No. A-

SUPREME COURT OF THE UNITED STATES

HERBERT J. HOFFMAN,

Applicant,

v.

JOHN KNUTSON, *et al.*,

Respondents.

EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF MAINE PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

H. CHRISTOPHER BARTOLOMUCCI
(Counsel of Record)
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN H. BRANSON
LAW OFFICE OF JOHN H. BRANSON, P.A.
183 Middle Street, 4th Floor
Post Office Box 7526
Portland, Maine 04112-7526
(207) 780-8611

OLIVER B. HALL
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294

Counsel for Applicant Herbert J. Hoffman

QUESTION PRESENTED

In the decision below, the Supreme Judicial Court of Maine construed state election law to void three of Applicant's nomination petitions because each petition contained a single signature that was invalid under state law in that Applicant did not see the voter sign his name. As a result, 90 otherwise valid signatures on the petitions were voided along with the three invalid signatures, and Applicant — an independent candidate for United States Senate — has been excluded from the ballot this November. If the 90 valid signatures were counted, Applicant would be entitled to appear on the ballot. There is no allegation, evidence, or finding of fraud or intentional misconduct on Applicant's part. Maine's own Secretary of State opposed the voiding of Applicant's petitions as "absurd" and imposing an "undue burden" on First Amendment rights.

The question presented is whether Maine's law as applied here violates the First Amendment because it imposes a severe burden on political expression, associational rights, and voting and is not narrowly tailored to serving a compelling state interest.

PARTIES TO THE PROCEEDING

The Maine Department of the Secretary of State and Herbert J. Hoffman were the Appellees in the Supreme Judicial Court of Maine.

John Knutson was the Appellant in that court.

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To the Honorable David H. Souter, Associate Justice of the Supreme Court and Circuit Justice for the First Circuit:

Pursuant to 28 U.S.C. §§ 1651(a) and 2101(f) and this Court's Rules 22 and 23, Applicant Herbert J. Hoffman respectfully requests a stay of enforcement of the judgment of the Supreme Judicial Court of Maine in *Knutson* v. *Department of Secretary of State*, 2008 ME 124 (July 28, 2008), pending the filing and disposition of a petition for a writ of certiorari.

INTRODUCTION

Herbert Hoffman is an independent candidate for the United States Senate from Maine. To gain access to the ballot for the general election to be held on November 4, 2008, Hoffman presented to the Maine Secretary of State ("Secretary") nomination petitions signed by 4,000 registered Maine voters, as state law requires, plus additional signatures.

Respondent John Knutson, a registered voter and the Chair of the Maine Democratic Party, challenged three of Hoffman's petitions on the ground that each of the three contained *one* invalid signature. Knutson contended that Hoffman had not been, as Maine law requires, "in the presence of" the three registered voters when they signed their names. It was not enough that Hoffman was in close physical proximity to the three voters when they signed, Knutson argued, because Hoffman did not personally witness them sign. Knutson argued that the invalidity of the three signatures rendered void, not just those three signatures, but all three petitions in their entirety and all of the 90 otherwise valid signatures on them — even though there has never been any allegation, evidence, or finding of fraud on the part of Hoffman, who simply had a different, good-faith understanding of the meaning of the undefined statutory term "presence." The Secretary and the trial court rejected the view that the petitions had to be nullified in their entirety. The Maine Supreme Court, however, adopted that view of state election law in a decision rendered on July 28, 2008.

A stay of enforcement of the judgment below should be granted pending Hoffman's filing and this Court's disposition of a petition for a writ of certiorari to review the Maine Supreme Court's decision. First, the decision below clearly subjects Hoffman — and the voters of Maine — to irreparable injury. With the invalidation of the three petitions and the 90 valid signatures on them, Hoffman now has fewer than 4,000 valid signatures and will be excluded from the ballot in November. The voters of Maine will be denied the opportunity to vote for Hoffman

as a qualified candidate in the 2008 general election.

Second, there is a fair prospect (indeed, a likelihood) that Hoffman will prevail on the merits of the federal constitutional question presented. The Maine Supreme Court held that "the invalidation of the three contested petitions in their entirety * * * falls well within acceptable constitutional parameters." Exh. A at 11. The court's scrutiny was not strict or even intermediate but perfunctory. It decided the weighty First Amendment issues at stake with a few conclusory sentences, two case citations, and a declaration that it need "not address the constitutional concern further." *Id.* Significantly, Maine's own Secretary of State — the state officer charged with enforcing state election law — advised the Maine Supreme Court that the nullification of Hoffman's three petitions would be "draconian," "absurd" and impose an "undue burden" on First Amendment rights.

