dated April 2, 2020. The BCD denied the motion, finding no grounds for the taking of evidence pursuant to 5 M.R.S. § 11006(1)(A), given that the Secretary had neither failed nor refused to act, and that Reed had not

presented any irregularities in procedure. App. 29-31. The court noted that nothing in its decision on the motion would affect Reed's ability to challenge whether the Secretary had abused his discretion in reaching the new determination. App. 31.

On April 13, 2020, the BCD ruled on the merits of Reed's Rule 80C petition, affirming the Secretary's Amended Determination. App. 8-28. The court concluded that the Secretary's interpretation of 21-A M.R.S. § 903-E was reasonable and should be upheld, particularly as applied to the facts found by the Secretary and supported by the record. The court held that the Secretary properly exercised his plenary power to investigate allegations of fraud on remand; did not abuse his discretion in declining to pursue Reed's further lines of inquiry; and did not err as a matter of law or abuse his discretion in deciding that he lacked authority to conduct an evidentiary hearing on remand. *Id.* The court declined to address Reed's allegations of errors intrinsic to the petitions, finding that invalidation of all 492 signatures in this category would not be enough to change the outcome. App. 28.

Reed and supporting Intervenors IECG and Maine State Chamber of Commerce filed timely notices of appeal on April 15 and 16, 2020. App. 5-6.

Decisions Subject to Review

Because the Business and Consumer Court acted in an intermediate appellate capacity, the decision to be reviewed by this Court is the Secretary's Amended Determination of Validity, dated April 1, 2020. *McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933; *Palesky v. Secy' of State*, 1998 ME 103, ¶ 9, 711 A.2d 129.

STATEMENT OF THE ISSUES

- V. Whether the Secretary erred as a matter of law in his interpretation of 21-A M.R.S. § 903-E or abused his discretion in determining that notaries Leah Flumerfelt, Brittany Skidmore, and Wesley Huckey were authorized to administer oaths to circulators of petitions pursuant to 21-A M.R.S. § 903-E.
- VI. Whether the Secretary abused his discretion when he declined to pursue Reed's suggested avenues of further inquiry into allegations of fraud.
- VII. Whether the Secretary erred as a matter of law or abused his discretion in determining that he lacked authority to hold evidentiary hearings after remand.
- VIII. Whether the Secretary abused his discretion when he failed to invalidate additional signatures after remand for other reasons.

SUMMARY OF ARGUMENT

In determining the validity of this initiative petition, the Secretary correctly interpreted the applicable provisions of the Maine Constitution and the implementing statutes, including 21-A M.R.S. § 903-E, the new law

pertaining to the authority of notaries to administer oaths to circulators. The Secretary, who has been given the plenary power to investigate and determine the validity of initiative petitions, acted well within his discretion in determining the scope and extent of the investigation and did not err in declining to grant Reed and IECG's requests to convert the petition review process into a contested adjudicatory hearing. He did not fail or refuse to consider any relevant evidence and instead thoroughly examined all allegations of error. His Amended Determination of validity includes detailed findings of fact that are well supported in the record. The Secretary's decision should be affirmed.

ARGUMENT

I. The Secretary's interpretation of 21-A M.R.S. § 903-E is both reasonable and correct, and his application of that statute to the factual circumstances of each notary is supported by substantial evidence.

A. Standard of Review

A party aggrieved by the Superior Court's decision on review of the Secretary's determination of validity may appeal to this Court "on questions of law." 21-A M.R.S. § 905(3).¹² Questions of statutory interpretation are

¹² Section 905(3) further provides that "the standard of review shall be the same as for the Superior Court." However, the standard specified in subsection 905(2) for review by the Superior Court is only applicable to reviewing ballot questions prepared by the Secretary pursuant to section 906:

reviewed by the Court *de novo*. *McGee v. Sec’y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933. The first step in that review involves determining whether the statute is ambiguous, *Competitive Energy Servs. LLC v. Pub. Utils. Comm’n*, 2003 ME 12, ¶ 15, 818 A.2d 1039, and that begins with an analysis of its plain language. *McGee*, 2006 ME 50, ¶ 12.

