

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. KEN-20-169

CLARE HUDSON PAYNE, PHILIP STEELE, FRANCES M. BABB,
and THE COMMITTEE FOR RANKED CHOICE VOTING,

PLAINTIFFS-APPELLANTS

v.

MATTHEW DUNLAP, AS MAINE SECRETARY OF STATE ET AL.

DEFENDANT-APPELLEE

BY REPORT FROM THE SUPERIOR COURT (KENNEBEC COUNTY)

BRIEF OF DEFENDANT-APPELLEE
MATTHEW DUNLAP, MAINE SECRETARY OF STATE

AARON M. FREY
Attorney General

THOMAS A. KNOWLTON
Assistant Attorney General

Of Counsel

PHYLLIS GARDINER, AAG
Maine Bar No. 2809
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8830

Attorneys for Defendant-Appellee

TABLE OF CONTENTS

Table of Authorities	ii
Case History	1
Statement of the Issues	6
Summary of Argument	6
Argument.....	8
I. The Intervenor’s application for a people’s veto petition was timely filed with the Secretary because the legislative session at which L.D. 1083 was “passed by the Legislature,” for purposes of Article IV, part 3, sections 16 and 17 of the Maine Constitution, was the Second Regular Session of the 129 th Legislature, which convened on January 8, 2020 and adjourned <i>sine die</i> on March 17, 2020	9
II. The Intervenor’s application for a people’s veto petition was timely filed under 21-A M.R.S. § 901(1) because it was submitted after final passage of Chapter 539 and before the tenth business day following adjournment of the Second Regular Session of the 129 th Legislature.....	16
Conclusion.....	26
Certificate of Service.....	27
Certificate of Compliance with Word-Count Limit	28
Addendum.....	29

TABLE OF AUTHORITIES

Cases

<i>Allen v. Quinn</i> , 459 A.2d 1098 (Me. 1983)	20
<i>Bowler v. State</i> , 2014 ME 157, 108 A.2d 1257	22
<i>Klosterman v. Marsh</i> , 180 Neb. 506, 143 N.W. 2d 744 (1966)	22
<i>Leader v. Plante</i> , 95 Me. 339, 50 A.2d 54 (1901)	19
<i>McGee v. Sec’y of State</i> , 2006 ME 50, 896 A.2d 933	20
<i>Novak v. Bank of N.Y. Mellon Trust Co.</i> , 783 F.3d 910 (1st Cir. 2015)	19
<i>Opinion of the Justices</i> , 484 A.2d 999 (Me. 1984)	12
<i>Opinion of the Justices</i> , 571 A.2d 1169 (Me. 1989)	11
<i>Opinion of the Justices</i> , 2015 ME 107, 123 A.2d 494	10, 12, 20, 23
<i>Rommel v. Gwadosky</i> , AP-97-112 (Me. Super. Ct., Ken. Cty., Nov. 21, 1997)	passim
<i>Stuart v. Chapman</i> , 104 Me. 17 (1908)	11
<i>Young v. Waldrop</i> , 111 Mont. 359, 109 P.2d 59 (1941)	19

Statutes

21-A M.R.S. § 1(27-C)	1
21-A M.R.S. § 1(35-A)	1
21-A M.R.S. § 723-A	1
21-A M.R.S. § 723-A(6)	23
21-A M.R.S. § 901	17
21-A M.R.S.A. § 901(1)	passim
21-A M.R.S. § 905(2)	8

Const. Res. 1907, c. 121 (Amendment XXXI).....	14
Me. Const. art. IV.....	passim
Me. Const. art. IV, pt. 3, § 2	passim
Me. Const. art. IV, pt. 3, § 16.....	passim
Me. Const. art. IV, pt. 3, § 17.....	passim
Me. Const. art. IV, pt. 3, § 18.....	18
Me. Const. art. IV, pt. 3, § 20.....	10, 17
Neb. Const. art. III, sec. 3	21
Pub. L. 1997, c. 205 (eff. May 16, 1997)	19
Pub. L. 1997, c. 581, § 2 (eff. June 30, 1998).....	22
Pub. L. 2009, c. 82 (repealed Nov. 3, 2009)	24
Pub. L. 2015, I.B., c. 3, § 5 (eff. Jan. 7, 2017).....	23
Pub. L. 2017, c. 316 (eff. Feb. 5, 2018)	23
Pub. L. 2019, c. 539 (suspended June 15, 2020).....	passim

Rules

M.R. App. P. 24(a).....	5, 6
-------------------------	------

Other Authorities

L.D. 1020 (124 th Legis. 2009).....	24
L.D. 1083 §§ 1 and 2 (129 th Legis. 2019)	passim
L.D. 1116 (118 th Legis. 1997).....	19
L.D. 1646 (128 th Legis. 2017).....	23
L.D. 1917 (118 th Legis. 1997).....	22
Legis. Rec. 640-645 (1907).....	15

Legis. Rec. H-1193 – H-1196 (1st Spec. Sess. 2017)	23
Legis. Rec. S-579 (1 st Reg. Sess. 2009)	24
Op. Me. Att'y Gen. 79-179, 1979 WL 482479.....	2, 6, 15
http://legislature.maine.gov/ros/LawsOfMaine/breeze/Law/getDocById/?docId=59538	23
https://web.archive.org/web/20091120093501/http://www.maine.gov/sos/cec/elec/pets02/pets02-1.htm	25
Department of the Maine Secretary of State, Press Release (Nov. 6, 2017), https://www.maine.gov/sos/news/2017/peoplesveto.html	24
Kevin Miller, Ranked-choice voting supports to begin ‘people’s veto’ campaign today, Portland Press Herald (Nov. 11, 2016), https://www.pressherald.com/2017/11/06/ranked-choice-voting-supporters-to-begin-peoples-veto-campaign-tuesday/ (last visited July 1, 2020).....	24
Tinkle, The Maine State Constitution: A Reference Guide (1992 Ed.).....	12

CASE HISTORY

Factual History:

Ranked-choice voting (“RCV”) is the method currently used to conduct primary elections in Maine to select party nominees for all state and federal offices (other than president) as well as general elections for Congress and U.S. Senate. 21-A M.R.S. §§ 1(27-C) & (35-A). RCV allows voters to rank candidates for any given office in order of preference. The counting of votes proceeds in sequential rounds, in which the last-place candidates are eliminated and the second choices of the voters who chose the losing candidates are counted in the next round. The candidate with the most votes in the final round is elected. *Id.* § 723-A.

In the spring of 2019, a bill was introduced in the Legislature to extend RCV to presidential elections – both primary and general. L.D. 1083 §§ 1 & 2 (129th Legis. 2019). Joint Appendix (“A.”) 18 (Stipulated Facts), ¶ 1. The bill was amended by Committee Amendment “A” (S-313) and enacted by the Maine House of Representatives on June 19, 2019. A. 18, ¶ 2. The 129th Legislature adjourned *sine die* the following day, however, before the Senate had taken any action on the bill. A. 18, ¶ 3. The bill was carried over as “unfinished business” in the Senate. *Id.*

The 129th Legislature convened its First Special Session on August 26, 2019, at which point the Senate enacted L.D. 1083 as amended, in concurrence with the House. A. 18, ¶¶ 3-4. The bill was presented to the Governor for her signature that same day, and the Legislature also adjourned *sine die* on that day.