Third, it is reasonably probable that four Members of this Court would vote to grant certiorari. The Maine Supreme Court decided an extremely important question regarding the First Amendment rights of voters and candidates in the context of a United States Senate election, and its decision runs contrary to recent decisions by this Court and federal circuit courts applying strict scrutiny to — and striking down — similarly burdensome state election restrictions.

In accordance with this Court's Rule 23.3, Hoffman on August 6, 2008, moved the Maine Supreme Court to stay its mandate. *See* Exh. E. The Maine Supreme Court has not acted on that motion.

This is an emergency application. Yesterday afternoon, Hoffman learned for

the first time that the Secretary intends to, and believes he must, finalize the form and contents of the ballot by August 29, 2008, and begin printing ballots by September 2, 2008. *See* Affidavit of Deputy Secretary of State Julie F. Flynn dated Aug. 13, 2008, especially ¶¶ 6, 14 & 17 (Exh. F). The Secretary will begin designing the ballot, without Hoffman's name, on or about August 18, 2008. *See id.* ¶ 9. To design and proof a ballot that would include Hoffman before August 29, "a staff of six people would need to fit an additional 40 hours of work into the two week period beginning August 18." *Id.* ¶ 15. Although 40 hours of work presumably could be performed by a staff of six within a day, realistically more time may be required. Thus, Hoffman would respectfully request that this Court issue a stay no later than August 27, 2008.

JUDICIAL OPINIONS AND EXECUTIVE BRANCH DECISIONS BELOW

The opinion of the Supreme Judicial Court of Maine (Exh. A), styled *John Knutson* v. *Department of Secretary of State and Herbert J. Hoffman*, is reported at 2008 ME 124. The opinion of the Superior Court for Kennebec County (Exh. B) is not reported.

The Secretary of State's Decision on Report of the Hearing Officer (Exh. C) and the Report of the Hearing Officer (Exh. D) are not published.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on July 28, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * *." U.S. Const. amend. I.

The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *." U.S. Const. amend. XIV, § 1.

21-A Maine Revised Statutes § 354(5)(C) provides:

> **5. Number of signatures required.** Nomination petitions must be signed by the following numbers of voters: * * *
> C. For a candidate for United States Senator, at least 4,000 and not more than 6,000.

21-A Maine Revised Statutes § 354(7)(A) provides:

> **7. Certification of petitions.** A nomination petition shall be verified and certified as follows. A. The circulator of a nomination petition shall verify by oath or affirmation before a notary public or other person authorized by law to administer oaths or affirmations that all of the signatures to the petition were made in the circulator's presence and that to the best of the circulator's knowledge and belief each signature is the signature of the person whose name it purports to be; each signature authorized under section 153-A was made by the authorized signer in the presence and at the direction of the voter; and each person is a resident of the electoral division named in the petition.

21-A Maine Revised Statutes § 354(9) provides:

> **Petition Void**. A nomination petition which does not meet the requirements of this section is void. If a voter or circulator fails to comply with this section in signing or printing the voter's name and address, that voter's name may not be counted, but the petition is otherwise valid.

STATEMENT

A. Maine Election Law

In Maine, a non-party candidate seeking to earn a place on the ballot must file with the Secretary by June 1 of the election year nomination petitions bearing the signature, address, and municipality of registration of a sufficient number of registered voters. 21-A M.R.S. § 354. A candidate for United States Senate must collect at least 4,000 signatures. *Id.* § 354(5)(C). The circulator of a petition is required to verify by oath or affirmation that each signature is genuine, that each signer is a resident of the electoral division named in the petition, and that "all of the signatures to the petition were made in the circulator's presence." *Id.* § 354(7)(A). The term "presence" is not defined in the statute. The Maine law provides that "[a] nomination petition which does not meet the requirements of this section is void." *Id.* § 354(9).

B. The Secretary's Decision

Desiring to appear on the November ballot as a candidate for the United States Senate, Hoffman presented 355 nomination petitions bearing 4,112 signatures to the Secretary by the statutory deadline of June 2, 2008 (June 1 was a Sunday). Exh. D at 7. On June 9, 2008, Respondent Knutson filed a challenge with the Secretary pursuant to 21-A M.R.S. § 356(2) seeking to invalidate particular signatures and whole petitions. The Secretary appointed a hearing officer who, on June 16, 2008, held a hearing on the challenge. On June 19, 2008, the hearing officer issued her written report.

