STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
DOCKET NO. AP-26-10

JANE GILBERT, MARK SAYRE, and KAITLIN WEBBER,

Petitioners,

v.

SHENNA BELLOWS, in her official capacity as Maine Secretary of State,

Respondent,

PROTECT GIRLS' SPORTS IN MAINE, a registered Ballot Question Committee,

Intervenor.

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REPLY BRIEF OF INTERVENOR, PROTECT GIRLS SPORTS IN MAINE BALLOT QUESTION COMMITTEE, ON FINAL DECISION OF SECRETARY OF STATE ON REMAND FROM THIS COURT

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NOW COMES, Protect Girls Sports in Maine Ballot Question Committee (the "Committee"), by and through its attorneys, Timothy C. Woodcock and Janna Gau, and files its reply brief on the Final Decision of the Secretary of State on remand from this Court as follows:

I. INTRODUCTION

The Committee responds to and opposes those portions of the Secretary's brief that oppose the Commmittee's defense of the out-of-state circulators over whom the Secretary is attempting to exercise powers in excess of her constitutional authority. The Committee also responds to those portions of the Secretary's brief that oppose the validation of petitions circulated by Circulator Cairo. The Committee reconfirms and reasserts its argument that this Court should decide on the merits whether the residency and voter registration requirements of Article IV, Part Third, Section 20 of the Maine Constitution violate the First Amendment to the U.S. Constitution. The Court's decision on these questions is warranted by the ambiguous status of those exclusions, which status has led the Secretary to arrogate to herself and to apply powers that the Maine Constitution denies to her to invalidate scores of otherwise valid petition signatures, disenfranchise those electors, and frustrate the clear desire of more than 67,682 electors who want no more than that the people of Maine should have the opportunity to vote for or against the Ballot Initiative.

The Committee also continues to challenge the constitutionality of the statutory exclusion of petitions witnessed by notaries who, in the exercise of their rights to engage in core political speech, circulated petitions in their own right and later witnessed the signatures of other circulators. The "other services" exclusion violates the notaries' First Amendment rights as set forth in the Committee's original brief.

Finally, the Committee presses its argument that, for all the challenges to the Secretary's Final Decision, that the Committee raised in its initial brief, including the Secretary's exclusion of

elector signatures that used "ditto" marks to indicate the date, the Secretary should demonstrably apply the interpretive principles for the implementation of the Initiative Amendments and the protection of the electors' individual and collective rights under those amendments.

The Committee contends that, as it set forth in more detail below, in several material respects, the Secretary failed to acknowledge or engage with the Committee's arguments and, in some instances, mischaracterized them. For the reasons set forth below, the Committee respectfully asks this Court to reverse the Secretary's Final Decision and reinstate the Ballot Initiative on the November 3, 2026 ballot.[1]

II. ARGUMENT

A. THE SECRETARY ERRED IN INVALIDATING PETITIONS CIRCULATED BY OUT-OF-STATE CIRCULATORS WHO DID NOT CHECK THE JURISDICTION BOX ON THE CIRCULATOR AFFIDAVIT

The Secretary of State has disqualified all the petitions circulated by four out-of-state circulators, Ummsalamaah Hakeem, Kewechi Chukwuma, Jordan Albert, and Cairo, and the otherwise valid elector signatures thereon, based on the Consent Order which the District Court issued in *We the People PAC v. Bellows*, 519 F. Supp.3d 13 ((D. Me. 2021). The plaintiffs in *We the People*, had challenged the unconditional exclusion of out-of-state circulators in Article IV, Part Third, Section 20 of the Maine Constitution as well as complementary statutory provisions, 21-A M.R.S. § 903-A on the grounds that the mandatory residency and voter registration requirements violated the freedom of speech and associated freedoms in the First Amendment to the U.S. Constitution. The District Court ruled that plaintiffs had shown a "likelihood of success" on merits in their constitutional challenge to Section 20's residency and voter registration requirements and issued injunctive relief. *We the People PAC v. Bellows*, 519 F.Supp.3d 13, 53 (D.

[1] The Committee incorporates by reference the briefs it has filed with this Court and with the Secretary pursuant to this Court's remand order as if fully set forth herein.

Me. 2021). On appeal, the District Court's ruling and injunctive relief were upheld. *We the People v. Bellows*, 40 F.4th 1, 27 (1st Cir. 2022).

Following remand from the First Circuit, the Secretary and the plaintiffs terminated the litigation by agreeing to a Consent Order and Judgment ("Consent Order") which, upon submission by the parties, the District Court endorsed.

1. The Secretary has not Validated her Exercise of Extra-Constitutional Powers

By its plain terms, Article IV, Part Third, Section 20 plainly bans the circulation of petitions for initiatives and referenda by persons who are not residents of Maine and are not registered to vote in Maine; that these prohibitions are complete and entire unto themselves and admit of no exceptions. Me. Const. art. IV, pt. 3d, § 20. The Law Court has upheld the constitutionality of each prohibition in the face of challenges that they violated the First Amendment to the U.S. Constitution. *Jones v. Sec'y of State*, 2020 ME 113, ¶ 34, 238 A.3d 982 (upholding registered voter requirement); *Hart v. Sec'y of State*, 1998 ME 189, ¶ 13, 715 A.2d 165 (upholding residency requirement). With both the residency and voter registration conditions fully intact in the Maine Constitution, the Committee argued those aspects of the Consent Order which, beyond simply barring her from enforcing these requirements, purported to authorize her to circumvent them, were invalid because the Consent Order could not infuse the Secretary with the power to violate or circumvent the Maine Constitution. Committee br. at 19-21.[2]