“If a statute can reasonably be interpreted in more than one way and comport with the actual language of the statute, an ambiguity exists.” *Me. Ass’n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 35, 923 A.2d 918. If the Court finds section 903-E to be ambiguous, then it must defer to the interpretation given by the Secretary, who is charged with administering the laws pertaining to initiative petitions, Me. Const. art. IV, pt. 3, §§ 18-22 and 21-A M.R.S. §§ 901-905, as well as the laws governing the commissioning and disciplining of notaries public, 4 M.R.S. § 955-C & 5 M.R.S. § 82. *See S.D. Warren Co. v. Bd. of Env’tl. Prot.*, 2010 ME 27, ¶ 4, 868 A.2d 210 (agency’s interpretation of statute it administers “will be given great deference and should be upheld unless the statute plainly compels a contrary result”). This Court also defers to the Secretary’s determination of ambiguous statutes if his

In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter’s wishes. The above standard has no relevance to the issues raised in this appeal.

interpretation is reasonable. *Knutson v. Dep't of Sec'y State*, 2008 ME 124, ¶ 9, 954 A.2d 1054; *Melanson v. Sec'y of State*, 2004 ME 127, ¶ 8, 861 A.2d 641.

B. The plain language of section 903-E supports the Secretary's interpretation.

A core constitutional requirement for initiative petitions is that each circulator take an oath “that all of the signatures to the petition were made in the presence of the circulator 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. That oath “must be sworn to in the presence of a person authorized by law to administer oaths.” *Id.* Notaries commissioned by the Secretary in Maine are generally authorized to administer oaths pursuant to 4 M.R.S. § 951,¹³ but in 2017, the Legislature adopted a statute specifically restricting the authority of notaries to administer oaths to circulators under certain circumstances.

First enacted in 2017 as 21-A M.R.S. § 903-D, and subsequently repealed and replaced by 21-A M.R.S. § 903-E, the statute currently provides as follows:

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 authorized person is:

¹³ Attorneys “have all powers of notaries public” and are “authorized to do all acts which may be done by notaries public” in their jurisdiction, pursuant to 4 M.R.S. § 1056.

- 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 section, "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 ... for which the petition is being circulated.

(Emphasis added). Section 1052(4-B) defines the term "initiate" to mean "the collection of signatures and related activities to qualify a state or local initiative or referendum for the ballot." The phrase "promote the direct initiative" is not defined, nor is the term "services" defined.

The plain language of section 903-E is expressed in the present tense. As noted by the BCD, the statute focuses on whether the notary "is providing any other services." App. 21. This is only logical since a qualification to perform an act such as administering an oath must be gauged *at the time the act is to be performed* – not determined at some future time, in hindsight, based on events that had not yet occurred when the notary was administering the oath. If the notary is not performing any "other services" related to the collection of signatures to qualify the petition for the ballot or to promote the initiative when the circulator appears before the notary to take the oath, then the notary is qualified to administer that oath. That is the strongest

interpretation of the plain language of section 903-E. Nothing in the plain language suggests otherwise.

Reed and his supporting Intervenors argued below that the use of the term “services” means services provided by the notary *at any time before or after* the administration of the oaths in question, but that is not a logical reading of the express language. Their interpretation places far too much weight on the word “services,” which by itself has no temporal meaning. The word “services” in the context of section 903-E can certainly be read to encompass any non-notarial activity that assists the effort to collect signatures to qualify the petition, as well as any activity to promote the initiative. But neither the word by itself or in context suggests that it encompasses services that have *not yet been provided* or may be provided at some point in the future. The same is true for the words “initiate” and “promote.” The plain meaning of both words can encompass a wide range of activities in support of the effort to qualify the initiative or to advocate for it, but neither word connotes a restriction to be applied based on circumstances that may arise in the future as well as the present or recent past.

The BCD found Reed’s interpretation flawed because it would “mean that a notary’s authority was *dependent upon* a future act.” App. 21 (emphasis in original).

[I]f at the time an oath is administered, a notary has not yet performed any non-notarial services in support of the campaign, the oath would be valid at that point in time, and the Petitioners do not seem to argue otherwise. However, according to Petitioner's interpretation of Section 903-E, the Secretary is required to retroactively reach back in time to revoke the authority to administer what was, at the time it was given, a lawfully administered oath. Petitioner's interpretation of these sections would nullify not just the notarial action, but the oath taken by the circulator. An oath duly sworn would be unsworn.

(Emphasis added.) The Secretary agrees. Reed's interpretation is contrary to the plain language of section 903-E – the statute does not expressly prohibit a notary from administering oaths if the notary “may in the future” provide other services.

C. If the Court rules that the statute is ambiguous, it should defer to the Secretary's interpretation.

If the Court nonetheless concludes that Section 903-E is susceptible of two differing interpretations – both Reed's and the Secretary's – it should defer to the Secretary's reading for several reasons: 1) the Secretary has broad authority to administer these statutes, 2) his interpretation is reasonable and comports with the underlying purpose of the restriction in section 903-E, and 3) neither the language of the statute nor its legislative history compels a reading contrary to the Secretary's interpretation.