The hearing officer found that Hoffman's petitions contained 71 signatures that were invalid because they were made by unregistered voters, were duplicative, or were illegible. Exh. D at 3-5. Even so, Hoffman had more than the 4,000 valid signatures necessary to qualify for the ballot. Knutson also argued, however, that several petitions should be invalided in their entirety on the ground that they contained signatures not made in the presence of the circulator. The hearing officer agreed with Knutson's view that "presence" in 21-A M.R.S. § 354(7) means "physical proximity" plus "awareness" and that the circulator must not be "too far away to see the voters sign their names." Exh. D at 5. She disagreed with Hoffman's view that § 354(7) "does not require the circulator to personally witness each person signing the petition" and that "being in the vicinity while voters are signing is all that is required." *Id.*

The hearing officer found that three signatures were collected when Hoffman "who took the oath as circulator was not present to observe the voters sign their names to the petitions." Exh. D at 5. State Representative Herb Adams testified at the hearing that he signed a petition at a rally and that Hoffman was not in sight. *Id.* Dan Flack (who signed two Hoffman petitions) testified that while in the Portland Post Office he signed a petition handed to him by Hoffman's daughter. *Id.* at 6. Although Flack testified that he did not see anyone else around at the time, Hoffman testified that he was at the Post Office that day working in close proximity to his daughter. *Id.* John Woods testified that while at a training program he signed a petition handed to him by Hoffman's daughter. *Id.* Although Hoffman was

standing only a few feet away, Woods said that Hoffman was turned to the side and not looking at him when he signed his name. *Id.*

Adams, Flack, and Woods signed three different petitions. In addition to their signatures, the three petitions contained a total of 90 otherwise valid signatures of registered voters plus a number of invalid signatures. *See* Exh. I (copies of the petitions). The hearing officer found no evidence that "Hoffman was absent when the other voters listed on these petitions signed their names." Exh. D at 6. She also rejected Knutson's "presence" challenge to a fourth petition. *Id.*

Knutson sought to invalidate not just the Adams, Flack, and Woods signatures but every signature on all three petitions, which would leave Hoffman with 3,929 signatures — not enough to qualify for the ballot. Exh. A at 4 & n.4. The hearing officer, however, concluded that "the three (3) signatures of these witnesses should be invalidated, but not the petitions in their entirety." Exh. D at 6. Accordingly, she recommended that the Secretary determine that Hoffman's petitions contain "a total of 4,038 valid signatures, which is more than the minimum required," that "the challenge to the petition is not valid, and that there are sufficient signatures for the nomination of Herbert J. Hoffman to the Office of United States Senator." *Id.* at 7.

On June 23, 2008, the Secretary adopted the hearing officer's report and rejected Knutson's challenge. Exh. C. The Secretary found that the hearing officer's recommendations were "consistent with the manner in which the Secretary of State has interpreted and applied the relevant statutory provisions regarding

nomination by petition and the collection of and witnessing of signatures by circulators of petitions, and the validation of those signatures in other contexts." *Id.*

C. The Superior Court's Decision

Knutson sought review of the Secretary's decision in the Superior Court of Maine. The Secretary responded and defended his decision, while Hoffman intervened to do the same. On July 14, 2008, the Superior Court affirmed the Secretary's decision. Giving deference to the Secretary's interpretation of the statutory "presence" requirement, the court found "the Secretary of State's conclusion that the three signatures were not made in the circulator's presence reasonable and without error." Exh. B at 3. The court then observed that "[t]he parties are in general agreement that Mr. Hoffman, when swearing the oath, did not act fraudulently or have actual knowledge that he was falsely stating that the petitions had been signed in his presence." *Id.* Rather, "he simply was utilizing a different interpretation of the requirement than found by the [Secretary]." *Id.* Thus, the remaining issue, as the court saw it, was "whether the legislature intended in the absence of fraud or intentionally or knowingly false conduct, an entire petition to be invalidated if a single signature on the petition is demonstrated to be collected outside the presence of the circulator who swore the oath." *Id.*