The Secretary protests that the Committee's argument is "remarkable" and constitutes a "dangerous road" that this Court should not travel. Sec'y br. at 15. The Secretary justifies her

[2] The Secretary asserts that, '[t]hough the Committee acknowledges that the Secretary is authorized to impose the requirements on out-of-state circulators by a consent judgment of the United States District Court for the District of Maine." Sec'y Br. at 14-15. The Committee has "acknowledged" no such thing. As was set forth in the Committee's initial brief and is restated below, the Committee contends that the District Court could not "authorize" the Secretary to exercise those powers because the Maine Constitution does not permit it.

position by arguing that she is actually enforcing Section 20's ban on out-of-state circulators by allowing them to circulate petitions pursuant to conditions that the Secretary, herself, devised and for which she obtained the approval of the District Court. *Id.* The Secretary lists several risks that would threaten the integrity of the initiative process; risk so great that the Secretary should not be required to pursue "the difficult process of amending the Constitution." *Id.*[3]

The Committee and the Secretary agree that the Committee's challenge presents this Court with a dangerous road, but it is not the potential risks to petition circulation; it is the far graver risk to the foundational structure of the Maine Constitution posed by judicial approval of the Secretary's exercise of powers that she not only does not possess but which the fundamental law of Maine—twice approved the electors—have denied her.

a. Article IV, Part Third, Section 20 Imposes an Absolute Ban on Out-State-Circulators

In 1909, Maine voters amended the Maine Constitution to invest themselves with the sovereign lawmaking power to enact and repeal legislation. Me. Const. art. IV, pt. 3d, § 17-22 ("the Initiative Amendments"); see, also, Committee br. at 8. Article IV, Part Third, Section 20 sets forth detailed definitions and procedures that govern the initiative process. Among Section 20's terms is the definition of "circulator" which provides in pertinent part as follows:

> "'circulator' means a person who solicits signatures for written petitions, and who **must** be a resident of this State and qualified to vote for Governor."

Me. Const. art. IV, pt. 3d, § 20 (emphasis supplied).

[3] Strangely, in an attempt to prove her need for the affirmative, extra-Constitutional powers in the Consent Order, the Secretary cites to Maine voters recent "overwhelming" rejection of a proposal to amend the Maine Constitution to remove these prohibitions. Sec'y br. at 15. It would appear, then, that the Secretary has concluded that the voters get one chance to amend the Maine Constitution to conform to the First Amendment. If they fail to approve the amendment, the Secretary has recourse to other sources of authority, including federal court consent orders, to exercise powers that Maine voters denied to her. The Secretary cites no authority for this de facto "one bite at the constitutional apple" rule.

By its plain terms, Section 20 bars anyone who fails to meet its residency and registration requirements from circulating petitions for initiatives and referenda in Maine. The Initiative Amendments expressly provides that they would be "self executing." *Id.* at § 22. The Law Court has noted that the Initiative Amendments "laid out in unusual detail the procedure by which they will legislate by direct vote." *Allen v. Quinn*, 459 A.2d 1098, 1103 (1983). Although they provided the Legislature could enact "procedures" for implementing them, the Initiative Amendments expressly provided that the Legislature could not "enact laws inconsistent with the Constitution." art. IV, pt. 3d, § 22.

b. No Federal Court has Held that the Affirmative Powers in the Consent Order are Consistent with the First Amendment.

To understand the invalidity of the Secretary's claim to allow out-of-state circulators to circulate petitions in Maine subject to the affirmative conditions set forth in the Consent Order, a close analysis of what the District Court decided, and what it did not decide, is essential.

Before the District Court was the plaintiffs' claims that the residency and voter registration requirements set forth in Section 20 and further implemented by statute[4] violated the First Amendment. On plaintiffs' motion for summary judgment, the District Court found that they had demonstrated a "likelihood of success" on their challenges to both the residency and voter registration exclusions. *We the People PAC v. Bellows*, 519 F.Supp.3d 13, 48, 51 (D. Me. 2021). The District Court issued injunctive relief. *Id.* at 53.[5] The appellate court affirmed. *We the People v. Bellows PAC v. Bellows*, 40 F. 4th 1, 24-27 (1st Cir. 2022). All this is clear enough.

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[4] The plaintiffs also challenged statutes implementing Section 20's residency and voter registration exclusions. *We the People PAC v. Bellows*, 519 F. Supp.3d 13, 20-21 (D. Me. 2021) (reviewing 21-A M.R.S. 901, *et seq.*),

[5] The District Court's injunction was directed at 21-A M.R.S.§ 903-A "to the extent" its provisions limited petition circulators to Maine residents and registered Maine voters. *We the People*, 519 F.Supp.3d at 53.

But given the Secretary's outsized reliance on these decisions for authority she does not possess, it raises the question—what exactly did the District Court decide? Or put another way, what exactly **could** the District Court decide?

To place the Secretary's position in full perspective, it should be clear that the **only** laws whose validity were under challenge were the mandatory residency and voter registration requirements of Section 20 and the implementing provisions of 21-A M.R.S. § 901, *et seq.* *We the People*, 519 F.Supp.3d at 19-21. The District Court was not considering any laws, constitutional or otherwise, qualifying or conditioning these exclusions. That is because, as is true to this day, none existed. Given the clear breadth of these exclusions and the subordinate implementing role to which the Initiative Amendments restricted the Legislature, outside of an amendment to the Maine Constitution, these exclusions could not be qualified, overridden or circumvented by any Maine law.[6]

The plaintiffs' First Amendment challenge to these exclusions triggered the application of longstanding standards of review articulated in a series of Supreme Court decisions. As the District Court explained, one line of analysis required the District Court to subject Section 20's exclusions to "strict scrutiny"; the other "more flexible approach" conditioned "[t]he rigorousness of [] judicial scrutiny... upon the extent to which the challenged regulation burdens First Amendment rights." *Id.* at 39-40.[7]

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[6] The District Court noted the limited authority the Initiative Amendments allowed the Legislature noting: "[T]he Legislature is authorized to enact implementing legislation, but **cannot** do so in a way that is inconsistent with the Constitution or that abridges or directly or indirectly the people's right of initiative." *We the People*, 519 F.Supp.3d at 19, quoting, *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231, 60 A.2d 908, 910 (1948) (emphasis supplied).