On September 10, 2019, which was the tenth business day following final adjournment of the Legislature's First Special Session, Demitroula Kouzounas, the chair of the Maine Republican Party, and five other registered Maine voters submitted an application to the Secretary for a People's Veto of L.D. 1083. A. 19, ¶ 10 & A. 22-23 (Ex. B). Deputy Secretary of State Julie Flynn advised counsel for Ms. Kouzounas by email on that day that the Secretary would accept the application but would not consider it "complete" until after L.D. 1083 had become a chaptered law. A. 19, ¶ 9, & 21 (Ex. A). The Secretary's understanding, as explained in a 1979 Opinion of the Attorney General attached to Ms. Flynn's email, was that pursuant to Article IV, part 3, section 2, L.D. 1083 could not become law without the Governor's signature until the fourth day after the Legislature reconvened, which likely would not occur until January 2020. *Id.*

Indeed, the 129th Legislature did not reconvene until January 8, 2020, when the Second Regular Session began. A. 19, ¶ 12. The Governor took no

action on L.D. 1083 before or after January 8, 2020, other than to signal her intention to allow the bill to become law without her signature. A. 19, ¶¶ 7, 8. On January 12, 2020 – the fourth day after the Legislature convened – L.D. 1083 became law without the Governor’s signature and was designated by the Revisor of Statutes as Chapter 539 of the Public Laws of 2019. A. 24 (Ex. C). On January 16, 2020, counsel for Ms. Kouzounas and the Maine Republican Party submitted a new application for a People’s Veto of Chapter 539. A. 26-29 (Ex. D). The Secretary of State’s office approved the application on February 3, 2020, and provided the applicants with petition forms to begin circulating. A. 19, ¶ 17.

The Second Regular Session of the 129th Legislature adjourned *sine die* on March 17, 2020, in response to the pandemic. A. 19, ¶ 21. The 90th day after adjournment was June 15, 2020. On that day, organizers of the petition drive submitted petitions containing more than 63,067 signatures, which if valid, would be enough to present a proposed veto of P.L. 2019, Chapter 539 (“Chapter 539”) to the voters at the general election in November 2020. A. 5.

Procedural History:

On April 15, 2020, three registered Maine voters of different political affiliations, Clare Hudson Payne, Philip Steele, Frances M. Babb, and a nonprofit corporation that describes itself as a “public proponent” of Chapter

539, The Committee for Ranked Choice Voting, filed a complaint for declaratory judgment and injunctive relief against the Secretary. A. 2 & 7-17. The complaint sets forth two alternative legal theories, either of which, if accepted by the Court, would invalidate the people's veto referendum petition now under review by the Secretary.

Count I alleges that Chapter 539 was "passed" by the Legislature at the special session on August 26, 2019, and "took immediate effect on January 12, 2020" when it became law without the Governor's signature more than 90 days later. Plaintiffs allege that Chapter 539 therefore cannot be the subject of a people's veto referendum, which is permitted only for laws that have been "passed by the Legislature but not then in effect." A. 11-13 (Complaint), ¶¶ 24-26, 33-35.

Count II alleges that under Title 21-A, section 901(1), an application for a people's veto referendum petition may not be filed *any sooner than* the date of final adjournment of the legislative session at which the act to be vetoed was passed, *and not any later than* ten (10) business days after adjournment. A. 14, ¶¶ 40-41. Plaintiffs allege that if Chapter 539 is deemed to have "passed" when it became a public law during the Legislature's Second Regular Session in 2020, then the window to request a people's veto referendum petition was open only between adjournment *sine die* of the Second Regular

Session on March 17, 2020, and ten business days thereafter, on March 31, 2020. A. 14, ¶¶ 44-45. Because Ms. Kouzounas's application was filed on January 16, 2020, during the legislative session and before that window opened, plaintiffs assert that the Secretary had no legal authority to accept the application or, in the alternative, to accept as valid any signatures collected on petitions before March 17, 2020. A. 16, 1st ¶.

Plaintiffs ask the Court to issue a declaratory judgment in their favor and to enjoin the Secretary from accepting the people's veto petition or placing a referendum question on the ballot for the November 2020 election to veto Chapter 539. A. 16-17.

On April 24, 2020, Ms. Kouzounas filed a motion to intervene, which was unopposed. Promptly thereafter, the parties engaged in discussions with the Superior Court (Murphy, J.) about reporting the case to the Law Court pursuant to Rule 24(a) of the Maine Rules of Appellate Procedure. A. 3 (Docket entry for May 15, 2020). It appeared at the outset that there were no material facts in dispute and that certain questions of law would be dispositive of the entire action. Accordingly, the parties submitted stipulations of fact and proposed questions of law to the Superior Court along with a Joint Motion for Report on June 10, 2020. A. 4. Once the people's veto referendum petitions were filed with the Secretary on June 15, 2020, and

appeared to contain more than the minimum number of registered voter signatures to suspend Chapter 539, the parties amended the joint motion to add that fact. The Superior Court promptly granted the motion and submitted the report to this Court. A. 5-6.

STATEMENT OF THE ISSUES¹

- I. Which session of the 129th Legislature was the session at which L.D. 1083, An Act to Implement Ranked-choice Voting for Presidential Primary and General Elections in Maine, was passed for purposes of Me. Const. art. IV, pt. 3, §§ 16 and 17?
- II. Was P.L. 2019, ch. 539 effective on January 12, 2020?
- III. Does 21-A M.R.S.A. § 901(1) permit filing of a people's veto application with the Department of the Secretary of State prior to adjournment of the legislative session at which the Act in question was passed?

SUMMARY OF ARGUMENT

Ms. Kouzounas's application to the Secretary for approval to circulate a referendum petition to reject Chapter 539 was timely when it was filed on January 16, 2020. It was not too late because the legislative session in which L.D. 1083 was passed was the Second Regular Session of the 129th Legislature, which did not convene until January 8, 2020. *See Op. Me. Att'y Gen.* 79-179, 1979 WL 482479 at *6. It was not filed too early because, as the Superior

¹ The issues presented on appeal are the questions of law reported to this Court by the Superior Court, pursuant to M. R. App. P. 24(a). A. 5.

Court correctly concluded when this issue was litigated in *Remmel v. Gwadosky*, AP-97-112 (Me. Super. Ct., Ken. Cty., Nov. 21, 1997) (attached as Addendum), 21-A M.R.S. § 901(1) authorizes the filing of a people's veto petition application within ten business days after adjournment of the legislative session at which the bill was passed – meaning at any time after passage of the bill and before 5:00 pm on the 10th business day following adjournment of that legislative session. The statute does not require applicants to wait until after adjournment to obtain approval of a petition form and to begin circulating it.

Chapter 539 did not take effect immediately on January 12, 2020, and in accordance with Me. Const. art. IV, pt. 3, § 16 could not take effect as a non-emergency measure until 90 days *after* adjournment of that legislative session– i.e., on June 15, 2020. Because petitions containing the signatures of voters equal to or exceeding 10% of the total votes cast for Governor in the last gubernatorial election were filed by the 90th day, on June 15, 2020, the effect of Chapter 539 has now been suspended pursuant to Me. Const. art. IV, pt. 3, § 17. Whether a people's veto referendum question asking voters to reject Chapter 539 must be placed on the ballot in November 2020 now depends on the results of the Secretary's review to determine the validity of

the petition, and the outcome of any court challenge to the Secretary's determination that may be filed thereafter pursuant to 21-A M.R.S. § 905(2).