The Superior Court again sided with the Secretary's construction. Exh. B at 5-6. The court deferred to the Secretary's reasonable interpretation that § 354(9) requires a circulator to take an oath but does not require the voiding of an entire petition if it turns out that not every signature was in fact signed in the circulator's

presence. In adopting that construction, the Superior Court also relied on the doctrine of constitutional doubt after considering this Court's jurisprudence applying First Amendment scrutiny to ballot access restrictions. *Id.* at 6-9 (citing *inter alia Anderson* v. *Celebreeze*, 460 U.S. 780 (1983)). The court rejected Knutson's interpretation, "which raise[d] the specter of rendering the statutory scheme unconstitutional." Exh. B at 9. It refused "to invalidate the presumptively legitimate signatures of 94 registered voters exercising their precious rights to have a voice in and associational right to a candidate on the ballot who is not of the two major political parties" simply because "Hoffman without knowledge incorrectly interpreted the 'in the presence of' language of the statute and therefore swore an oath that was incorrect as to three signatures." *Id.* Of course, the Superior Court did not have to answer definitively the constitutional question because it rejected Knutson's construction.

D. The Maine Supreme Court's Decision

Knutson appealed to the Supreme Judicial Court of Maine, and on July 28, 2008, that court vacated the Superior Court's judgment. Exh. A. The Maine Supreme Court agreed with the Secretary's construction of the statutory term "presence," which no party had disputed on appeal. The court said that "[t]he term 'presence' is ambiguous," *id.* at 5, and found the Secretary's construction "both reasonable, thus, requiring our deference, and correct." *Id.* at 7.

The Maine Supreme Court then turned to the question "whether Hoffman's misunderstanding" of the presence requirement "requires the voiding of all three

petitions." *Id.* at 8. Rejecting the Secretary's view, the court said it did. The Maine Supreme Court held that the three invalid signatures required the voiding of the three petitions in their entirety. It also held that Hoffman's good faith and the absence of fraud were no defense: "The Legislature has not conditioned the application of [§ 354(9)] on the presence of fraud, nor has it created any exception for a failure to comply that is done in good faith." *Id.* at 10. *See also id.* at 9 n.6 ("None of the parties allege that Hoffman's inaccurate oath was a product of fraud."); *id.* at 15 ("The absence of fraud does not change this result.").

The Maine Supreme Court held that interpreting § 354(9) "to require the invalidation of the three contested petitions in their entirety" was constitutional, and it rejected Hoffman's and the Secretary's contrary arguments regarding "the associational and voting rights of the signors and of the electorate generally." Exh. A at 11. "Long-standing jurisprudence in Maine," the court said, "confirms that voiding petitions that fail to comply with the statute falls well within acceptable constitutional parameters." *Id.* (citing *Maine Taxpayers Action Network* v. *Secretary of State*, 795 A.2d 75, 82 (Me. 2002), and *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972)). With that, the court below saw no need to "address the constitutional concern further." Exh. A at 11. (We note that by statute the Maine Supreme Court was required to render its decision within 14 days of the date of the Superior Court's decision. *See* 21-A M.R.S. § 356(2)(E).)

The parties had squarely presented the constitutional issue to the Maine Supreme Court. Because the Superior Court had adopted the Secretary's

construction of § 354(9), the Secretary and Hoffman defended the correctness of that construction in the Maine Supreme Court. But they also raised the First Amendment question decided below. *See* Hoffman Br. 18-21 (Exh. J); Secretary Br. 6-7, 7-9, 19-22 (Exh. K). The Secretary informed the Maine Supreme Court that "[a] regulation that significantly burdens First Amendment rights must be justified by a compelling governmental interest and must be narrowly tailored to serve that interest." Secretary Br. 8. He argued that his interpretation of § 354(9) "is consistent with constitutional principles and furthers the underlying purpose of Maine's ballot access laws" while noting "the severe impact on the rights of qualified voters that would result from [Knutson]'s interpretation." *Id.* at 7. The Secretary also argued that his interpretation "*preserves the constitutionality* of the nomination petition statute as applied to the facts of this case." *Id.* at 19 (argument heading) (emphasis added). As he explained:

> [T]o require voiding of all of the voters' signatures on a petition form based on a later finding that the oath was factually incorrect (or based on a misinterpretation of law) with regard to only one signature on that form, would deprive the voters who signed the petition of their rights to associate with, and vote for, the candidate in question. In the absence of any evidence of fraud or misconduct on the part of the candidate or circulator, reading the statute this way *imposes a draconian remedy that is not narrowly tailored to serving an important governmental interest.*

Id. at 21 (emphasis added). *See also id.* at 22 (Knutson's "interpretation would significantly burden the First Amendment rights of association and the fundamental right to vote of the individuals whose names appear on all of Hoffman's petitions, without furthering a governmental interest sufficient to justify

that burden.").