[7] The latter mode of analysis is termed the "*Anderson-Burdick*" test because it arises from the Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780, 788-89)983) and *Burdick v. Takushi*, 504 U.S. 428, 432-33 (1992).

With the benefit of "the substantial factual record" before it, the District Court concluded that the residency and voter registration requirements imposed a "severe burden on [the plaintiffs'] exercise of their First Amendment Rights." *Id.* at 46. The District Court then reviewed the interests the Secretary offered to support the residency and voter registration exclusions and found they were insufficient to sustain them. *Id.* at 50-51.[8]

As it was required to do, the District Court considered whether certain of the State's interests in support of the residency and voter registration exclusions could be served by non-exclusionary means. On this point, the District Court found that "the Defendants have failed to show how a requirement that petition circulators enter into a binding agreement to submit to Maine's jurisdiction and comply with any subpoenas would be inadequate." *Id.* at 47.

The District Court's comparison of the State's interests supporting the residency and voter registration exclusions against the plaintiffs' First Amendment followed a well worn path. Indeed, it was the same path followed by six circuit court decisions it cited, each of which reviewed state residency restrictions for circulators. *Id.* at 40-21. As will be seen below, every one of those decisions involved blanket exclusions and, therefore, the less burdensome means these courts identified were **necessarily** hypothetical because they had not been enacted into law. Moreover, they did not reach the same conclusions as to less burdensome means.

Of these decisions, the Secretary singled out *Nader v. Brewer* for the point that "Federal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for the purposes of subpoena enforcement and some courts have viewed such a system

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[8] Among other things, the District Court found that "[i]t is clear to the Court that one of the purposes of the residency requirement and the 2015 amendment is to keep out-of-state interest groups out of Maine's political process." *We the People*, 519 F. Supp.3d at 47. The Court rejected this rationale because "Maine is also a part of the Union and its Constitution and laws must comport with the United States Supreme Court and, when in conflict with fundamental rights, state interests must bend to the greater national good." *Id.*

to be a more narrowly tailored means than residency to achieve the same result." Sec'y Br. at 25, quoting 531 F.3d 1028, 1037 (9th Cir. 2008). Given the Secretary's reliance on it, *Nader* warrants closer scrutiny.

Nader involved a challenge, *inter alia,* to Arizona's requirement that circulators of candidate nominating petitions be Arizona residents. *Id.* at 1030. In evaluating the constitutionality of the residency requirement, the *Nader* Court was required to consider whether the State interests behind this prohibition could be less burdensome. It was in this context, that the Court noted some courts had favorably viewed consent-to-jurisdiction requirements as more narrowly tailored. In support of this point, *Nader* cited two circuit court decisions and one district court decision. *Id.* at 1036-37. The circuit court decisions were *Chandler v. City of Arvada*, 292 F.3d 1236, 1238-39 (10th Cir. 2002) and *Krislov v. Rednour,* 226 F.3d 851, 866, n. 7 (7th Cir. 2000) and the district court decision was *Frami v. Ponto*, 255 F.Supp.2d 962, 970 (W.D. Wisc. 2003).[9]

Krislov concerned a challenge to unconditional residency and voter registration requirements for candidate petitions. 226 F.3d at 856. Among other findings, *Krislov* determined that these exclusions violated the plaintiffs' First Amendment rights because while severely burdening those rights, they could be "achieved just as easily (and probably more effectively) through other means." *Id* at 867. In a footnote, *Krislov* cautioned that its ruling did not mean that "a State could never regulate non-citizen circulators. Thus, for example, to ensure the integrity of the process, States might require non-citizens to submit to the jurisdiction of Illinois courts. [citing *Buckley v. American Constitutional Law Found*, 525 U.S. 182, 119 S.Ct. 636, 644 (1999)]." *Krislov* added that. "[i]f the use of non-citizens were shown to correlate with a high incidence of

[9] The *Nader* Court also cited *Kean v. Clark,* 56 F.Supp.2d 719 (S.D. Miss. 1999) but only *conferre* because *Kean* found the residency requirement was narrowly tailored and, therefore, *Kean* did not consider "the 'consent to jurisdiction' alternative." 531 F.3d at 1037, citing 56 F. Supp.2d at 733,

fraud, a State **might** have a compelling interest in further regulating noncitizen circulators. But the Board does not assert these interests." *Id.*, at 866, n. 7 (emphases supplied).[10]

Chandler concerned a First Amendment challenge to the City of Arvada's residency and voter registration requirements. 292 F.3d at 1239-40. In concluding that these restrictions violated the First Amendment, the Court noted, "[a]s was suggested at oral argument, Arvada could require, **for example,** as a prerequisite to circulating an initiative, referendum, or recall petition in the City, the prospective circulator agree to submit to the jurisdiction of Arvada Municipal Court for the purpose of subpoena enforcement." *Id.* at 1244 (emphasis supplied).