The questions of law presented to this Court may be answered succinctly as follows:

1) L.D. 1083 was "passed by the Legislature" within the meaning of Me. Const. art. IV, pt. 3, §§ 16 & 17 when it became law without the Governor's signature on January 12, 2020, during the Second Regular Session of the 129th Legislature.

2) Chapter 539 was not in effect on January 12, 2020, and could not take effect until June 15, 2020 – 90 days after the Second Regular Session of the 129th Legislature adjourned *sine die* on March 17, 2020.

3) The Intervenor's application for a people's veto referendum petition was timely filed on January 16, 2020, in accordance with 21-A M.R.S. § 901(1), notwithstanding that the Second Regular Session of the 129th Legislature remained in session.

ARGUMENT

Standard of Review. The questions of law submitted on report by the Superior Court are subject to *de novo* review by this Court.

- I. **The Intervenor’s application for a people’s veto petition was timely filed with the Secretary because the legislative session at which L.D. 1083 was “passed by the Legislature,” for purposes of Article IV, part 3, sections 16 and 17 of the Maine Constitution, was the Second Regular Session of the 129th Legislature, which convened on January 8, 2020 and adjourned *sine die* on March 17, 2020.**

Passage of legislation within the meaning of Me. Const. art. IV, pt. 3, §§ 16 & 17 (“Section 16” and “Section 17”) means that all the steps required to enact a bill, as described in Me. Const. art. IV, pt. 3, § 2 (“Section 2”) have occurred – not simply, as plaintiffs contend, when the House and Senate have voted to enact the bill. Plaintiffs’ theory that “passage” of legislation concludes with action by the House and Senate would preclude a people’s veto of any bill that was carried over to a later session by virtue of the timing of legislative adjournment and the Governor’s exercise of her authority under Section 2 to return the bill with objections to the House or Senate, or to let it become law without her signature. Section 2 of the Constitution affords the Governor these options, and Sections 16 and 17 afford Maine’s electors the opportunity to subject any nonemergency enactment to a statewide vote, or “people’s veto,” before the new law takes effect. The Secretary’s interpretation correctly harmonizes these three sections of the Constitution and protects the people’s sovereign power to legislate.

The meaning of Sections 16 and 17. Section 17 authorizes the electors to submit a petition containing the signatures of a number of voters equal to 10% of the total vote cast for Governor in the last election in order to “refer[] to the people” for a statewide vote (known as a “people’s veto”) any “Acts, bills, resolves or resolutions, or part or parts thereof, *passed by the Legislature but not then in effect by reason of the provisions of the preceding section.*” Me. Const. art. IV, pt. 3, § 17 (emphasis added). Under Section 16 (“the preceding section”), “[n]o Act or joint resolution of the Legislature” with limited exceptions not applicable here,² “*shall take effect until 90 days after the recess of the session of the Legislature in which it was passed*” unless passed as an emergency measure with a vote of two thirds of all members elected to each house. Me. Const. art. IV, pt. 3, § 16 (emphasis added). The “recess of the Legislature” in this context means “adjournment without day” (or “adjournment *sine die*”) of a session of the Legislature. Me. Const. art. IV, pt. 3, § 20. *See Opinion of the Justices*, 2015 ME 107, ¶ 16 n. 3, 123 A.2d 494.

Section 16 thus determines when legislation that has been finally enacted *takes effect*; it does not determine when legislation that has received

² The exceptions are orders or resolutions that pertain “solely to facilitating the performance of the business of the Legislature, of either branch, or of any committee or officer thereof, or appropriate money therefor or for the payment of salaries fixed by law.” Me. Const. art. IV, pt. 3, § 16.

the concurrence of the House and Senate becomes a public law. The question of when legislation becomes a public law is governed by Article IV, part 3, section 2 (“Section 2”). To determine which session of the 129th Legislature passed Chapter 539 requires reading Section 2 in conjunction with Sections 16 and 17.

Section 2. Pursuant to Section 2, “[e]very bill or resolution, ... to which the concurrence of both Houses may be necessary, ... which shall have passed both Houses, shall be presented to the Governor, and if the Governor approves, the Governor shall sign it; if not, the Governor shall return it with objections.” Under Section 2, “[t]he last legislative act is the approval of the governor.” *Stuart v. Chapman*, 104 Me. 17, 23 (1908). “The approval of the governor was the last legislative act which breathed the breath of life into these statutes and made them a part of the laws of the State.” *Id.*; *see also Opinion of the Justices*, 571 A.2d 1169, 1174 (Me. 1989) (legislative process must include review by Governor pursuant to Section 2, thus “proper enactment” of bond legislation requires Governor’s approval).

If the Governor fails to act within the time period prescribed in Section 2, then the bill becomes law without her signature. When that time period expires, however, depends on when the Legislature adjourns. Section 2 provides:

If the bill or resolution shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him, it shall have the same force and effect, as if he has signed it unless the Legislature by their adjournment prevent its return, in which case it shall have such force and effect, unless returned within three days after the next meeting of the same Legislature which enacted the bill or resolution; if there is no such next meeting of the Legislature which enacted the bill or resolution, the bill or resolution shall not be a law.

The first day of the “next meeting of the same Legislature” is excluded from the computation. *Opinion of the Justices*, 484 A.2d 999, 1001 (Me. 1984). Thus, the Governor has until the fourth day of the next session of the same Legislature in which to act, or the bill will become law without her signature. *See Tinkle, The Maine State Constitution: A Reference Guide* (1992) at 79 (“When the ten-day period is tolled by the legislature’s adjournment, the same legislature must be continuously in session for more than three days before the period in which the governor may act on the pending bill expires.”)

Governor Mills chose not to sign L.D. 1083 into law. By adjourning its special session *sine die* on August 26, 2019, immediately after presenting the bill to the Governor for her signature, the Legislature prevented the Governor from returning the bill with objections. *See Opinion of the Justices*, 2015 ME 107, ¶ 75, 123 A.3d 494 (*sine die* adjournment of a legislative session prevents the Governor from returning a bill with objections). The Legislature’s adjournment stopped the 10-day clock in Section 2 and thus also prevented

the bill from becoming law without the Governor's signature. Because gubernatorial action in accordance with Section 2 is the "last legislative act" required for passage of a bill, L.D. 1083 was not "passed" during the one-day special session on August 26, 2019. Under Section 2, passage could not occur until the "next meeting" of the 129th Legislature lasting more than three days, which did not occur until the Second Regular Session convened on January 8, 2020. L.D. 1083 could not become a law without the Governor's signature until the fourth day of that session, on January 12, 2020, and until then, there was no enacted law for the people to seek to veto.

Plaintiffs' interpretation. Plaintiffs focus on the phrase "passed by the Legislature" in Section 17 and construe it to mean only final passage by the House and Senate, regardless of any action by the Governor. A. 11, ¶¶ 26-27. They concede that L.D. 1083 did not become a public law until the fourth day of the Second Regular Session – January 12, 2020 – but then reach the remarkable conclusion that the law "took immediate effect" on that day because more than 90 days had elapsed since the adjournment *sine die* of the previous legislative session. A. 11, ¶ 24.