Hoffman's own brief echoed the constitutional arguments made by the Secretary. He argued that "in the absence of fraud or intentional misconduct, due respect for the constitutional rights of voters implicated by the electoral petition process weighs strongly against invalidation of entire petitions." Hoffman Br. 20. And he contended that "the Superior Court in this case properly found that — in the absence of fraud or intentional misconduct — the Secretary's refusal to invalidate petitions in this case was bolstered by due consideration of the constitutional rights of the thousands of Maine voters who signed Mr. Hoffman's petitions." *Id.*

Knutson, too, addressed the constitutional question in the court below. *See* Knutson Br. 9, 17-22. Defending the constitutionality of Maine's law, he argued that "the State has a legitimate interest in regulating ballot access and the statutes at issue are neither unconstitutional nor constitutionally suspect" and that Maine's "nomination petition requirements are reasonable and not unduly burdensome on candidates." *Id.* at 17, 20 (argument headings). He also cited and quoted a half-dozen of this Court's First Amendment ballot access cases. *See id.* at 17-20.

E. Hoffman's Motion for a Stay Filed With the Court Below

On August 6, 2008, Hoffman filed a motion with the Maine Supreme Court to stay its mandate. *See* Exh. E. The court, however, has not ruled on Hoffman's motion. On August 13, 2008, Knutson filed an opposition to Hoffman's motion. *See* Exh. G. On August 14, 2008, Hoffman filed a supplemental statement in further support of his motion. *See* Exh. H.

REASONS FOR GRANTING A STAY

For a stay to issue pending certiorari proceedings, three conditions must be met: "a likelihood of irreparable injury that, assuming the correctness of the applicants' position, would result were a stay not issued; a reasonable probability that the Court will grant certiorari; and a fair prospect that the applicant will ultimately prevail on the merits." *Planned Parenthood of S.E. Pa.* v. *Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers) (citing *Rostker* v. *Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)). All three conditions are met here.

I. Without a Stay, Hoffman and the Voters of Maine Will Suffer Irreparable Injury.

Assuming that Hoffman's legal position is correct, it is clear that irreparable injury would flow from the denial of a stay. First, in violation of the First Amendment, Hoffman will have been denied the opportunity to appear on the ballot this November as a candidate for the United States Senate. *See Fowler* v. *Adams*, 400 U.S. 1205, 1206 (1970) (Black, J., in chambers) (directing the State of Florida to place on the ballot the name of a candidate for the United States House of Representatives and explaining that if "the applicant is denied an opportunity to run for office and the Florida law is later invalidated, this candidate would have been unconstitutionally barred from the ballot"); *see also Brown* v. *Chote*, 411 U.S. 452 (1973) (affirming preliminary injunction requiring inclusion of congressional candidate's name on the ballot). It is too late to submit additional signatures because the June 2 deadline has long passed. Furthermore, the ability to receive "write-in" votes "is not an adequate substitute for having the candidate's name

appear on the printed ballot." *Anderson* v. *Celebreeze*, 460 U.S. 780, 799 n.26 (1983). *Accord Lubin* v. *Panish*, 415 U.S. 709, 719 n.5 (1974). And the constitutional injury to Hoffman cannot be remedied post-election. *See, e.g.*, *Campbell* v. *Bennett*, 212 F. Supp. 2d 1339, 1347 (M.D. Ala. 2002) ("Obviously, there is no adequate remedy of law for the injury of being denied placement on the ballot for the elections this fall."). It will be four years before another federal senatorial election is held in Maine.

In addition to thwarting his chances for election, the judgment below undermines Hoffman's ability to communicate his vision for political change because Maine citizens will take his candidacy and ideas less seriously if he is not on the ballot. *See Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 186 (1979) (noting that "an election campaign is a means of disseminating ideas").