The Secretary is charged by the Constitution and by the implementing statutes with the authority to review and determine the validity of citizen

initiative petitions. Me. Const. art. IV, pt. 3, § 20; 21-A M.R.S. §§ 901-905.

Indeed, this Court has recognized that the Secretary has broader authority in the context of reviewing initiative petitions than in exercising his other election-related statutory duties. *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 13, 795 A.2d 75 (recognizing the Secretary’s plenary power to investigate and determine the validity of petitions); *Knutson*, 2008 ME 124, ¶ 20, n. 7, 954 A.2d 1054 (noting that Secretary has broader authority to review initiative petitions than candidate petitions pursuant to 21-A M.R.S. § 354).

The Secretary is also charged with commissioning and disciplining notaries public, pursuant to 4 M.R.S. §955-C and 5 M.R.S. § 82.¹⁴ For these reasons alone, his interpretation of section 903-E is entitled to deference. *See Street v. Bd. of Licensing of Auctioneers*, 2006 ME 6, ¶ 9, 889 A.2d 319 (“agency’s interpretation of ambiguous statute it administered is reviewed with great deference and will be upheld unless the statute plainly compels a contrary result”).

¹⁴ Indeed, the Secretary has express statutory authority to suspend, revoke, or refuse to renew the commission of a notary public on grounds that the notary is “in violation of [Title 4] section 954-A.” Title 4, section 954-A, enacted concurrently with Title 21-A, section 903-E, makes it “a conflict of interest for a notary public to administer an oath or affirmation to a circulator of a petition for direct initiative ... 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.” 4 M.R.S. § 954-A, enacted by P.L. 2017, c. 418, § 1. As the BCD correctly observed, section 954-A concerns notaries’ ethical obligations, whereas section 903-E affects their authority to administer oaths to circulators of initiative and referendum petitions. App. 19. Both are expressly within the Secretary’s administrative purview.

The Secretary's interpretation also deserves deference because it is reasonable and gives effect to the intent of the Legislature while remaining consistent with the limits of legislative power under the provisions of the Constitution governing initiative and referendum. *Knutson*, 2008 ME 124, ¶ 9, 954 A.2d 1054 (“we defer to the Secretary's interpretation if that interpretation is reasonable”); *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983) (any doubt as to meaning of statutes relating to citizens' initiative “must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate”).

The circulator's oath is essential to maintaining the integrity of the petition process, *Me. Taxpayers Action Network*, 2002 ME 64, ¶¶ 8, 13, and the notary plays an important role as the administrator of that oath. Section 903-E, like the former section 903-A construed in *McGee*, 2006 ME 50, ¶56, 896 A.2d 933 (Clifford, J. concurring), is “not an end in itself” – it serves a larger purpose of reinforcing constitutional requirements. *See also Birks v Dunlap*, No. BCD-AP-16-04, 2016 WL 1715405 (purpose of Title 4, section 951-A requiring notary to use signature consistent with official signature on file with Secretary “is to facilitate compliance with the constitutional requirement of a properly performed oath”). Section 903-E prevents notaries from serving in different roles at the same time and thus serves the purpose of assuring that

notaries exercise their oath-taking responsibilities without bias or conflict of interest. A notary who is also serving as the manager of a petition drive, supervising circulators, or promoting the subject matter of the initiative, for example, might be too invested in the success of the petition drive to be objective and to exercise independent judgment when administering oaths. If the notary's independence or objectivity were compromised in this way, it might lessen the notary's resolve to follow the oath-taking procedures that the Constitution requires. Concerns about the integrity of notaries have arisen in previous petition cases, leading to the enactment of Section 903-E. *See Birks*, 2016 WL 1715405; *Johnson v. Dunlap*, No. AP-09-56, 2009 WL 6631827 (Me. Super. Ct., Dec. 23, 2009) (Stavros Mendros alleged to be "self-interested notary" because he was also paid to run petition drive). The Legislature thus thought it wise to prevent notaries from serving in different roles at the same time.

Requiring that a notary not be engaged in providing services to support the initiative when undertaking to administer oaths to circulators achieves the above objectives. Invalidating the circulator's oath based on the future actions of a commissioned notary who administered that oath, however, as Reed and his supporters contend, would contribute nothing to safeguarding or reinforcing the integrity of the process. The Secretary's interpretation of

Section 903-E thus draws the line at the appropriate place to achieve the Legislature’s objectives, without nullifying the circulator’s oath based on future actions by a notary that are beyond the circulator’s control. App. 21.