Plaintiffs' novel interpretation lacks any support in the text of the Constitution. Moreover, their reading is incorrect as a matter of law precisely because it frustrates the people's right to veto nonemergency legislation.

Under plaintiffs' view, Maine citizens would lose their constitutional right to veto any legislation that the Governor allows to become law without her signature under circumstances where (A) the Legislature adjourned *sine die* less than ten days after presenting the bill to the Governor, and (B) there was a gap of more than 90 days between that legislative adjournment and the next meeting of the same Legislature lasting more than three days.

Another obvious flaw in plaintiffs' theory is that if Chapter 539 "took immediate effect on January 12, 2020," as they contend, then the presidential primary election held on March 3, 2020, should have been conducted using ranked-choice voting. The Secretary did not implement RCV for the presidential primary, however, precisely because he knew that under Section 16, the new law *could not take effect* until 90 days *after* final adjournment of the Second Regular Session of the 129th Legislature, and the Legislature was still in session on March 3rd. No one suggested that RCV should have been applied to this year's presidential primary election – not even The Committee on Ranked Choice Voting, which actively supports the use of RCV in elections.

The correct interpretation of Sections 16 and 17. Section 16 was enacted as part of the same constitutional resolve that established the people's sovereign power to legislate by initiative and referendum. Const. Res. 1907, c. 121 (Amendment XXXI). The 90-day provision in Section 16

mirrors the 90-day period for a people's veto referendum in Section 17, revealing that the purpose of the 90-day delayed effective date for non-emergency enactments in Section 16 was to afford Maine citizens the opportunity under Section 17 to circulate and file referendum petitions before the law could take effect. The legislative history bears this out. *See* legislative debate at Legis. Rec. 640-645 (1907).

As the Attorney General observed in 1979:

To interpret § 16 as providing that the pending bills would become effective 90 days after the adjournment of the session at which they were approved by the Houses of the Legislature would ... undercut the very policy which prompted the adopting of that section. Such an interpretation would severely curtail, and in some cases possibly even eliminate, the right of the people to override legislative action through the referendum process.

Op. Me. Att'y Gen. 79-179, 1979 WL 482479 at *5. The Attorney General went on to conclude:

Thus, the only interpretation which is faithful to the underlying purposes of § 16 is that the phrase "the session of the Legislature in which it was passed," means that session at which the Governor could have returned the pending bills under art. IV, pt. 3, § 2 of the Constitution.

Id. (emphasis added). The Attorney General's reasoning remains sound today, and the Court should reach the same conclusion in this matter.

The answer to the first question of law referred to this Court, therefore, is that L.D. 1083 was "passed" for purposes of Sections 16 and 17 during the

Second Regular Session of the Legislature in January 2020, when the Governor allowed the bill to become law without her signature.

The answer to the second, closely related question of law is that Chapter 539 did not take effect on January 12, 2020. It was not enacted as an emergency measure with a 2/3 vote of all the members of both houses of the Legislature and thus could not become effective until 90 days after adjournment of the Second Regular Session of the 129th Legislature, pursuant to Section 16.

II. The Intervenor’s application for a people’s veto petition was timely filed under 21-A M.R.S. § 901(1) because it was submitted after final passage of Chapter 539 and before the tenth business day following adjournment of the Second Regular Session of the 129th Legislature.

The Intervenor’s application for a people’s veto petition was filed with the Secretary on January 16, 2020 – four days after L.D. 1083 became a chaptered public law (Chapter 539) without the Governor’s signature. A. 26-29. The application was not too early in the Secretary’s view because L.D. 1083 had by that point become a public law,³ and it was not too late because the final deadline for filing would not occur until 10 business days after adjournment *sine die* of the Second Regular Session on March 17, 2020.

³ See communication from Deputy Secretary Flynn to Intervenor’s counsel after the previous application was filed on September 10, 2019, at A. 21.

Plaintiffs' contention that the Intervenor needed to wait to file the application until after the Second Regular Session of the 129th Legislature had adjourned on March 17, 2019, is contrary to the statutory framework, the Superior Court's decision in *Remmel*, and the Secretary's longstanding interpretation, which has been followed by numerous applicants including those affiliated with plaintiffs who advocate for expanded use of RCV in Maine elections. It is unduly restrictive and inconsistent with the people's sovereign power to legislate by referring enacted laws to Maine voters for approval or rejection, pursuant to Section 17.

Before circulating a petition for a people's veto referendum, petitioners are required by statute to submit an application to the Secretary for approval, and the Secretary must approve both the wording of the question and the form of the petition before it can be circulated. 21-A M.R.S. § 901 (Supp. 2020). The basis for requiring an application and approval of the petition form is set forth in the Constitution,⁴ but the timing is specified only in statute. Here is the entire text of the provision at issue:

⁴ Me. Const. art. IV, pt. 3, § 20 requires that petition forms be "furnished or approved by the Secretary of State upon written application signed and notarized and submitted to the office of the Secretary of State by a resident of this State whose name must appear on the voting list of the city, town or plantation of that resident as qualified to vote for Governor." Section 20 also directs the Secretary to "prepare the ballots in such form as to present the question or questions concisely and intelligibly."

1. Limitation on petitions. An application for a people's veto referendum petition must be filed in the Department of the Secretary of State *within 10 business days after adjournment* of the legislative session at which the Act in question was passed. A direct initiative of legislation must meet the filing deadlines specified in the Constitution of Maine, Article IV, Part Third, Section 18.

Id. § 901(1) (emphasis added).

Plaintiffs contend that the italicized phrase establishes both a beginning and an end point for filing applications – i.e., that the statute allows only one brief window of time, between the day of adjournment and 10 business days after adjournment, in which registered voters may seek to exercise their right to undertake a people's veto referendum campaign. Under plaintiffs' interpretation, the Intervenor was required to wait to file the application until the Legislature adjourned *sine die* on March 17, 2020. The entire window of opportunity to file would have been between March 17 and March 31, 2020, in plaintiffs' view.

The Secretary agrees with plaintiffs about the end point for filing such an application but disagrees about the beginning point. The Secretary's longstanding interpretation is that Section 901(1) allows citizens to initiate a people's veto campaign by filing an application at any point from the time the legislation is enacted as a public law up to and including the 10th business day after *sine die* adjournment of the legislative session at which the bill was

passed. This interpretation was challenged in 1997 and upheld on de novo review by the Superior Court (Cole, J.) in *Remmel*.⁵ No appeal was filed, however, and Question of Law # 3 in this case has never been presented to this Court as far as the Secretary is aware.