The voters of Maine, too, will be irreparably harmed absent a stay because they will be denied their only opportunity to find Hoffman's name on the November 2008 ballot. *See Lubin* v. *Panish*, 415 U.S. at 716 ("The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."). "The right to vote is 'heavily burdened' if that vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.' " *Anderson* v. *Celebreeze*, 460 U.S. at 787 (quoting *Lubin* v. *Panish*, 415 U.S. at 716, and *Williams* v. *Rhodes*, 393 U.S. 23, 31 (1968)). In recent years New England voters have elected two sitting United States Senators who are independents. The voters of Maine may wish to follow suit, but realistically they can only do so if Hoffman's name appears on the ballot this

November. *See Anderson* v. *Celebreeze*, 460 U.S. at 802 ("There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."). Maine voters will have lost a fundamental right: "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." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964).

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976). Here, the loss is not temporary but irretrievable. Absent a stay, Maine voters will never see Hoffman's name on the ballot in 2008, and Hoffman will never have the opportunity to appear on that ballot.

II. Hoffman Is Likely Succeed on the Merits of His First Amendment Claim.

There is also a "fair prospect" that Hoffman would prevail on the merits if certiorari were granted. *Casey*, 510 U.S. at 1310 (Souter, J., in chambers). Indeed, it is likely that Hoffman would succeed on the merits because Maine's election law, as construed and applied here, cannot survive the exacting scrutiny called for by this Court's cases. It is telling that Maine's Secretary of State did not support the statutory construction adopted by the Maine Supreme Court and, for constitutional reasons, urged the court below to eschew that construction.

The process of gathering signatures on a nomination petition to secure a

candidate's place on the ballot is a political speech activity protected by the First Amendment. This Court has held that "the solicitation of signatures for a petition involves protected speech" since it "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." *Meyer* v. *Grant*, 486 U.S. 414, 421, 422 n.5 (1988). "Petition circulation, we held, 'is core political speech,' because it involves 'interactive communication concerning political change.' " *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer* v. *Grant*, 486 U.S. at 422). "First Amendment protection for such interaction, we agreed, is 'at its zenith.' " *Id.* at 187 (quoting *Meyer*, 486 U.S. at 425).

In *Buckley*, this Court struck down several provisions of Colorado election law restricting the circulation of initiative petitions. This Court stated that its "now-settled approach" is that state election regulations "imposing 'severe burdens' on speech must be narrowly tailored to serve a compelling state interest." *Buckley*, 525 U.S. at 192 n.12 (internal quotation marks, brackets, and ellipses omitted). *See also Meyer* v. *Grant*, 486 U.S. at 420 (subjecting state regulation of petition circulation to "exacting scrutiny"). As part of the now-settled approach, a court must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into account "the legitimacy and strength" of the State's interests and "the extent to which those interests make it necessary to burden [constitutional] rights."

Anderson v. *Celebreeze*, 460 U.S. at 789.

A. Maine Election Law Imposes a Severe Burden on Maine Voters and Independent Candidates Seeking Ballot Access.

Maine's rule — that one invalid signature on a nomination petition requires the voiding of the entire petition and every valid signature on it — imposes a severe burden on independent candidates. To access the ballot as an independent candidate for Senate in Maine, the candidate must collect the signatures of 4,000 registered voters. "In reality a candidate needs a surplus of signatures, because they will likely be challenged on any number of grounds, resulting in some, perhaps many, invalidations." *Krislov* v. *Rednour*, 226 F.3d 851, 859-860 (7th Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001). These signatures must be gathered "in the circulator's presence." 21-A M.R.S. § 354(7)(A). If the signatures are challenged (which the candidate's opponents have a strong incentive to do) and the Secretary or a court finds that one signature on the petition is invalid then every signature on the petition is invalidated. Maine's rule thus imposes a serious burden because "it makes it less likely that [a candidate] will garner the number of signatures necessary to place [his name] on the ballot." *Meyer* v. *Grant*, 486 U.S. at 423. Here, the three invalid signatures on Hoffman's petitions resulted in the voiding of 90 valid signatures and reduced his signature total below the 4,000 necessary for ballot access.

The risk that an independent candidate will lose numerous valid signatures because of one invalid signature is enhanced by Maine's very strict definition of "presence." A presence violation occurs if the circulator is too far away from, or not

directly looking at, the voter when she signs her name. Furthermore, as here, a presence violation can occur without any showing of fraud and without any bad faith or wrongful intent on the part of the candidate or circulator.