Similarly, *Frami* involved a challenge to a Wisconsin law imposing a rigid residency requirement on circulators of candidate petitions. 255 F. Supp. 2d at 964. In considering Wisconsin's interest in preserving the integrity of the candidate petition process as manifested by the residency requirement, the *Frami* Court observed that initiatives and referenda were different, noting that "courts have recognized that the risk of fraud is more remote at the petition stage of a ballot initiative or candidate election than at the time of voting." *Id.* at 969-70, citing, *Meyer v. Grant*, 486 U.S. 414, 427 (1988), *Lerman v. Bd of Elections in City of New York*, 232 F.3d 135, 149 (2d Cir. 2000), *Krislov*, 226 F.3 at 865. Turning to the residence restriction for candidate petitions, consistent with *Krislov* and *Chandler*, the *Frami* Court cited *Chandler* for the "suggest[ion]" that the City of Arvada "could require circulators to agree to submit to the municipal court's jurisdiction for purposes of subpoena enforcement." *Id.* at 970.

This review of the *Nader v. Brewer* and the decisions it cited shows that, although in one way or another, all these courts identified jurisdiction submission requirements as more narrowly tailored than blanket exclusions, no court vouched for their constitutionality. They were simply

[10] In the body of its opinion, *Krislov* suggested that the petition review process, itself, might be sufficient to satisfy the State's interests in promoting the integrity of the process. 56 F. Supp.2d at 867.

identifying what they concluded were less burdensome means by which the state or municipality in question could protect their initiative and candidate petition processes without entirely banning out-of-state or out-of-jurisdiction circulators.[11] This type of analysis is a staple of federal court review of state constitutions, statutes, and local ordinances when challenged as violative of the U.S. Constitution. *Cf., Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970) (invalidating state law as violative of the dormant commerce clause that imposes "clearly excessive burden on commerce" if local objectives "could be achieved as well with a lesser impact on interstate activities.").

Federal courts identifying more narrowly tailored—less restrictive---means of achieving state or local objectives are not, thereby, vouching for their constitutionality. That is because federal courts do not rule on inchoate laws that have yet to be enacted. Under Article III, Section 2, federal courts may only decide "cases" and "controversies". U.S. Const., Art. III, § 2. Notional legislation does not meet these requirements.

c. The People of Maine Retain the Power to Amend the Maine Constitution and to Approve, themselves, any Conditions for Out-of-State Circulators or to Delegate Power to Devise such Conditions to the Legislature.

Although, as the Secretary noted, Maine voters "overwhelmingly" rejected the proposal to remove the unconstitutional and unenforceable residency and voter registration requirements from the Maine Constitution, notwithstanding the Secretary's apparent "one bite at the apple" rule, they retain the authority to amend these provisions as they see fit. For example, as authorized by Article X, Section 4, the Legislature could issue a proposed constitutional amendment which, while

[11] With the exception of *Initiative & Referendum Institute v. Jaeger,* 241 F.3d 614 (8th Cir. 2001), which upheld a residency requirement, all the other circuit court decisions reviewed in the District Court's decision identified the requirement of submission to jurisdiction as less burdensome that wholly exclusionary bans based on residency, voter registration or both. *We the People*, 519 F. Supp.3d at 40-41 (reviewing, *Wilmouth v. Sec'y of New Jersey*, 731 F. App'x 97, 103 (3d Cir. 2018); *Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 317 (4th Cir. 2013); *Nader v. Blackwell*, 545 F.3d 459, 478 (6th Cir. 2008); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 2028 (10th Cir. 2008)).

removing the residency and voting registration requirements, could replace them with detailed and very particular prerequisites that out-of-state circulators would be required to satisfy. This approach would be consistent with the Initiative Amendments' "self executing" powers and the "unusual detail" by which Maine voters set forth the lawmaking powers in the Initiative Amendments. *Allen*, 459 A.2d at 1103; see also, *McGee v. Sec'y of State*, 2006 ME 50, ¶ 24; 896 A.2d 933.

Constitutional amendments and statutes are the means by which policies take on the force of law. As has been seen above, where the Initiative Amendments are concerned, the Legislature is limited to enacting implementing legislation not inconsistent with the Constitution. *Farris*, 143 Me. at 231; see also, Me. Const., art. IV, pt. 3d, § 22. When closely examined, it becomes apparent that the Secretary's list of the many needs for the Consent Order's empowering provisions in reality pose the types of policy choices that only Maine voters or their elected representatives are authorized to make. See, *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.")

The predicate to this discussion is the District Court's determination that Section 20's residency and voter registration requirements (and related implementing statutes) are constitutionally infirm and the Secretary is enjoined from enforcing them. Without the Consent Order's purported authorization to the Secretary to place particular conditions on out-of-state circulators, the invalidation of these requirements would raise legislative policy issues.

For example, the Secretary contends that, if out-of-state circulators could cure defective petitions after the deadline for submitting the petitions to the Secretary has passed, "the deadlines would become effectively meaningless." Secy's Br. at 20. But, however persuasive this point

might be, it is a policy decision. Maine voters or their elected representatives, not the Secretary interpreting a very general Consent Order, must make such judgment.[12] In their exercise of this power, presumably the Secretary's views would be accorded considerable, even decisive, weight but the people would retain the right to set different timing constraints. Does the Secretary contend that in the wake of the entry of the Consent Order, Maine voters and their elected representatives lost this authority?