The language of Section 903-E does not compel a reading contrary to the Secretary’s interpretation. Instead, the use of the present tense and the absence of any language in Section 903-E expressing an absolute all-time ban on a notary ever performing services for an initiative once having administered oaths to circulators contradicts Reed’s interpretation.

Finally, the legislative history of Section 903-E supports the Secretary’s interpretation, not Reed’s. Initially adopted as section 903-D, the statute provided, in pertinent part, that a notary could not notarize an initiative petition under section 902 “[i]f employed or compensated by a petition organizer for any purpose other than notarial acts” or “[i]f providing services or offering assistance to a ballot question committee established to influence the ballot measure for which the petitions are being circulated.” P.L. 2017, c. 277, § 5. The Secretary proposed an amendment the following legislative session to strike the phrase “or offering assistance.” L.D. 1726, § 19 (128th Legis. 2017). In testimony supporting this bill, the Deputy Secretary of State expressed concern that “offering assistance” was too vague for a prohibition. She also wondered whether the phrase “providing services” prohibited a

volunteer as well as a paid notary from engaging in any services, “such as alphabetizing petitions by town, delivering notarized petitions to the municipalities for verification of the signers, helping to organize the forms for submission to the state, etc.?” Testimony of Deputy Sec’y of State Julie L. Flynn, dated Jan. 3, 2018. The legislative committee did not adopt the Secretary’s proposal as presented, but instead repealed Section 903-D and replaced it with the current version of Section 903-E. P.L. 2017, c. 418. The phrase “offering assistance” was eliminated, and the prohibition was clarified to apply to paid as well as volunteer services. The phrase “providing services” was not further defined. *Id.*

In his filings with the BCD, Reed made much of the fact that the Deputy Secretary expressed satisfaction with these changes in testimony on the replacement bill (L.D. 1865 (128th Legis. 2018)), enacted as P.L. 2017, c. 418. The full text of her statement undercuts Reed’s argument, however. Referring to the sections of L.D. 1865 enacting Title 4, § 954-A and Title 21-A, § 903-E, Deputy Secretary Flynn testified:

In both sections, the bill proposes that a notary public or other person authorized to administer oaths may not administer the oath on an initiative or referendum petition if the notary public or other authorized person is providing any services other than notarial acts to initiate or promote the direct initiative or referendum for which the petition is being circulated. These changes do clarify the

questions we had about the prior conflict provisions in Title 21-A § 903-E.¹⁵

This passage reveals that the Secretary understood the prohibition on other services to mean any services other than notarial acts – but there is nothing to indicate that the Secretary or the Legislature considered the prohibition to extend to any *future* acts by a notary administering oaths to circulators.

D. The Secretary’s factual findings with respect to the notaries are supported by competent evidence in the record and must be upheld.

The Secretary’s findings with respect to notaries Leah Flumerfelt, Brittany Skidmore, Wesley Huckey, Michael Underhill, and David McGovern, Sr., reflect his common-sense reading of the plain language of Section 903-E. In his Amended Determination, the Secretary invalidated signatures on petitions notarized by Mr. Underhill and Mr. McGovern after learning on remand that both individuals had already circulated petitions when they administered the oath to other circulators. App. 147, ¶¶ 6(E) & (F).

Ms. Flumerfelt and Ms. Skidmore, by contrast, worked exclusively as notaries on the petition drive up until the January 24th deadline for delivering petitions to local registrars. The Secretary agreed with Reed that the services these notaries later performed – delivering petitions to towns, checking over

¹⁵ The citation to § 903-E is a typographical error; the prior version was § 903-D.

petitions in the office to make sure they were complete, and cleaning up the campaign field office – constituted “other services” to initiate the direct initiative within the meaning of Section 903-E. But neither of these notaries had engaged in such services before or during the period when they were administering oaths to circulators; thus, the Secretary properly found that they were not disqualified by the plain language of Section 903-E. App. 147-149, ¶¶ 6(H) & (I).

The record shows that Wesley Huckey was hired by the petition organizers only to serve as a notary, and not to perform any other services. App. 177. On one occasion in mid-January 2020, however, Mr. Huckey acknowledged that he carried some petitions from the Augusta City Clerk’s office, where he was employed during the day, to the Augusta field office of the petition organizers, where he was already headed to perform his work that evening as a notary for the petition drive. *Id.* He continued to serve as a notary after that date and did not carry petitions to any other locations. *Id.* Although the Secretary found that delivering petitions from point A to point B “could be construed as performing other services in violation of section 903-E,” the Secretary considered the single occurrence of this small errand to be a *de minimis* violation of section 903-E that did not disqualify Mr. Huckey from administering oaths to circulators thereafter. App. 147, ¶ 6(G).