Maine's rule also imposes a severe burden on the rights of Maine voters. Voters who have expressed their support for an independent candidate's appearance on the ballot by signing a nomination petition can have their signatures nullified — through no fault of their own — if an invalid signature happens to appear on the petition they signed. Here, 90 registered Maine voters who signed Hoffman's petitions and thereby signaled their desire to see his name on the ballot — and who did absolutely nothing wrong — have had their signatures voided and their political voices silenced.

Significantly, the Secretary himself agrees with Hoffman on the severity of the burden created by the Maine Supreme Court's construction of § 354(9). "To void three entire petitions containing 94 signatures of registered voters, based on the [invalidity of] one signature on each of those petitions and in the absence of any evidence to undermine the validity of those 94 signatures, *would be an absurd result* that would impose an *undue burden* on the fundamental rights of voters who signed the petitions." Secretary Br. 15-16 (emphases added). *See also id.* at 7 (warning the court below of "the severe impact on the rights of qualified voters that would result from [Knutson]'s interpretation"); *id.* at 21 (stating that the nullification of Hoffman's petitions "imposes a draconian remedy that is not narrowly tailored to serving an important governmental interest").

Maine's rule exposes independent candidates and their supporters to strategic, even fraudulent, behavior. In the rough-and-tumble world of politics, it is hardly far-fetched to think that someone might sign a petition and later claim that the candidate did not observe the signature being made, all in an effort to invalidate the entire petition. A candidate and his circulators, who must collect 4,000 signatures in a Senate race, will be hard pressed to remember the details of every signing and will have considerable difficulty refuting false or manufactured "presence" violations. Significantly, in this case, the three signatures that form the basis for invalidating three entire petitions are concededly valid signatures, but for the technical "presence" violations.

Finally, the burden imposed on Hoffman is especially great because he had no notice that the rule applied to him even existed. The meaning of "presence" in § 354(7)(A) was ambiguous, as the Maine Supreme Court held, *see* Exh. A at 5, and Hoffman had no way to know how the Secretary would construe that term, for the first time, in this case. As the Secretary told the court below: "There is no statute, rule, or guidance document that further defines the meaning of the phrase 'in the circulator's presence' used" in § 354(7)(A). Secretary Br. 14. The interpretation of § 354(9) which Hoffman was subjected also came as a bolt from the blue. Indeed, the Secretary noted that his office in every prior case involving invalid signatures refused to count the invalid signatures themselves but did not discard the entire petition. *See id.* at 15 & n.9 (citing the example of the Secretary's decision in *In re: Challenge by Robert Bailey to Nomination Petitions of John L. Tuttle, Jr., Candidate*

for Representative to House District 143 (April 2004)).

B. Maine's Rule Is Not Narrowly Tailored to Serve the State's Legitimate Interests.

Hoffman does not dispute that the State of Maine may (a) require a Senate candidate to collect the valid signatures of 4,000 registered voters, (b) require circulators to verify nomination petitions in the manner required by § 354(7)(A), (c) refuse to count any signature that is not made in the presence of the circulator or otherwise invalid, and (d) discard an entire petition that is tainted by fraud. But a rule that requires the voiding of 90 valid signatures on three petitions on the ground that each petition contained one otherwise valid signature made in technical violation of the presence requirement — where there is no claim, evidence, or finding of fraud — is not narrowly tailored to serve any legitimate state interest. Invalidating each individual signature not made in the circulator's presence is a proper response to a non-fraud presence violation. Invalidating all the signatures on a petition based on one such violation is too severe. *See Storer* v. *Brown*, 415 U.S. 724, 738 (1974) ("[T]he requirements for an independent's attaining a place on the general ballot can be unconstitutionally severe."). The Maine rule applied here to Hoffman is grossly disproportionate to the unintentional violation he committed. *See Illinois State Bd. of Elections*, 440 U.S. at 185 ("[W]e have required that States adopt the least drastic means to achieve their ends. This requirement is particularly important where restrictions on access to the ballot are involved.") (citations omitted).

In this case there has never been any allegation, showing, or finding of fraud.

The Secretary informed the Maine Supreme Court that "the evidence shows that [Hoffman] took his oath in good faith, believing it to be true and correct (both factually and legally), and without any intent to deceive." Secretary Br. 17. And the court itself observed that "[n]one of the parties allege that Hoffman's inaccurate oath was a product of fraud." Exh. A at 9 n.6.