Plain language and context. Although the word “within” can be used in different contexts to convey a certain circumscribed time range within which action must occur, it is more typically construed to describe only the end point beyond which the action may not be taken. *See, e.g., Leader v. Plante*, 95 Me. 339, 341 (1901) (“within” a certain period, and “on or before” or “at or before” a certain day are equivalent terms); *Young v. Waldrop*, 111 Mont. 359, 109 P.2d 59, 60 (1941) (“within” as applied to time means “not beyond” or “not later than,” and “includes only the final limit and not the starting point”); and authorities cited in *Remmel*, slip op. at 7-8 (Add. 7-8). Determining the meaning of the word “within” depends, of course, on the context. *See Novak v. Bank of N.Y. Mellon Trust Co.*, 783 F.3d 910, 914 (1st Cir. 2015) (determining

⁵ *Remmel* involved a challenge to the Secretary’s determination of validity for a petition to veto legislation to prevent discrimination on the basis of sexual orientation. L.D. 1116 (118th Legis. 1997) enacted as P.L. 1997, c. 205. The bill was passed by the House and Senate on May 8, 1997, and signed by Governor King on May 16, 1997. *Remmel*, slip op. at 1-2 (Add. 1-2). Proponents of the people’s veto submitted their application to the Secretary on May 13, 1997 – before the Governor had even signed the bill – and the Secretary approved the form of the petition on June 4, 1997. *Id.* The Legislature was in a special session at the time, which did not adjourn *sine die* until June 20, 1997. *See* dates of Legislative session at http://lldc.mainelegislature.org/Open/Laws/1997/1997_PL_c205.pdf.

from context of removal statute that “within” did not describe a “bounded” time range within which action must occur, but simply an end point for the action to occur); *see also Opinion of the Justices*, 2015 ME 107, ¶ 40, 123 A.2d 494 (“[c]ontext is critically important”).

Both the context of section 901(1) and general rules of construction support the Secretary’s and the Superior Court’s interpretation of “within” as synonymous with “no later than” or “on or before” 10 business days after adjournment.

First of all, this time limit appears in statute, not in the Constitution, and statutes implementing the constitutional provisions for initiative and referendum must be “liberally construed to facilitate, rather than to handicap, the people’s exercise of their sovereign power to legislate.” *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983). Moreover, the Court should not construe a statutory time limit in a manner that is more restrictive than the Constitution. *See id.*, at 1103 (court must be chary of reading another time limitation into initiative provisions of the Constitution by implication); and *McGee v. Sec’y of State*, 2006 ME 50, ¶¶ 33, 39, 896 A.2d 933 (striking down statute setting one-year filing limitation for initiative petitions because it denied petitioners flexibility allowed by the Constitution to decide when to begin circulating their petitions). There is no support in the Constitution for restricting citizens

who wish to mount a people’s veto campaign to a 10-business day window in which to apply to the Secretary for a petition form, nor does there appear to be a compelling policy rationale for creating such a restriction in statute.

Plaintiffs suggest there is a legislative purpose in “ensuring parity in the amount of time available” to the proponents of various people’s veto petition drives, and that this necessitates interpreting section 901(1) as imposing a single 10-day window. A. 14, ¶ 42. But a people’s veto referendum is not a horse race, and groups of citizens who may wish to reject different bills for entirely different reasons are not competing against one another.

It is true that under the Secretary’s and the Superior Court’s reading of section 901(1) in *Remmel*, citizens who wish to veto a bill that was passed early in the legislative session will have more time to circulate their petitions than citizens who object to a bill passed just prior to adjournment, but that difference is of no legal consequence. Once a bill has been enacted into law, there is no justification for requiring electors to wait until after the Legislature adjourns to apply for a people’s referendum petition and begin to circulate it.

The Nebraska Supreme Court reached the same conclusion in construing a very similar “within” clause in its state constitution.⁶ The court

⁶ Article III, section 3 of the Nebraska Constitution provided that “[p]etitions invoking the referendum shall be signed by not less than five per cent of the electors of the state ... and filed in the office of the Secretary of State within ninety days after the Legislature at which the act sought to

held that a “reading of this sentence in context would indicate that the time limitations were intended to refer only to a cut-off date after which no referendum petition could be filed and was not intended to fix the date that the right of referendum became exercisable, nor the date before which signatures could not be validly obtained.” The court thus held that petitioners were not precluded from gathering signatures before adjournment of the legislative session. *Klosterman*, 143 N.W.2d at 747.

Legislative acquiescence. The Legislature is presumed to be aware of judicial interpretations when it enacts or amends statutes. *Bowler v. State*, 2014 ME 157, ¶ 8, 108 A.2d 1257. It is significant, therefore, that the Legislature amended section 901(1) only a few months after *Rommel* was decided and changed “within 10 working days” to “within 10 business days” without altering any other language in that subsection. P.L. 1997, c. 581, § 2 (eff. June 30, 1998).⁷ If the Legislature believed the Superior Court or the Secretary of State had misconstrued the meaning of that phrase, it could have altered the wording to compel a different interpretation.

be referred was passed shall have adjourned sine die or for more than ninety days.” *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744, 747 (1966) (emphasis added).

⁷ Indeed, the bill was originally submitted by the Department of the Secretary of State on December 3, 1997. L.D. 1917 (118th Legis. 1997). *Rommel* was decided on November 21, 1997. See Addendum at Add. 14. The Statement of Fact accompanying the bill states that the word “business” was substituted for “working” because “business days” is a term already defined in the election law.

Historical practice. As further support for the Secretary's interpretation, since *Remmel* was decided, the Secretary has both received and approved applications to circulate petitions for a people's veto of legislation *prior to adjournment* of the legislative sessions that enacted the bills in question. *See Opinion of the Justices*, 2015 ME 107, ¶ 47, 123 A.3d 494 (how constitutional provision has been construed and applied in practice over time is relevant to interpreting its meaning).

Indeed, one recent example concerned the successful petition drive in 2017 by the proponents of RCV to veto legislation that would have delayed implementation of RCV. The first RCV law (enacted by citizen initiative) was scheduled to apply to primary and general elections held after January 1, 2018. P.L. 2015, c. 3, § 5, enacting 21-A M.R.S. § 723-A(6). When the Legislature passed a bill (L.D. 1646) on October 23, 2017, to delay implementation for another three years,⁸ RCV proponents immediately applied to the Secretary for approval of a people's veto referendum petition form even before the bill became law without the Governor's signature, on November 4, 2017. P.L. 2017, c. 316.⁹ The Secretary approved the people's

⁸ Legis. Rec. H-1193 – H-1196 (1st Spec. Sess. 2017).

⁹ See copy of public law at <http://legislature.maine.gov/ros/LawsOfMaine/breeze/Law/getDocById/?docId=59538>

veto petition for circulation on November 6, 2017 – the same day that the Legislature adjourned its special session and just in time for the proponents to collect signatures at the polls on election day, November 7, 2017.¹⁰

Under the plaintiffs’ theory of this case, the RCV proponents in 2017 should not have been able to file an application with the Secretary for a people’s veto petition form until after the Legislature had adjourned *sine die* on November 6, 2017, and the Secretary likewise should have been precluded from approving a petition form on that date. Had plaintiffs’ current interpretation in this case been applied, it would have cost their fellow RCV supporters the extremely valuable opportunity of collecting signatures at the polls on Election Day, November 7, 2017.