The Secretary also argues that if out-of-state circulators could wait to consent to the State's jurisdiction, it would "greatly undermine the State's ability to enforce petition laws." *Id.* at 21. Although the people exercising their lawmaking powers might agree with and adopt the Secretary's view on this point, do they not also hold the power to disagree? Does the Secretary assert that the Consent Order has deprived Maine voters (or their properly authorized elected representatives) of the power to disagree and enact a different standard? For example, where, as here, no one is challenging the validity of any of the elector signatures on Circulator Cairo's petition forms or, for that matter, those of Circulators Hakeem, Chukwuma, and Albert, so couldn't Maine voters provide that the law should either allow the circulators to cure any deficiency or simply require the Secretary to count them anyway? Couldn't Maine voters choose this approach over the Secretary's preferred approach of "disenfranchising" voters. See, *Maine Taxpayer Action Network v. Sec'y of State,* 2002 ME 64, ¶ 23 (petition invalidation causes "disenfranchisement of over three thousand Maine voters").

[12] For example, Maine voters or their properly authorized elected representatives might wish to consider the Tenth Circuit's observation that, "[i]]t was not obvious from the record that the ability to question circulators after the petition is submitted significantly aids in protecting the integrity of the initiative process." *Yes on Term Limits,* 550 F.3d at 1030, n. 3. Although the Committee contends that Cairo's submission to the State's jurisdiction during the review process, including appearing at the May 12 hearing and subjecting herself to direct and cross-examination, served the interests of the initiative process, the Committee also contends that the policy decision on this matter belongs to Maine voters subject, of course, to judicial review.

When considered against Maine voters' right to make their own policy choices that would have the force of law, it becomes apparent that the provisions in Paragraph 2 of the Consent Order which the Secretary claims empower her to disqualify petitions, disenfranchise electors and deny Maine voters the opportunity to vote for or against the Ballot Initiative at the November 3, general election, are based on the Secretary's own policy preferences for protecting the initiative process which, given the opportunity, Maine voters or their properly authorized elected representatives might accept, reject, or revise.

d. The Consent Order has, in Effect, Amended the Maine Constitution.

The Hearing Officer's Recommended Decision described the effect of the Consent Order on Section 20's residence and voter registration requirements in language markedly different from the Secretary's formulation in her brief. The Recommended Decision clearly acknowledged the Consent Order as the source of the Secretary's power to impose conditions on out-of-state circulators. As the Recommended Decision put it:

> "The United States District Court **authorized** Maine to impose [the out-of-state circulator] requirement by limiting its injunction of Maine's ability to enforce the residency requirement to circumstances in which the circulator fails to consent to Maine's jurisdiction."

Rec. Dec. at 35 (emphasis supplied). At another point, the Recommended Decision asserted that the Consent Order "narrows the scope" of [the Maine Constitution's] prohibition on out-of-state circulators." *Id.*[13]

The Secretary chides the Committee for failing to find a "single case holding that an injunction like the one contained in the *We the People* consent judgment is 'ultra vires.'" Sec'y Br. at 16, citing Com. Br. at 20-24. In support of its defense of the affirmative aspects of the

[13] Petitioners were also candid on this point. They acknowledged that the Consent Order had "modified" the residence and voter registration requirements. Petitioners' Post-Hearing Brief at 42. What they do not quite spell out that the law that the injunction had "modified" was Section 20 of the Maine Constitution.

Consent Order—those on which the Secretary relies to allow out-of-state circulators, notwithstanding the express language of Section 20 of the Maine Constitution, to circulate petitions—cites the Secretary insists that the Consent Order fits squarely within the Supreme Court's decision in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328 (2006). Sec'y Br. at 17. In advancing these positions, the Secretary has failed to acknowledge the Committee's true argument and has entirely misconstrued and misapplied *Ayotte*. Indeed, the Secretary is viewing this question through the wrong end of the telescope. The Secretary is focused on the District Court's remedial powers. The Committee is contending that the Consent Order cannot give the Secretary the power she claims to exercise over out-of-state circulators. The validity of any court injunction depends on the source and breadth of the court's remedial powers and the nature of the restrictions or obligations imposed on the subject of the injunction.

What the Committee tried to make clear is that, although there were serious questions about the District Court's authority to infuse the Secretary with powers outside the Maine Constitution, the Committee was not asking this Court to address those questions. To the contrary, the Committee's challenge was directed at the Secretary, herself; that is, with the residency and voter registration **exclusions** wholly intact in Section 20 of the Maine Constitution could **the Secretary** nonetheless rely on the U.S. District Court's purported "authorization", as the Secretary put it, to allow out-of-state circulators to circulate petitions in Maine in accordance with the conditions in the Consent Order? Or, was the Secretary's exercise of those Consent Order-derived powers outside of her constitutional powers and, therefore, *ultra vires* **as to the Secretary**?

Given the Secretary's mischaracterization of the Committee's argument, the following clarification is required. To begin with, as one court has pointed out, it is "not quite right" to say that the courts "'strike down' laws when ruling them unconstitutional." *Pool v. City of Houston*,

978 F.3d 307, 3090 (5th Cir. 2020). "Courts hold laws **unenforceable**, they do **not** erase them." *Id.* Indeed, "[m]any laws that are plainly unconstitutional remain on the statute books." *Id.*[14] (emphases supplied).

Where a state law is challenged on the grounds that it violates the First Amendment, the Supreme Court has observed that "[i]t has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be "readily susceptible" to a narrowing construction that would make it constitutional, it will be upheld. [citations omitted]. The key to application of this principle is that the statute be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). This brings us to *Ayotte.*

At issue in *Ayotte* was a New Hampshire law requiring physicians to notify parents if the parents' minor child presented for an abortion. The law provided three exceptions to the otherwise mandatory notification. 546 U.S. at 324. The District Court found constitutional infirmities in the notice provisions and permanently enjoined the law in its entirety. *Id.* at 325. The First Circuit affirmed. *Id.* at 326.

