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

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**DOCKET NUMBER CUM-26-288**

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**JANE GILBERT, et al.,**
***APPELLANTS*,**

**v.**

**SECRETARY OF STATE, et al.**
***APPELLEES*.**

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**ON APPEAL FROM THE MAINE SUPERIOR COURT**

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# BRIEF OF *AMICI CURIAE* INITIATIVE AND REFERENDUM INSTITUTE AND DANE WATERS IN SUPPORT OF INTERVENOR PROTECT GIRLS' SPORTS IN MAINE

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## INTERESTS OF AMICI CURIAE

Amici are the Initiative and Referendum Institute ("IRI") and Dane Waters, the Chairman and Founder of IRI. Amicus Dane Waters founded IRI as a non-profit, non-partisan educational and research organization dedicated to the study of the initiative and referendum, the two most important processes of direct democracy. Through their work at IRI, Amici collect and distribute information on the initiative and referendum process and sponsors studies of various aspects of direct democracy, including its effect on public policy, citizen participation, and its reflection of trends in American thought and culture. Amici have a strong interest in this case because the Maine Secretary of State's newly imposed restrictions infringe on Maine's broad right of initiative and direct democracy, particularly as applied against circulator Cairo.

## INTRODUCTION

The Maine Constitution has long protected the people's broad right to engage in the initiative and referendum process. ME. CONST. ART. IV, pt. 3, § 18. This right must be liberally construed and safeguards against any exercise of governmental authority—whether federal or state, legislative or executive—that limits direct democracy more than the Maine Constitution does. A federal consent decree may not be read in such a way that conflicts with this broad constitutional provision. *Pike Indus., Inc. v. City of Westbrook*, 2012 ME 78, ¶ 14, 45 A.3d 707, 713.

But the Maine Secretary of State has done just that. And she has dared to go where even the federal consent decree at issue did not. Specifically, she has imposed a timing requirement on out-of-state circulators' consent to jurisdiction that she admits, and that the Maine Superior Court acknowledged, is entirely absent from the federal consent decree. Me. Super. Ct. Op. at 9. She did so without any authorization from state law (or the consent decree). Rather, she assumed legislative authority to "enact" a new substantive mandate, notwithstanding the Maine Constitution's separation of powers principle and prohibition on even the *Legislature* creating substantive limits on the right of initiative. ME. CONST. ART. IV, pt. 3, § 18. To protect "the people's exercise of their sovereign power to legislate," this Court should reverse. *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983) (citation omitted).

## ARGUMENT

### I. The Right of Initiative Is to Be Liberally Construed.

To begin, the people's constitutional right of direct initiative of legislation is broad and must be interpreted as such. *See* ME. CONST. ART. IV, pt. 3, § 18. As this Court has reiterated time and again: "We have previously recognized the importance of the right of initiative, and again conclude that the right of the people to initiate and seek to enact legislation is an absolute right." *McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933, 940 (citing *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 911 (1948)). "The broad purpose of the direct initiative is the encouragement of participatory democracy. By section 18 the people, as sovereign, have retaken unto themselves legislative power, and that constitutional provision 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 (Me. 1983) (citation omitted); *see also id*. ("Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." (citation omitted)). This Court has also held that "[t]he circulation of direct initiative petitions is core political speech, and any state regulation of the initiative process must be narrowly tailored to carry out a compelling state purpose." *Me. Taxpayers Action Network v. Sec'y of*

*State*, 2002 ME 64, ¶ 8, 795 A.2d 75, 78 (quotation omitted). As such, courts must construe this right broadly.

This right "cannot be abridged directly or indirectly by any action of the Legislature" or any other branch of government. *McGee*, 2006 ME at ¶ 21, 896 A.2d at 940 (citing *Farris*, 143 Me. at 231, 60 A.2d at 911). In other words, "any legislative implementation," or any other government action, "must respect the substance of the constitutional right." *Id*.; *see also* ME. CONST. ART. IV, pt. 3, § 22. The government fails to respect these constitutional requirements whenever it imposes any additional substantive restrictions on the initiative right that the Constitution does not. *McGee*, 2006 ME at ¶ 25, 896 A.2d at 941 ("[S]ection 18 cannot be said merely to *permit* the direct initiative of legislation upon certain conditions. Rather, it reserves to the people the right to legislate by direct initiative *if the constitutional conditions are satisfied*." (first emphasis in original; second emphasis added)). Even if "the Constitution does not *explicitly* prohibit or allow" certain governmental restrictions on the people's initiative power, those restrictions are unconstitutional whenever they impinge upon the right of initiative. *Id*. The Constitution is both the floor and the ceiling.

The Legislature only has authority to establish *procedures*; specifically, the Legislature can "enact laws not inconsistent with the Constitution to establish procedures for determination of the validity of written petitions." ME. CONST. ART.

IV, pt. 3, § 22. Accordingly, the Legislature cannot by statute delegate authority to another official, such as the Secretary of State, that the Legislature does not possess itself.