A similar example occurred in 2009, with the successful effort to veto a law authorizing same-sex marriage. L.D. 1020, “An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom” was adopted by the Legislature and signed by the Governor on May 6, 2009. Legis. Rec. S-579 (1st Reg. Sess. 2009); P.L. 2009, c. 82. Petitioners promptly applied to the

¹⁰ See Department of the Maine Secretary of State, Press Release (Nov. 6, 2017), <https://www.maine.gov/sos/news/2017/peoplesveto.html>; Kevin Miller, *Ranked-choice voting supports to begin ‘people’s veto’ campaign today*, Portland Press Herald (Nov. 11, 2016), <https://www.pressherald.com/2017/11/06/ranked-choice-voting-supporters-to-begin-peoples-veto-campaign-tuesday/> (last visited July 1, 2020)

Secretary for a people's veto petition, and the Secretary approved the petition form for circulation on May 19, 2009.¹¹ The Legislature did not adjourn *sine die* until June 12, 2009.¹² Again, under the plaintiff's theory, this 2009 people's veto petition would have been deemed untimely and invalid.

In sum, there have been no developments in the law since 1997 that contradict or call into question the Secretary's and Superior Court's interpretation in *Remmel* of the 10-business day deadline in section 901(1). Legislative acquiescence and consistent application over the ensuing decades – including by proponents of RCV – support this Court reaching the same conclusion in this case as a matter of law.

The answer to Question of Law #3, therefore, is that the Intervenor's application for approval of a people's veto petition form on January 16, 2020—after L.D. 1083 was enacted as P.L. 2019, Chapter 539 on January 12, 2020 and before adjournment *sine die* of the Second Regular Session of the 129th Legislature on March 17, 2020—was timely pursuant to 21-A M.R.S. § 901(1).

¹¹ See Secretary of State web page listing the date the petition form was "issued": <https://web.archive.org/web/20091120093501/http://www.maine.gov/sos/cec/elec/pets02/pets02-1.htm>

¹² See dates of each legislative session at: http://lldc.mainelegislature.org/Open/Laws/2009/2009_PL_c082.pdf.

CONCLUSION

For the foregoing reasons, the Secretary's interpretation of the constitutional and statutory provisions in this case should be upheld, and the questions of law answered as the Secretary has suggested.

DATED: July 2, 2020

Respectfully submitted,

AARON M. FREY
Attorney General

Phyllis Gardiner
Assistant Attorney General
Maine Bar No. 2809
Office of the Attorney General
6 State House Station
Augusta ME 04333-0006
Tel: (207) 626-8800

Attorney for Appellee

CERTIFICATE OF SERVICE

I certify that on this 2nd day of July, 2020, I mailed two copies of the Appellee’s Brief to the parties listed below, by United States Mail, first class, postage prepaid, addressed to as follows:

James G. Monteleone, Esq.
Bernstein Shur
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029

Joshua D. Dunlap, Esq.
Ann R. Robinson, Esq.
Pierce Atwood LLP
Merrill’s Wharf
254 Commercial Street
Portland, ME 04101-4664

DATED: July 2, 2020

Phyllis Gardiner
Assistant Attorney General
Maine Bar No. 2809
Office of the Attorney General
6 State House Station
Augusta ME 04333-0006
Tel: (207) 626-8800

Attorney for Appellee

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

As required by M.R. App. P. 7A(f)(1), I certify that the Appellee's brief I have filed today does not exceed 10,000 words.

Dated: July 2, 2020

Phyllis Gardiner
Assistant Attorney General

ADDENDUM

1997, Governor Angus King signed L.D. 1116 into law. On June 4, 1997, the Secretary of State approved the Ad Hoc Committee's application. The first special session of the 118th Legislature adjourned on June 20, 1997.

On September 18, 1997, the Ad Hoc Committee submitted petitions containing some 65,256 signatures in favor of the people's veto, to the Secretary of State. By Determination dated October 20, 1997, the Secretary concluded that 51,131 valid signatures were needed and that the Ad Hoc Committee had collected 58,182 valid signatures.¹ The Secretary therefore found the petition valid.

Immediately upon the Secretary's determination, a political action group, Maine Won't Discriminate, began its own examination of the petitions. Petitioners, alleging that the group found an additional 15,000 invalid signatures, commenced this action on October 27, 1997. On November 3, 1997, this Court granted Intervenor status to the Christian Civic League of Maine, (CCL), a member of the Ad Hoc Committee. The parties submitted simultaneous briefs and reply briefs. All briefs are organized around twenty-seven questions of law posed by the Petitioners.

Oral arguments were had in Kennebec County on November 18, 1997. At the close of arguments all parties met and agreed to submit seven of the twenty-seven questions of law to this Court. Petitioners stated on the record that they were waiving their right to have this Court consider nineteen of the remaining twenty

¹In order to place a people's veto on the ballot the proponent must produce the valid signatures totalling at least "10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of such petition." Me. Const. Art. IV, Pt. 3, § 17.

questions. As to the one remaining question², the parties stipulated to the governing law, but were unable to stipulate to the facts. This Court agreed to render a speedy decision on the seven questions of law, and to hold any necessary evidentiary hearing November 24, 1997 through November 26, 1997.

Maine's Referendum

Maine's Constitution was amended in 1909 to add the initiative and referendum process.³ The concept, however, was far from new to the citizens of Maine. Indeed, Maine's birth as an independent state in 1820 can be seen as the result of an initiative process. Responding to the petitions from the citizens of The District of Maine, the General Court of Massachusetts enacted the "Articles of Separation" and granted to Maine people the privilege of voting on the Act. J. William Black, *Maine's Experience with the Initiative and Referendum*, The Annals of the America Academy of Political and Social Sciences, Sept. 1912, at 159.

As early as 1898 Maine was watching, with interest, her sister states in the west as they enacted referendum and initiative provisions into their respective constitutions. Black, *supra*, at 160-61; Legis. Rec. 640 (1907). The idea was first brought before the Maine Legislature in 1903, and in 1909, Maine became the first eastern

² "Are signatures invalid when they are duplicate signatures, contrary to, *inter alia*, 21-A M.R.S.A. § 904(4) and the Secretary of State's instructions on the petition form?" All parties agree that the answer to this question is "yes".

³ The resolve enacted in 1907, was approved by a popular vote of 53,785 to 24,543. Lawrence Lee Pelletier, *The Initiative and Referendum in Maine*, The Bowdoin Bulletin, March 1951, at 9. Article XXXI became effective January 1, 1909. *Farris ex rel Dorsky v. Goss*, 143 Me. 227, 230 (Me. 1948).

state to enact initiative and referendum provisions. Black, *supra*, at 161. The people were apparently motivated to reclaim some of their legislative power by a sense that the Legislature itself was too often under the control of powerful lobbies. Black, *supra*, at 161-63.

The referendum and initiative process has been sparingly used in its eighty-eight year history, and the courts have only infrequently been called upon to address issues presented by the process. When doing so, however, the Court has been consistently guided by the principle that the constitutional provisions are to be liberally construed so as to effectuate the intent behind the amendment. See *Allen v. Quinn*, 459 A.2d 1098, 1103 (Me. 1983). As the Law Court has stated,

[T]he sovereign which is the people has taken back, subject to the terms and limitations of the amendment, a power which the people vested in the legislature when Maine became a state. The significance of this change must not be overlooked, particularly by this court whose duty is to so construe legislative action that the power of the people to enact their laws shall be given the scope which their action in adopting this amendment intended them to have.

Farris ex rel Dorsky v. Goss, 143 Me. 227, 231 (1948); See also, *Wagner v. Secretary of State*, 663 A.2d 564, 566 (Me. 1995); *Allen*, 459 A.2d at 1102 (Me. 1983) ("section 18. . . must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate").