In considering the breadth of the injunction effectively invalidating the parental notification law in its entirety, the *Ayotte* Court identified three rules: First, "the 'normal rule' is that 'partial, rather than facial, invalidation is the required course.'" 456 U.S. at 329. Second, "we must restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we try to save it." *Id.*, quoting *American Booksellers*, 484 U.S. at 397. Third, "the touchstone for any decision is legislative intent, for a court **cannot** 'use its remedial powers to **circumvent**

[14] At issue in *Pool* was the City of Houston Charter, which "allows only registered voters to circulate petitions for initiatives and referenda, even though the Supreme Court held a similar law unconstitutional twenty years ago." 978 F.3d at 309, citing, *Buckley v. American Constitutional Law Foundation*, 525 U.S. at 193-197. The *Pool* Court characterized such vestigial laws as "'zombie' laws." *Id.*

the intent of the legislature.'" *Id.* at 330 (emphases supplied).

Having identified these guiding principles, *Ayotte* remanded the case for the District Court to consider whether the parental notification statute should be enjoined or whether certain notification requirements could stand while others should be enjoined. Here it bears emphasis that, because the parental notification sought to impose affirmative notification requirements on physicians, in contrast to the Consent Order, the injunction was entirely prohibitory.

From the foregoing, one might argue that the affirmative, ostensibly empowering provisions of the Consent Order exceed the District Court's remedial powers. But, as the Committee plainly stated in its initial brief, this Court need **not** answer that question. Indeed, it likely lies beyond the purview of this Court. See, *e.g., United States v. Council of Keokuk*, 73 U.S. 514, 517 (1867). So that there is no confusion on this point, the Committee is **not** asking this Court to rule on whether any aspect of the Consent Order exceeded the District Court's remedial powers.

The question the Committee has raised is a matter of **state** law. That is, can the Secretary exercise the powers ostensibly "authorized" by the Consent Order if, in doing so, the Secretary is circumventing Section 20's unambiguous, and **unerased,** exclusion of out-of-state circulators? On this point, the Committee repeats and incorporates by reference its argument that no state official can exercise powers that the Maine Constitution does not grant to that official. Nor can a state official exercise powers that the Maine Constitution expressly denies to that official. Although a federal court can certainly, and should, enjoin a state official from enforcing a state law that violates the U.S. Constitution. That State official may not exercise powers inconsistent with or violative of the Maine Constitution, even if federal court has purported to authorize otherwise.

e. The Submission to Jurisdiction Requirement does not Guarantee the Secretary's Jurisdiction over Out-of-State Circulators.

Although the Secretary predicts dire consequences if this Court does not uphold the "authority" that she claims the Consent Order gave her to require out-of-state circulators to submit to the State's jurisdiction, there is reason to doubt that, even if checked, the jurisdiction authorization provides the Secretary with any real power over the out-of-state circulators.

Shortly before the May 12 hearing the Petitioners asked the Secretary to issue subpoenas to certain of the out-of-state circulators. The Hearing Officer, in consultation with the Attorney General's Office, declined the request for subpoenas. The Attorney General's Office explained to the parties that the Presiding Officer had determined that 5 M.R.S.A. § 9060's restriction on service outside the territorial jurisdiction prevents issuance of formal subpoenas. Therefore, the Presiding Officer could only send letters to the circulators asking that they appear. The letters that the Secretary sent to the three out-of-state witnesses advised them that should they fail to comply with the letter, the Secretary could decide to disqualify the electors' signatures on their petitions. See, *e.g.*, R.0033376 (Letter to Rokelle Harris).

The Hearing Officer's interpretation as to the extremely limited reach of the jurisdiction consent provision undermines the Secretary's current position that invalidation of the Secretary's reliance on the jurisdiction provisions of the Consent Order would have the disastrous effects the Secretary claims. Indeed, when balanced against the Secretary's preferred remedy—the invalidation of the otherwise valid signatures of electors, the risk of harm is decidedly placed on Maine voters—not the circulators.

f. Circulator Cairo's Consent to Jurisdiction Complied with the Consent Order.

The Secretary acknowledges that Circulator Cairo completed her Circulator's Affidavit and appeared at the May 12 hearing. Assuming arguendo that the Consent Order's delegation of unconstitutional powers to the Secretary was somehow valid, the Committee argued that Circulator Cairo complied with the Consent Order. Because, unlike the preliminary injunction, which required that out-of-state circulators "first" comply with submission to jurisdiction requirements, the Consent Order contained **no** timing requirements.

The Secretary, who assisted in drafting the Consent Order and whose consent was essential to the District Court's endorsement of it, calls the absence of the omission of the preliminary injunction's timing requirement from the Consent Order "a purported discrepancy." Secy's Br. 22. This is simply disingenuous. The absence of the preliminary injunction's timing requirement from the Consent Order is not "purported"; it is demonstrable. As a drafter of the Consent Order, the Secretary should be well positioned to explain the omission of the word "first" from the submission to jurisdiction provisions of the Consent Order. But the Secretary offers no such explanation. Her response is to pretend that the "purported discrepancy" does not exist. This tack is unworthy of a state official much less a constitutional officer charged with overseeing the fulfilment of the Initiative Amendment's letter and spirit.