The Secretary of State's authority over the initiative power is even more limited than the Legislature's. The Secretary cannot enact new laws. The Secretary only administers the laws as written and must follow the Constitution's broad provision for the right of initiative. *Id*.

## II. The Secretary of State's Reading Has No Basis in State Law.

Nonetheless, the Secretary has fabricated an additional substantive requirement for filing affidavits that has no basis in Maine law. Specifically, she has imposed a requirement on out-of-state circulators that they not only sign affidavits consenting to jurisdiction of the state, but that they do so before they submit their initiative petitions. Importantly, this requirement is not merely a procedural convenience for state officials or for voters. Instead, it is a new substantive requirement for exercising the initiative right: regardless of whether the underlying signatures are valid, and regardless of whether the state ever finds that it needs to question a particular circulator and assert jurisdiction over that circulator, every last valid voter's signature will be stricken if the voter's circulator has not checked the box *before* gathering signatures.

The Maine Constitution and Maine statutes, from which the Secretary derives authority, do not give the Secretary such substantive power over the validity of voter signatures. Both are entirely silent on the circulator timing question. An executive agency must "have a basis *in law*," meaning "[s]tatutes and regulations, not unwritten agency customs and practices," to require certain conduct. *Tenants Harbor Gen. Store, LLC v. Dept. of Env't Prot*., 2011 ME 6, ¶ 15, 10 A.3d 722, 727 (emphasis in original). Where applicable laws do "not require" such conduct, the agency's "requirement" is "contrary to the statutory and regulatory law." *Id*. ¶ 16, 727. The Secretary's attempt to reverse this presumption (*i.e.* by effectively arguing that statutory silence empowers her to fill the void) is entitled to no deference from this Court. *Id*. ¶ 16, 727-28.

Even if that silence were not enough to bar the Secretary's new requirement (it is), this Court has held that "time-based requirements" are substantive and therefore cannot emanate from sources outside the Constitution. *McGee*, 2006 ME at ¶¶ 26-33, 896 A.2d at 941-43 (striking down legislative timing restriction that was stricter than the more flexible constitutional restrictions). The Maine Constitution prescribes the time of filing, *Allen*, 459 A.2d at 1103, and otherwise gives circulators "significant flexibility" in the timing of their filings, *McGee*, 2006 ME at ¶ 27, 896 A.2d at 941. Given the specificity of the timing restriction in section 18, there is a presumption against inferring additional restrictions: "In the midst of this specificity,

with one time limitation on filing clearly defined, a court must be chary of reading another time limitation into section 18(1) by implication." *Allen*, 459 A.2d at 1103. Thus, a reading that imposes additional time restrictions—like the one the Secretary fabricated—would violate a core principle of constitutional interpretation.

Moreover, to do so would infringe on the flexibility of the constitutional right of initiative, which is a substantive part of that right: "[A]llowing the circulators reasonable flexibility in completing the process is not only consistent with the constitutional right at issue, . . . it is an integral component of the constitutional scheme." *McGee*, 896 A.2d at 941-42.

These three principles, taken together, unequivocally forbid the Secretary's new "legislation."

The Maine Superior Court cited one statutory provision in upholding the Secretary's actions. Specifically, it said, "the Secretary relied on the statutory requirement that a circulator's affidavit be filed 'with the Secretary of State at the time the petition is filed' and therefore consent to Maine's jurisdiction must occur at the time the Petition is filed. 21-A M.R.S.A. § 903-A(4)."

But § 903-A(4) is silent on the question of whether an out-of-state circulator must submit an affidavit that consents to the jurisdiction of the State. Specifically, § 903-A(4) says:

> **4. Circulator affidavit.** A person who circulates a petition shall execute an affidavit that must include:

> A. The circulator's printed name, the physical address at which the circulator resides and the date the circulator signed the affidavit;
>
> B. That the circulator read the information provided by the Secretary of State pursuant to subsection 3 and understands the laws governing the circulation of petitions in the State;
>
> C. That the circulator was a resident of the State and a registered voter in the State at the time of circulating the petition; and
>
> D. That the circulator understands that the circulator can be prosecuted under section 904 for violating the laws governing the circulation of petitions, including the requirement that the circulator truthfully executed the affidavit.
>
> The circulator shall file the affidavit with the Secretary of State at the time the petition is filed.

There is no statutory requirement of consent *at all*, much less to consent contemporaneously with the filing of the petition. Thus, any reading that inserts such a requirement is "contrary to the statutory and regulatory law," and the Court may not defer to the Secretary's interpretation. *Tenants Harbor Gen. Store, LLC*, 2011 ME at ¶ 16, 10 A.3d at 727-28.

## III. The Consent Order Cannot Change State Law.

The Secretary of State really claims greater authority than she has under state law by virtue of the federal consent decree. In describing the Consent Order, the Hearing Officer admits as much: "The United States District Court **authorized** Maine to impose this [out of state circulator submission to jurisdiction] requirement

by limiting its injunction to Maine's ability to enforce the residency requirement to circumstances in which the circulator fails to consent to Maine's jurisdiction. In other words, Maine may treat out-of-state circulators as unauthorized to the extent they fail to consent to the jurisdiction of the State." Recommended Decision at 35 (emphasis added). That federal order is the *only* basis to require out-of-state circulators to consent to the State's jurisdiction.