With that guiding principle in mind, this Court turns to the particular questions of law presented for its consideration.

I. COUNT I:

A. Is this people's veto a nullity when the application for a people's veto was approved by the Secretary of State and circulation of petitions commenced before the adjournment of the first special session of the 118th Legislature, which session passed "An Act to Prevent Discrimination" contrary to, *inter alia*, 21-A M.R.S.A. § 901(1) and the Secretary of State's summary of the law as stated in a document entitled "Information Summary on Pending People's Veto; P.L. 1997, ch. 205; An Act to Prevent Discrimination"?

This Court holds, as a matter of law, that the filing of the application with the Secretary of State prior to the adjournment of the first special session of the 118th Legislature, does not nullify that application.

At the center of the dispute is the language of 21-A M.R.S.A. § 901(1), to wit:

1. Limitation on petitions. An application for a people's veto referendum petition must be filed in the Department of the Secretary of State within 10 working days after adjournment of the legislative session at which the Act in question was passed.

21-A M.R.S.A. § 901(1)(Supp 1996).

Petitioners assert that "within 10 working days after adjournment" provides both a beginning point and an endpoint. That is, Petitioners argue, an application may not be filed prior to the adjournment, nor any more than ten days after such adjournment. Both the Respondent and the Intervenor assert that the language establishes only an endpoint.

In support of their position, Petitioners rely on *Allen v. Quinn*, 459 A.2d 1098 (Me. 1983). They argue that *Allen* draws a clear distinction between "within" and "on or before", and that the former does not permit filing of the application prior to adjournment of the legislative session which enacted the law. Additionally,

Petitioners urge on this Court public policy rationales for their interpretation of § 901(1); namely, “fairness, uniformity, predictability of the process and minimizing competition between the people and the Legislature...” (Petitioners’ Reply Brief, 3).

This Court is unpersuaded by Petitioners’ reading of *Allen* and the policy justifications advanced by them. The *Allen* Court addressed whether an Art. IV, Pt. 3, § 18 petition could be “filed with the Secretary of State only during the first 50 days after the legislature convenes in its first regular session of the biennium. . .”. *Allen*, at 1098. The Court discusses at some length the history of Section 18. In so doing the Court refers to the 1975 Constitutional Resolution which, *inter alia*, changed the wording of that Section from requiring petitions to be “filed in the office of the Secretary of State or presented to either branch of the Legislature within forty-five days after the date of convening of the Legislature” to “filed in the office of the Secretary of State by the hour of five o’clock, p.m., on the fiftieth day after the date of convening of the Legislature” L.D. 188, (107th Legis. 1975) (emphasis added). In reviewing this history the Court states:

The ‘within’ clause plainly limited the presentation of initiative petitions to the legislature to the time when it was in regular session. It is less clear whether that pre-1975 time restriction was intended also to apply to filings in the Secretary of State’s office. In 1975 section 18(1) was amended Const. Res. 1975, ch.2, passed in 1975. Plainly, that amendment eliminated the option of presenting the initiative petitions directly to the legislature. At the same time, the abandonment of the ‘within’ clause used previously in the time restriction plausibly supports a construction by which the amendment changed that time restriction to set only a final deadline for filing in the Secretary of State’s office rather than fixing a period within which petitions had to be filed. Obviously that is not, however, the only plausible reading of the 1975 amendment. In sum, the history of the evolution of the language of section 18(1) does not provide any clear

answer to the question posed by the case at bar.

Allen, at 1102.

Thus the *Allen* Court did not address the issue of whether, prior to 1975, "within" had applied to the filing of a petition with the Secretary of State, or whether it only applied to filing the petition directly with the Legislature. In its final analysis, the Court found that the filing of a petition when the Legislature had not yet convened, "has, as a practical operating matter, no effect whatever upon the Secretary of State's function in receiving the petition for filing and in promptly determining its validity . . ." Such early filing provides a "boon" to the Secretary and Legislature. *Id.* at 1099 and 1101.

In opposition to the Petitioners' argument, the Secretary cites a 1901 case on negotiable instruments wherein the Court regarded "within" as synonymous with "on or before". *Leader v. Plante*, 95 Me. 339, 341 (1901). This definition is consistent with extra-jurisdictional and secondary authorities. Black's Law Dictionary, for example defines "within" as:

Into. In inner or interior part of, or not longer in time than.
Through. Inside the limits of; during the time of.
When used relative to time, has been defined variously as meaning any time before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than. *Gleen v. Garrett*, Tex. Civ. App., 84 S.W. 2d 515, 516

Black's Law Dictionary, 1602-03 (6th ed. 1990).

A review of Words and Phrases, and the extra-jurisdictional cases cited by the

Secretary⁴ reveal that relative to time, "within", though sometimes defined as providing a starting point, more frequently is equated only with an end point. See, 46 Words and Phrases (Perm. Ed. 1970 & Supp. 1997), pp. 82-110.

This Court is also not persuaded by Petitioners' policy justifications for their interpretation of "within". Petitioners make the interrelated arguments that all would-be petitioners should have the same amount of time to complete the process, (excepting that for a variety of legitimate reasons the Secretary may take longer to approve some applications than others), and that to interpret "within" as providing only an endpoint will encourage the Legislature to postpone all controversial matters until the end of the session. The result would therefore be that the opponents of those controversial acts would have less time to collect signatures than would opponents of non-controversial measures. That the Legislature would engage in such maneuvering is a disturbing thought. There is, however, neither a constitutional nor a statutory requirement that all who seek to initiate a people's veto have the same amount of time to complete the process. The Constitution provides only that all shall have until the 90th day after recess of the Legislature to submit their respective petitions. Me. Const. Art. IV, Pt. 3, § 20.

⁴ The cases cited by the Secretary involve a myriad of underlying factual scenarios, but all find or hold that "within" is not meant to establish a beginning point. See e.g. *Franklin v. Director of Revenue*, 909 S.W. 2d 759, 761 (Mo. Ct. App., 1995)(interpreting "within" to mean "on or before"); *Able Outdoor, Inc. v. Harrelson*, 439 S.E. 2d 245, 248, (N.C. Ct. App. 1994) *modified on other grounds*, 459 S.E. 2d 626 (1995)(finding "within 30 days following final disposition of the case,..." to state a deadline but not a starting point); *Royce v. Freedom of Info. Comm'n*, 418 A.2d 939, 940 (Conn. 1979)(citing to Webster and C.J. in finding that "within" means "not longer in time than" and "not later than" and "is almost universally used as a word of limitation,..."); *Klosterman v. Marsh*, 143 N.W. 2d 744, 749 (Neb. 1966)(comparable language in Nebraska Constitution found to "refer only to a cutoff date after which no referendum petition could be filed and was not intended to fix the date that the right of referendum became exercisable, nor the date before which signatures could not be validly obtained.").

Finally, Petitioners argue that interpreting "within" to provide a beginning point in essence establishes consecutive legislative power and promotes the finality of legislation. Again, there is simply no indication in the history of the referendum and initiative that the people of Maine so intended to limit their reacquired power to legislate.

In view of the principle that constitutional and statutory provisions in this area must be construed so as to facilitate the people's exercise of their right to legislate, this Court finds that "within" as used in § 901(1) provides merely an end point and not a beginning point. Accordingly, this Court holds as a matter of law that application for the petition prior to June 20, 1997, does not invalidate the petition.