The BCD disagreed with the Secretary on this point, concluding that “Mr. Huckey’s act of delivering petitions does not fall within any reasonable definition of ‘service’ toward initiating or promoting the initiative – any more than if his act had been to deliver those petitions to the post office to be mailed to the campaign.” App. 23. In the Secretary’s view, however, it is difficult to draw a clear definitional line to distinguish delivery of petitions to a campaign office or a post office from other non-notarial services related to the collection of signatures on petitions. Construing delivery of petitions to a campaign office as a non-notarial service rests on a more solid analytical foundation consistent with what the Secretary understands to be the legislative intent behind Section 903-E. At the same time, Mr. Huckey’s delivery of petitions from the office where he worked during the day to the office where he was going anyway, for the sole purpose of performing notarial services, makes the provision of this delivery service merely incidental.

Given the isolated, fleeting and incidental nature of this one-time errand, the Secretary properly treated it as no more than a *de minimis* violation of Section 903-E.¹⁶ See, e.g., *Hebron Academy, Inc v. Town of Hebron*,

¹⁶ The BCD found competent evidence in the record indicating that Mr. Huckey delivered the petitions to the field office “at the behest of his employer, the Augusta City Clerk” pursuant to the clerk’s obligation to “return [petitions] to the circulators or their agents within 5 days” of certifying them. Me. Const. art. IV, pt. 3, § 20. App. 23-24.

2013 ME 15, ¶ 24, 60 A.3d 774 (incidental use of property for non-exempt purpose considered *de minimis*). As the official responsible for administering the notary laws, the Secretary was well within the bounds of his discretion to reach that conclusion. Moreover, even if performance of this incidental service were deemed to disqualify Mr. Huckey from continuing to administer oaths to circulators, the Secretary determined that it would not affect the validity of signatures on petitions notarized by Mr. Huckey prior to that date. App. 147, ¶ 6(G).¹⁷

For all of the above reasons, this Court should affirm the Secretary’s interpretation of Section 903-E and his determination of validity with respect to administration of circulator oaths by the notaries involved in this petition campaign.

II. The Secretary did not abuse his discretion or make an error of law in his investigation on remand.

C. Standard of Review

The Secretary has “plenary power” to determine the validity of petitions and has authority to investigate “credible evidence of fraud” in the signature gathering process. *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 12, n. 8 & ¶

¹⁷ The Secretary found that if Mr. Huckey were disqualified from administering oaths to circulators after performing this errand on January 17, 2020, that would invalidate an additional 2,555 signatures, which is not enough to affect the validity of the petition.

25, n. 11 (Dana, J., concurring); and *Palesky*, 1998 ME 103, ¶¶ 3, 14, 711 A.2d 129. “The discretion to determine when an investigation is necessary, as well as the course and scope of such an investigation, ... is left to the Secretary.” App. 25, citing *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 12, n. 8.

Review of the Secretary’s decisions in this arena, therefore, must be “both deferential and limited.” *Birks*, 2016 WL 1715405, at *3 (Me. Bus. & Cons. Ct. Apr. 08, 2016). Indeed, given the Secretary’s plenary authority, substantial deference is appropriate. *See Knutson*, 2008 ME 124, ¶ 20, n. 7, 954 A.2d 1054. To establish that the Secretary abused his discretion with regard to the scope of his investigation, Reed must demonstrate that the Secretary “exceeded the bounds of the reasonable choices available to [him], considering the facts and circumstances of the particular case and the governing law.” *Sager v. Town of Bowdoinham*, 2004 ME 40, ¶ 11, 845 A.2d 567. Reed failed to make such a showing.

D. The Secretary considered all evidence of alleged fraud presented on remand and did not abuse his discretion in declining to pursue Reed’s suggested avenues of further inquiry or investigation.

Reed and the supporting intervenors have not identified, nor is the BCD or the Secretary aware of, “any case law or other legal authority which requires the Secretary to utilize specific investigatory methods or procedure when determining whether fraud has occurred in the course of a signature

gathering effort.” App. 25. Reed, IECG, and MSCC nonetheless contended below that the Secretary abused his discretion by allegedly refusing to conduct a “full-scale investigation of potential fraud in this petition drive.” App. 150, ¶ 10. This contention ignores the Secretary’s plenary authority in this area and “gloss[es] over” the actions he took based on finding credible evidence of fraud. App. 26.