Unlike the preliminary injunction, the Secretary drafted and consented to the Consent Order. She must know why the preliminary injunction's timing element was not carried over to the Consent Order, but she refuses to offer any explanation. Even as she fails to explain why she agreed to omit the timing element from the Consent Order, she also fails to engage with the Committee's argument that, based on the plain wording of the Consent Order, the timing of Circulator Cairo's consent to jurisdiction, not to mention her actual appearance at the May 12

hearing, Circulator Cairo complied with the Consent Order. The Secretary fails to engage with this argument because she has no good answer to it. The Consent Order did not require Circulator Cairo to submit to the Secretary's jurisdiction at a given point in time. When her willingness to submit to the Secretary's jurisdiction was called to her attention, she completed the Circulator's Affidavit and appeared before the Secretary and allowed herself to be questioned and cross-examined by the parties.[15]

The Secretary continues to cling to the argument she cobbled together in which she united to entirely dissimilar sources of authority—the ineffective "authorization" from the Consent Order and the timing requirement in the circulator statute, 21-A M.R.S. § 903-A(4). But, of course, neither Section 903-A(4) nor any part of Title 21-A can be a source of timing requirement governing or supplementing the provisions of the Consent Order that circumvent the Maine Constitution because, as has been discussed above, the Legislature is barred from enacting laws inconsistent with the Maine Constitution and the residency and voting registration requirements remain fully intact in Section 20 of Article IV, Part Third. No **statute**, including Section 903-A(4) can serve as a source of authority to circumvent the exclusion of out-of-state circulators Section 20 requires.

B. THE PROTECT GIRLS SPORTS BALLOT QUESTION COMMITTEE HAS STANDING TO DEFEND THE RIGHTS OF ELECTORS TO PETITION THE GOVERNMENT.

In passing, the Secretary has questioned the Committee's standing to defend the interests of electors whom the Secretary's Final Decision has disenfranchised. In particular, from the outset,

[15] The Secretary argues long and hard that no exception can be made for Circulator Cairo (an exception which the Consent Order does not even impose) because the Secretary must protect the integrity of the initiative process. Yet, no party to this proceeding, ,including the Secretary, has challenged the validity of any of the signatures Circulator Cairo gathered. And for all those electors who signed Circulator Cairo's petitions in good faith and, in accordance with the law, did not knowingly sign another, the Secretary answer is disenfranchisement.

the Committee has defended the rights of electors whose signatures the Secretary has invalidated through no fault of their own, including the Secretary's frustration of their right to petition the government as protected by the First Amendment and Article I, Section 15 of the Maine Constitution and their correlative rights of freedom of speech, freedom of assembly, and rights of association inherent therein as also protected by the First Amendment and Article I, Sections 4 and 15 of the Maine Constitution.

Although it is not clear that the Secretary is pressing this point, out of an abundance of caution, the Committee responds as follows. Protect Girls Sports in Maine ("the Committee") is a registered Ballot Question Committee in the State of Maine. The Committee is comprised of voters in the state of Maine who invoked the citizen initiative procedure at issue here. Specifically, on September 12, 2025, a Maine voter, Leyland Streiff[16], invoked the citizen initiative procedure provided for in the Constitution of Maine, art. IV, Part Third and governed by Title 21-A M.R.S.A. Chapter 11. [R 0003]. As required by the Maine Constitution and Title 21-A, the application for Citizen Initiative lists the names, addresses, and signatures of five additional Maine voters[17] who desired to invoke the citizen initiative procedure provided in the Constitution of Maine.

The Committee was organized for the purpose of promoting the Initiative, including securing sufficient valid signatures to ensure its placement on the general election ballot. The Initiative arose out of efforts by a grassroots group, "Maine Girl Dads"[18] who advocated for the adoption of policies by the legislature that would protect the participation of Maine girls in sports and sports-related activities based on their sex as determined at birth. When their efforts with the

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[16] Leyland Streiff is the Principal Officer of the Committee. Other Maine voters listed as officers, fundraisers and decision makers for the Committee are: Michelle Brown, Heidi Sampson, Joshua Tabor, and Allen Sarvinas.

[17] In addition to Leyland Streiff, the Maine voters who invoked the citizen initiative process are: Joshua Matthew Tabor, James E. Orr, Kristina Clair Parker, Robert N. Cross and Brian M. Ouellette. [R 0003].

[18] Maine Girls Dads has not registered as a Ballot Question Committee.

legislature were unsuccessful, Maine Girl Dads and others sought to institute these policy changes through citizen initiative.

On or about September 19, 2025, the initial language for the Initiative was submitted to the Maine Secretary of State. On October 7, 2025, the Committee registered as a Ballot Question Committee. On October 9, 2025, the Secretary approved Protect Girls Sports in Maine as a Ballot Question Committee. After the Secretary approved the wording of the Initiative, the Committee assumed the responsibility for organizing the circulation of petitions to gain sufficient valid signatures to place the Initiative on the ballot for the 2026 general election. These organizing efforts included recruiting volunteers, hiring circulators to obtain the requisite number of valid signatures on petitions, and ensuring the timely submission of the petitions to the Secretary. The Committee sought the assistance of several petition circulation organizations which were registered pursuant to 21-A M.R.S. § 903-A. [R 0028-0051]. On February 2, 2026, the Committee submitted the petitions it had gathered to the Secretary for the Secretary's review. [R 0096].

After the Secretary's determination that the Committee's Ballot Initiative had the requisite valid signatures to be placed on the November 2026 Ballot, the Petitioner's challenged the Secretary's determination by filing the Rule 80(C) Complaint in the above-captioned action. The Committee sought to intervene. Neither the Petitioners nor the Secretary opposed the Committee's Motion to Intervene.