II. Count II:

A. Are signatures invalid if the registrar did not circle a number corresponding to each valid signature, contrary to, *inter alia*, the Secretary of State's instructions on the petition form?

This Court holds as a matter of law that the mere failure of the registrar to circle a number corresponding to each valid signature does not necessarily invalidate the signature. There is no express or implied constitutional provision requiring such circling. Art. IV, Pt. 3, § 20, only requires the registrar to certify that the names of the petitioners appear on the voting lists of the given municipality. Neither the Constitution, nor Title 21-A provide any direction on how this is to be accomplished. There must, however, be some means by which the Secretary of State may determine from the face of the petition which of the names thereon are names

of registered voters.⁵

The Secretary asserts that so long as “there are other notations or indications on the face of the petition that reveal” who the registered voters are, he is free to rely on that other information. (Respondent’s Brief, 29). What those other notations and indications may be, and how they are used by the Secretary, is evidence that is not presently before this Court. It is evidence which this Court must receive in order to reach a final decision.

B. Are signatures invalid when the notary dated the circulator’s oath after the date of the registrar’s certificate contrary to, *inter alia*, the Secretary of State’s instructions on the petition form?

This Court holds as a matter of law that the circulator’s oath need not precede the notary’s verification. The Secretary instructs on the petition that:

B. VERIFYING CIRCULATOR...

(3) SHOULD TAKE OATH BEFORE THE REGISTRAR HAS COMPLETED THE REGISTRAR’S CERTIFICATION.

Beyond this permissive instruction, the Court finds no authority to support the proposition that the circulator’s oath must be taken prior to the registrar’s certification. Addressing a similar challenge in 1917, the Justices of the Supreme Judicial Court opined that “[i]n the Constitution the verification is evidently supposed to come first,” but none the less determined that the verification “has no connection with the clerk’s certificate. It is a simple declaration under oath of the

⁵ One of the most obvious reasons that the Secretary must be able to make such determination is to guard against duplicate signatures.

genuiness of the signatures. . .The vital fact is that the signatures are genuine.”

Opinion of the Justices, 116 Me. 557, 575 (1917).

In 1917, when the Justices so opined, there did not exist in the Constitution the current language regarding submission of the petitions to the registrar at least five days prior to the filing deadline. While the addition of this provision certainly makes the mandatory order suggested by Petitioners more efficient, it does not of necessity prescribe such order. Lacking a constitutional or statutory mandate that the oath must precede the certification, this Court holds as a matter of law that so long as the two are accomplished, the order is immaterial.

C. Are signatures invalid when the petitions were notarized after September 15, 1997, contrary to, *inter alia*, the Secretary of State’s instructions as stated in a document entitled “Information Summary on Pending People’s Veto: P.L. 1997, ch. 205: An Act to Prevent Discrimination”?

This Court holds as a matter of law that petitions notarized after September 15, 1997, are not thereby invalid. Even if this Court were to accept Petitioners’ argument that the petitions must be submitted to the registrar on the fifth day before the filing deadline with the Secretary’s office, it does not follow that notarization after that fifth day is invalid.

D. Are signatures invalid when they were collected before the adjournment of the first special session of the 118th legislature, which session passed “An Act to Prevent Discrimination”?

For those reasons laid out under Count I above, this Court holds as a matter of law that signatures collected before the adjournment of the first special session of the 118th Legislature are not invalid merely because they were so collected.

E. Are signatures invalid when the petitioner lists only a post office box, and not a street address or rural route, contrary to, *inter alia*, the Secretary of State's instructions on the petition form?

This Court holds as a matter of law that signatures are not invalid merely because the petitioner lists a post office box instead of a street address on the petition form. There is no express constitutional or statutory provision that a petitioner list his or her address. The only constitutional mandate is that the petitioner be a registered voter in the municipality in which the petitioner resides. The concern is that the registrar be able to determine whether the petitioner is a registered voter in that municipality. If the registrar can make such a determination without aid of a street address or rural route, the only constitutional requirement is met.

This Court holds as a matter of law, that failure to list a street address or rural route does not invalidate the signature.

F. Are signatures invalid when the petitions are improperly notarized, as where the notary fails to state the expiration date of his or her commission, contrary to, *inter alia*, the Secretary of State's instructions in a February, 1997 publication entitled "Notary Public Guide"?

This Court holds as a matter of law that the notary's failure to state the expiration date of his or her commission on the face of the petition does not invalidate the signatures thereon. 4 M.R.S.A. § 951 - 58 governs the notarization process. Nowhere therein is the express or implied requirement that the notary state his or her date of commission on the notarized document.

Petitioners point this Court to 5 M.R.S.A. § 82-A (Supp. 1996) wherein it is

provided that "[t]he Secretary of State shall make available such informational publications as may be necessary to ensure that notaries public are knowledgeable in the performance of their duties." Pursuant to that provision, the Secretary has provided the "Notary Public Guide"; a pamphlet comprised of approximately twenty-seven pages. In that publication, Petitioners refer to language on unnumbered page v. and, page 4. On page v. is found the following pertinent language:

In addition to your signature, you should print or type your name, print your office - Notary Public, State of Maine and include your expiration date.

On page 4 there appears:

Please keep in mind, using an embossing seal does not eliminate the other requirements for a proper notarization: a statement of what the Notary Public has done (an acknowledgement or jurat statement), the official signature of the Notary Public, the commission expiration date, and the date when the notarization was performed.

That the Secretary is required to provide the notaries public with helpful publications does not elevate those publications to the level of the law. The Law is as it appears in the Constitution and the controlling statutes. Even accepting the Secretary's publication as authoritative, its value is dubious given the inconsistencies, (i.e., compare p. v.; "should...include your expiration date" with p. 4; proper notarization "require[s]" expiration date). Additionally in that Publication the Secretary refers the reader to Alfred E. Piombino, Notary Public Handbook: A guide for Maine. In discussing the jurat that appears on a typical affidavit, the

author of that publication states: "failure of the officer signing the jurat to add a statement of office or of the territory to which he holds office does not invalidate the affidavit; it is presumed that he is an authorized officer." *Piombrio, supra*, at 101.

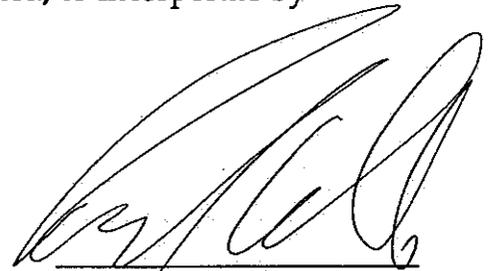
The Secretary of State is the official charged with regulating the appointment and renewal of notaries public. He has within his possession the information to determine whether in fact a particular notary is acting upon a valid commission. It is undisputed that the Secretary undertook such evaluation in this case. Given this ability, the failure of a notary to include a commission expiration date on the face of the petition is not a failure which leads to the invalidation of signatures.

With that, the Court having answered the seven questions submitted by agreement of all the parties, will forthwith make factual determinations deemed necessary to render a final judgment in this matter.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed, to incorporate by reference, this Order onto the docket.

Dated:

November 21, 1997



Roland A. Cole
Justice, Superior Court