As an initial matter, the first, and only, direct evidence of fraud or forgery in this petition drive came to light on Friday, March 20, 2020, when Reed attached to his first Motion to Take Additional Evidence the affidavits of two voters who attested that they had not signed petition #743 even though the voters’ names appear on that petition. App. 259-266. Both signatures had already been invalidated by the local registrar, who determined that these voters were not registered at the addresses listed on the petition. App. 149, ¶ 8; App. 266 (“NR” notation means “not registered”). The Secretary considered this evidence on remand, however, and, finding it credible, determined that this particular circulator’s oath could not be accepted as valid on any of the petitions she circulated. The Secretary thus invalidated all 174 signatures on her petitions. App. 147, ¶ 8. *See Me. Taxpayers Action Network*, 2002 ME 64, ¶ 12 (Secretary has authority to invalidate petitions *in toto* when circulator has not complied with statutory or constitutional requirements).

Reed and supporting intervenors IECG and MSCC contend that it was an abuse of discretion for the Secretary not to question this circulator on remand even though she likely would have asserted her Fifth Amendment right not to answer any questions. Given the press of time – the Secretary had only a few days on remand in which to consider over 300 pages of material submitted for review – the likely futility of such an inquiry, and the Secretary’s decision to invalidate all of the signatures collected by this circulator based on the evidence of forgery, the Secretary appropriately exercised his discretion not to pursue this individual for further questioning.

The other “evidence of fraud” that Reed claims the Secretary had an obligation to investigate is a hearsay report from an unnamed circulator that a supervisory staff person at Revolution Field Strategies (Melissa Burnham) allegedly knew that the circulator of petition #743 had forged names on a petition and yet still allowed the petition to be submitted to the Secretary. App. 231. Reed did not supply the name or provide an affidavit from this unnamed source, nor did the unnamed source suggest that any other circulator involved in the petition drive had engaged in similar conduct. App. 31, n. 4. The Secretary determined that it was speculative, at best, to suggest that this circulator’s actions – or a supervisory employee’s alleged awareness of those actions – made it likely that one or more of the other 562 circulators

involved in this petition drive also had engaged in fraud or forgery. Having rejected the signatures of the only circulator alleged or shown to have engaged in fraudulent activity, the Secretary decided, in the exercise of his discretion, not to explore this speculation further during the limited time available.¹⁸ App. 149-150, ¶¶ 8 & 10.

The Secretary and his staff have extensive experience reviewing petitions and ferreting out potential fraud and forgery. They take allegations of fraud very seriously, as shown in prior petition cases. *See, e.g., Palesky*, 1998 ME 103, ¶¶ 3, 12-13, 711 A.2d 129 (Secretary invalidated entire petitions signed by circulators who submitted affidavits on remand attesting that they did not appear before the person named as the notary on their petitions and did not take an oath before any other authorized person); and *Me. Taxpayers Action Network*, 2002 ME 64, ¶¶ 5, 20-21, 795 A.2d 75 (Secretary invalidated entire petitions circulated by an individual who took his oath before a notary but was not the person he claimed to be, having stolen another person's identity).

¹⁸ Reed also contends the Secretary should have investigated Revolution Field Strategies based on newspaper accounts of alleged problems in a prior petition drive in another state. App. 251. These allegations were adequately addressed in a responsive Affidavit from one of the principals in Revolution Field Strategies. App. 200.

The Secretary reasonably relied on that experience in exercising his discretion as to the scope of inquiry in this matter. It was also reasonable for the Secretary to take into account the absence of any reports of alleged misconduct from municipal officials, who are required by law to submit to the Secretary copies of any petitions indicating violations of the constitutional or statutory requirements. App. 150, ¶ 10.

The fact that the Secretary has both the authority and obligation to determine the validity of petitions does not mean that he is obligated to use his fairly limited resources in an extremely short time period to chase down every possible lead that the opponents of a particular initiative petition may suggest as a possible source of information relevant to the Secretary's determination. The Secretary reviewed all of the information submitted to his office and weighed the probabilities of learning additional probative information in deciding not to explore further. The facts, circumstances, and governing law, as noted by the court below, demonstrate that the Secretary's choices were reasonable, and that he did not abuse his discretion. App. 26.

III. The Secretary did not abuse his discretion or make an error of law in deciding not to conduct evidentiary hearings on remand.