But, as the Hearing Officer admits, the consent requirement *substantively* changes the Maine Constitution. Specifically, the Hearing Officer argues "it **narrows the scope** of" the Maine Constitution and "**allow[s]** enforcement against only those out-of-state circulators who decline to agree to certain terms meant to allow Maine to enforce its other circulator requirements." Recommended Decision at 38 (emphasis added).

If the Maine Legislature cannot substantively change section 18, surely a federal court cannot. A consent decree may not "violate the United States and Maine Constitutions, statutes, or other relevant sources of law." *Pike Indus., Inc.*, 2012 ME at ¶ 14, 45 A.3d at 713 (citing *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990)); *see also id*. (noting "a consent decree must not conflict with the requirements of applicable laws" (citation omitted)). Any "consent decree [that] results in an exercise of judicial authority that supersedes the otherwise applicable requirements of a validly enacted" state constitutional provision, like

section 18, is suspect. *Id*. ¶ 22, 716. And a federal court, obviously, cannot amend the Maine Constitution to avoid such a conflict.

Furthermore, government actors, like the Secretary, cannot enlarge their powers or otherwise violate state law by mere citation to a consent judgment. *Id*. ¶ 14, 713; *see also Pedreira v. Sunrise Children's Servs., Inc.*, 826 Fed. Appx 480, 487 (6th Cir. Sept. 2, 2020) (holding that "courts must be especially cautious when state officials seek to achieve by consent decree what they cannot achieve by their own authority" and ensuring that consent decree does not violate state law (quoting *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc)) (quotation omitted)); *Kasper v. Bd. of Elec. Comm'rs*, 814 F.2d 332, 342 (7th Cir. 1987) (emphasizing that "the court may not readily approve a decree that contemplates a violation of law").

But here, the Secretary has done just that. First, the Secretary has sought to effectively repeal section 18's liberal avenues for initiative petitions by imposing additional, substantive requirements on circulators. Second, and perhaps even more egregiously, the Secretary has relied on the consent decree to enlarge her own powers beyond mere administration of state law into the realm of legislation that surpasses even the consent decree's new requirements. It is to that second point that we turn now.

## IV. The Consent Order Does Not Authorize the Secretary's Timing Requirement.

Even if the consent decree could change state law, the Secretary has exceeded the scope of the consent decree by adding a new timing requirement. As the Maine Superior Court found, "the Consent Order contains no time restriction." Me. Super. Ct. Op. at 9. Nonetheless, the Secretary has claimed that circulators had to consent to jurisdiction *before* submitting a petition. Because the consent judgment was silent on the issue, it presumably allowed circulators to submit a consent statement at any point—whether before, contemporaneously, or after filing a petition. *Cf. Tenants Harbor Gen. Store, LLC*, 2011 ME at ¶¶ 15-16, 10 A.3d at 727-28 (holding where law is silent, administrative agency cannot impose a new requirement because it would be "contrary to the statutory and regulatory law"). The opposite presumption violates the broad construction of the right to initiative, and this Court's longstanding approach to constitutional and statutory interpretation. *Id*. ¶¶ 15-16, 727-28 (noting Court may not defer to agency interpretation where agency has read a requirement into a silent law).

And the statute governing circulator affidavits, § 903-A(4), cannot supply the timing requirement. Me. Super. Ct. Op. at 9; Recommended Decision at 36-37. That statute was enacted prior to the consent order and nowhere mentions any consent to jurisdiction requirement. *See supra* Part II. As such the Legislature could not have delegated authority to the Secretary to stretch the statute to these new bounds. The

Court should reject the Secretary's attempt to merge these two separate substantive requirements into a new law that far exceeds the Secretary's constitutional or statutory authority.

### V. There Is No State Interest at Play.

Finally, there is no state interest served by the Secretary's bloated authority. The one circulator impacted by the new timing restriction (Cairo) cured the error with an affidavit consenting to jurisdiction and testified at an administrative hearing before the Secretary about the sufficiency of the petitions. Me. Super. Ct. at 8-9; Recommended Decision at 35. The Secretary thereby had no reason to doubt Cairo's consent to jurisdiction in accordance with the consent decree. Because Cairo complied with all laws, and yes, even with the consent decree, the Secretary's rigid adherence to her fabricated mandate is unlawful.

## CONCLUSION

For the foregoing reasons, this Court should, respectfully, reverse the lower court's decision, insofar as it upholds the Secretary's new imposition of a time constraint on an out-of-state circulator's consent to jurisdiction and rejected Cairo's petition.

Dated: June 22, 2026

Respectfully submitted,

/s/Carl Woock_____

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## CERTIFICATE OF SERVICE

I caused the foregoing to be filed electronically and in hard copy to the Law Court on or before Monday, June 22, 2026, at 3:00 p.m.

*/s/ Carl Woock*
*Attorney for Amici Curiae*