The Committee's participation in this matter has been essential to maintaining adversity on certain issues. One prominent example, concerns the out-of-state circulators who did not check the jurisdiction box in the Circulator's Affidavit at all or who, in the case of Circulator Cairo, checked the box later than the Secretary deemed was required. From the outset, the Secretary accepted the Petitioners objection on this point and stood prepared to disqualify the otherwise valid

signatures of more than 1,500 voters. Indeed, so closely aligned were the Secretary's and Petitioners' views on this question that the Secretary largely adopted the Petitioners' arguments—arguments which the Secretary had not advanced in her initial April 17, 2026 brief—even though the Secretary, not the Petitioners, participated in drafting the agreement that became the Consent Order.[19]

Under Maine law, "[a]lthough standing 'relates to the court's subject matter jurisdiction,' it is an issue theoretically distinct and 'conceptually antecedent' to the issue of whether the court has subject matter jurisdiction. *Bank of America, N.A. v. Greenleaf (Greenleaf II)*, 2015 ME 127, ¶ 7, 124 A.3d 1122 (internal citations omitted). Subject matter jurisdiction is a principle of adjudicatory authority that "refers to the power of a particular court to hear the type of case that is then before it." *Id.* Citing *Hawley v. Murphy,* 1999 ME 127, ¶ 8, 736 A.2d 268 (quotation marks omitted). Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place. *Id.* citing *Wells Fargo Bank, N.A. v. Girouard,* 2015 ME 116, ¶ 8 n. 3, 123 A.3d 216.

In Maine, standing is prudential, not constitutional. *Id.* at ¶27, citing *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966. Thus, this Court may "limit access to the courts to those best suited to assert a particular claim." *Id.* (quotation marks omitted). "Just what particular interest or injury is required for standing purposes and the source of that requirement—whether statutory- or common law-based—varies based on the type of claims being alleged." *Greenleaf,* 2014 ME 89, ¶ 7, 96 A.3d 700.

[19] Petitioners claimed that all the petitions circulated by Cairo, Kewechi Chukwuma, Ummsalaamah Hakeem, and Jordan Albert should be invalidated due to the failure to check the box indicating that the circulator would submit to the jurisdiction of the state of Maine for any investigation or judicial review resulting from their circulation of such petitions. Thus, the invalidation of these petitions would invalidate each Maine voters right to petition the government simply because a box went unchecked and not as a result of any fraud or defect in the gathering of such signatures.

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Black v. Bureau of Parks and Lands*, at ¶ 29, citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); see also *Conservation L. Found.*, 2001 WL 1736584, at *6, 2001 Me. Super. LEXIS 26, at *18-19.

Moreover, in pressing the rights of disenfranchised electors, including the right to petition, the Committee is seeking to require the Secretary to properly apply the constitutionally mandated principles that the Secretary continues to fail to acknowledge or demonstrably apply but which, nonetheless, are binding on her. The principles include but are not limited to her obligation to apply the Initiative Amendments and statutory laws implementing them so as to encourage direct democracy and to facilitate, rather than handicap, their exercise by the voters. *League of Women Voters v. Secretary of State*, 683 A.2d 769, 771 (Me. 1996); see also, *McGee*, 2006 ME 50, ¶ 25, quoting, *Allen*, 459 A.2d at 1102-03

For these reasons, to the extent the Secretary is pressing this issue, this Court should find that the Committee has standing to represent the interests of electors whose rights to petition the government and to exercise their rights of freedom of speech, freedom of assembly, and rights of association inherent therein.

C. THE COURT SHOULD HOLD THAT THE MAINE CONSTITUTION'S RESIDENCY AND VOTER REGISTRATION REQUIREMENTS ARE UNCONSTITUTIONAL.

The Secretary opposes the Committee's request that this Court rule on whether Section 20's residence and voter registration requirements violate the Maine Constitution. The Secretary

contends that the Committee's request is "hypothetical." Sec'y Br. at 25. The Secretary prefers the current ambiguity arising from the continued presence of the residency and voter registration requirement in the Constitution, coupled with the vague and malleable "authorization" to manage out-of-state circulators untrammeled by the Maine Constitution or any other clearly ascertainable authority outside the Consent Order. The Secretary prefers the nearly boundless power she exercises to veto petitions and invalidate signatures without being accountable to any clear standards.

The Committee respectfully urges that a clear decision issue from the state courts on the constitutionality *vel non* of Section 20's residency and voter registration requirements vis a vis the First Amendment.

D. THE "OTHER SERVICES" PROHIBITION ON NOTARIES VIOLATES THE FIRST AMENDMENT.

The Committee rests on the arguments it has already advanced that the "other services" provisions in 21-A M.R.S. § 903-E and the related exclusion in 4 M.R.S. §1904(5) violate the First Amendment to the U.S. Constitution.

E. THE SECRETARY'S EXCLUSION OF ELECTORS' SIGNATURES WITH DITTO FOR THE DATE OF SIGNATURE VIOLATE THE CONSTITUTIONAL STANDARDS THAT THE SECRETARY IS REQUIRED TO EMPLOY TO FACILITATE THE ELECTORS' EXERCISE OF THEIR SOVEREIGN LAWMAKING POWER.

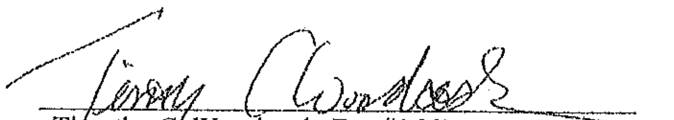
The Committee rests on the arguments it has already advanced that the Secretary's invalidation of electors' signatures on the grounds that they entered "ditto" marks instead of handwriting the date violates the constitutional standards the Secretary is required to apply to facilitate and not to handicap the voters' exercise of their sovereign lawmaking powers.

III. CONCLUSION

For the reasons stated above, the Committee respectfully asks this Court to reverse the Secretary's Final Decision and to restore the Ballot Initiative to the November 3, 2026 general election ballot.

Date: June 8, 2026

Respectfully submitted,



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