A. Standard of Review

The question of whether the Secretary had authority to convene an evidentiary hearing after remand from the Business and Consumer Court is an issue of law, subject to de novo review. *McGee*, 2006 ME 50, ¶¶ 5, 12. Even assuming the Secretary had such authority, however, his decision not to hold hearings is reviewable only for abuse of discretion. *See Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶¶ 31-41, 39 A.3d 74 (agency did not abuse its discretion by declining to conduct evidentiary hearings not required by statute or rule).

B. The Secretary's decision not to conduct evidentiary hearings on remand was consistent with the scope of his legal authority and an appropriate exercise of his discretion.

The initiative provisions of the Maine Constitution authorize the Legislature to:

enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions. Such laws shall include provision for judicial review of any determination, to be completed within 100 days from the date of filing of a written petition in the office of the Secretary of State.

Me. Const. art. IV, pt. 3, § 22. These laws appear in Title 21-A, sections 901 through 905, and nowhere in those statutes is there a provision authorizing

the Secretary to conduct hearings during the 30-day period for the review of petitions by his office. The Secretary thus determined that he lacked the authority to conduct an evidentiary hearing on remand. App. 147, ¶ 2.

The judicial review provisions of Section 905 specify that any challenge to the Secretary's determination "must be conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by this section." 21-A M.R.S. § 905(2). This Court clarified in *Palesky* that, in petition cases, "the taking of evidence is controlled by Rule 80C(e) and the judicial review provisions of the Administrative Procedures Act." 1998 ME 103, ¶ 8.

Reed argues that, since the APA allows a reviewing court to order the taking of additional evidence before the agency – as the BCD did in its remand order of March 23rd in this case – the Secretary must also have the authority to convene an adjudicatory hearing under the APA, at which interested parties could cross-examine witnesses. Reed's leap of logic is not supported by the language of any statute or by any case law. Nor would such a procedure be possible to conduct within the short time frame allowed by law for the Secretary's review and for judicial review, including any remand. 21-A M.R.S. § 905 & Me. Const. art. IV, pt. 3, § 22 (entire process of review must be completed within 100 days from the filing of the petition with the Secretary).

Remands to the Secretary have been ordered in many prior petition cases, but none have involved evidentiary hearings, and none of the parties or reviewing courts have suggested that such hearings would have been appropriate or legally required.¹⁹ The BCD correctly ruled that the Secretary’s review of initiative petitions “is not an adjudicatory proceeding and does not include a right to a hearing by those supporting or opposing the petition.” App. 37 & 144, ¶ 2.

The BCD’s ruling is consistent with the concept that review of a citizen initiative petition is part of a legislative process, not an adjudicatory one. It is thus completely unlike a review of nominating petitions by candidates – as in *Knutson* – where the statutory framework expressly provides for an adjudicatory hearing before the Secretary or his designee to contest the validity of the petitions. See 21-A M.R.S. § 337(2) (for party candidates) and § 356(2) (for non-party candidates). And although there are parties and intervenors who strongly favor or oppose this citizen initiative on its merits, the statutory framework for initiative petitions does not authorize

¹⁹ In both *Maine Taxpayers Action Network* and *Hart v. Sec’y of State*, 1998 ME 189, 715 A.2d 165, the Secretary accepted affidavits, as well as interview reports on remand. Court hearings in *Palesky* and *Hart* occurred before 21-A M.R.S. § 905(2) was amended to remove the reference to a “trial without jury.”

administrative hearings or confer any rights on such interested parties to engage in questioning witnesses.

In this case, the Secretary opted to proceed as he had done in prior cases, by gathering evidence through witness statements, interviews, and/or affidavits. This is a more efficient method that can be accomplished during the very brief review period allowed by law. By gathering evidence in this manner, the Secretary was exercising his plenary power to investigate and determine the validity of the petitions. The Secretary did not abuse that power or his discretion in doing so.

IV. The Secretary did not abuse his discretion when he failed to invalidate the remaining 492 signatures challenged by Reed, and those determinations in any event do not involve enough signatures to affect the validity of the petition.

A. Standard of Review

This Court reviews the Secretary's decision on an initiative petition for abuse of discretion, errors of law, or findings not supported by the evidence. *Me. Taxpayers Action Network*, 2002 ME 64, ¶ 7; *Palesky*, 1998 ME 103, ¶ 9, 711 A2d 129. Thus, the Secretary's findings of fact with respect to the validity of specific signatures on petitions must be upheld if they are supported by any competent evidence in the record, even if the record contains other evidence that might support a different factual finding. *See Friends of Lincoln Lakes v.*

Bd. of Env'tl. Prot., 2010 ME 18, ¶ 13-14, 989 A.2d 1128; *Palesky*, 1998 ME 103, ¶ 9 (court reviews Secretary's decision for findings not supported by evidence). As the party challenging the Secretary's determination, Reed bears the burden of persuasion on appeal. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 15.

B. The Court need not reach this issue.

As a threshold matter, and as the BCD concluded (App. 28), even if Reed could persuade the Court that 492 signatures were improperly counted as valid by the Secretary on remand, that would not be sufficient to change the outcome of the Secretary's Amended Determination, which concluded that the petition contained 3,050 signatures above the threshold to qualify for the ballot. App. 152, ¶ 15. Even if the Court were to hold that 2,555 signatures on petitions notarized by Mr. Huckey after he delivered petitions to the campaign's field office should have been invalidated, in addition to these 492 signatures, the petition would still have just enough valid signatures to qualify. Accordingly, the Court need not reach this last issue raised on appeal.

C. The Secretary's factual findings with respect to 492 signatures on petitions challenged by Reed are supported by substantial evidence in the record.

On remand, Reed presented numerous charts and exhibits outlining several categories of alleged errors "intrinsic" to the petitions. R. 25 A-N & R.

19A. The Secretary's office reviewed all of this information in detail (*see* App. 161-162 & R. 3) and made findings in the Amended Determination that reflect changes based on that additional review. For example, the Secretary determined that an additional 734 signatures (out of an alleged 900 duplicates) should be invalidated because, on further scrutiny, the Secretary's office was able to discern that the same voter was listed twice on separate petitions. *Compare* App. 151, ¶ 2(B) & App. 142, ¶ 2(B). Reed nonetheless contends that the Secretary erred by not invalidating 60 more signatures as duplicates. Pet. Rule 80C Br. at 22-23. Whether two signatures represent the same or different voters is a factual determination exclusively within the purview of the Secretary to make. A reviewing court may not second-guess those factual determinations and may not substitute its judgment for that of the Secretary. 5 M.R.S. § 11007; *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14 ("any court review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial decision-making without giving due regard to the agency's expertise, and would exceed [the court's] statutory authority").

Reed also asserted that the Secretary erred in failing to invalidate voter signatures that Reed alleges were added to the petition after the circulator had taken the oath before a notary. On remand, he identified 357 such

signatures. After review, the Secretary agreed with Reed on 122 of these, which were invalidated for “DATE” in the Amended Determination. Compare App. 151, ¶ 2(F) and App. 142, ¶ 2(F). Reed then argued to the BCD that the Secretary erred in not invalidating the remaining 205 signatures. Pet. Rule 80C Br. at 23.

Upon review, however, the Secretary discerned a number of dates on signature lines that were plainly erroneous: “12/12/20” for example, is a date that has not yet occurred, whereas “1/1/19” pre-dated the printing of the petition form after the applicants received approval to circulate in October 2019. Other dates on voters’ signature lines that appeared to be later than the date of the circulator’s oath were listed in the middle of the petition, in a sequence of voter names with valid dates. It was plainly within the Secretary’s discretion to determine that these reflected scrivener’s errors and did not support invalidating the voters’ signatures.

In some circumstances, the Secretary’s staff deciphered the handwriting differently than Reed – perhaps because staff were looking at the original petitions rather than scanned copies – and could see that the date in question was not actually later than the date of the circulator’s oath. The other groups of signatures within the 492 that Reed continues to dispute involve smaller

numbers of signatures where the Secretary’s office made determinations on remand that simply differ from Reed’s own analysis. *See* R. 3.

With respect to these 492 signatures, Reed is asking the Court to review factual determinations made by the Secretary and to reach a different conclusion. That is plainly beyond the scope of judicial review.

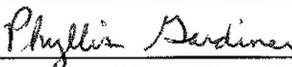
All of the factual determinations regarding the validity of signatures on petitions reflect the Secretary’s considered judgments and his reasonable reliance on the expertise of professional staff who have reviewed petitions for years. Such decision-making is “the very essence of discretion,” and there is no basis for the Court to now determine that the Secretary abused that discretion. *See McGee*, 2006 ME 50, ¶ 57, 896 A.2d 933 (Clifford, J. concurring), citing *Palesky*, 2002 ME 64, ¶ 12, n. 8, 711 A2d 129.

CONCLUSION

For the foregoing reasons, the Secretary’s Amended Determination of Validity, dated April 1, 2020, should be affirmed.

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