The point of the presence requirement is to help ensure that the signatures on a nomination petition are the genuine signatures of voters eligible to sign the petition. The three signatures at issue here were not made in the presence of the circulator, but there is no question as to their authenticity. Rep. Adams, Mr. Flack, and Mr. Woods all testified that they did, in fact, sign Hoffman's petition. The point of the signature requirement, in turn, is to ensure that the candidate has a sufficient modicum of support to warrant inclusion on the ballot. Here, Hoffman gathered more than 4,000 valid signatures. Absent fraud, Maine has no compelling interest in discarding valid signatures simply because they appear on the same petition as a signature made in violation of the presence requirement (but otherwise valid). *Cf. Krislov* v. *Rednour*, 226 F.3d at 863 ("As long as the required number of signatures are valid and they were obtained by an adult, what more is needed?").

Not only is Maine's rule excessive, it is arbitrary. The extent of the sanction imposed for one invalid signature will vary depending upon how many signatures happen to appear on a particular petition. The petition might have five signatures or it might have 45. In the election context, "a State cannot achieve its objectives by totally arbitrary means." *Bullock* v. *Carter*, 405 U.S. 134, 145 (1972). And now that

the rule is clear, it is also vulnerable to circumvention. The rule gives candidates an incentive to submit numerous petitions containing just a few signatures so that, if one signature is declared invalid, very few others are invalidated with it. Instead of submitting 100 petitions with 40 signatures per petition, a Senate candidate seeking to insure against the rule could submit 1,000 petitions with four signatures each — or 4,000 petitions bearing only one signature. If the rule can be defeated by formalism — and in the process drown the Secretary in paper — it can hardly be said to serve a compelling interest. Of course, Hoffman had no reason to employ to this strategy because he had no way to know that the Maine Supreme Court would construe § 354(9) — contrary to the Secretary's construction — to require the voiding of an entire petition for a technical, non-fraud presence violation.

The rule that was applied to Hoffman is not necessary to deter and punish misconduct by circulators because it is already a crime for a circulator to take the oath required by § 354(7)(A) and swear that every signature was made in the circulator's presence if the statement is not true and the circulator does not believe it to be true. *See* 17-A M.R.S. § 452(1)(A) (creating the crime of "false swearing"); *State* v. *Anthoine*, 789 A.2d 1277 (Me. 2002) (affirming petition circulator's false swearing conviction). Thus, even without the rule applied to Hoffman, Maine law "seem[s] adequate to the task of minimizing the risk of improper conduct in the circulation of a petition, especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage * * * than at the time of balloting." *Meyer* v. *Grant*, 486 U.S. at 427. *See also Krislov* v. *Rednour*, 226 F.3d

at 865 (noting that "dangers to the electoral system" are "particularly remote when simply gathering signatures"); *Citizens for Tax Reform* v. *Deters*, 518 F.3d 375, 388 (6th Cir.) (finding that Ohio law criminalizing fraudulent signatures was "adequate to deter improper conduct with regard to petition circulation") (internal quotation marks omitted), *petition for cert. filed* (U.S. Aug. 4, 2008) (No. 08-151).

Finally, the fact that Maine's Secretary of State did not defend — indeed, opposed — the rule applied by the court below should be given great if not conclusive weight in the First Amendment balancing analysis. In that analysis, a court must "evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." *Anderson* v. *Celebreeze*, 460 U.S. at 789. Here, the State of Maine has not sought to justify the burden imposed by the Maine Supreme Court's construction of state law. On the contrary, the Secretary told that court that to void Hoffman's three petitions in their entirety "would be an absurd result that would impose an undue burden on the fundamental rights of voters who signed the petitions." Secretary Br. 16. We are aware of no case in which a court has upheld a ballot access restriction against a First Amendment challenge where the Executive Branch did not defend the restriction.

III. The Grant of Certiorari Is Reasonably Probable.

There is a "reasonable probability" that four or more Justices would vote to grant certiorari. *Casey*, 510 U.S. at 1310 (Souter, J., in chambers). This case meets the Court's criteria for certiorari. The Maine Supreme Court decided an "important question of federal law" that should be "settled by this Court," and the Maine

Supreme Court decided that important federal question in a way that "conflicts with relevant decisions of this Court." S. Ct. R. 10(c). Furthermore, the consequence of the Maine Supreme Court's decision, absent a stay, is to exclude from the ballot a Senate candidate who collected more than enough valid signatures to earn a place on the November ballot. This Court has found the importance of the First Amendment questions arising from state laws restricting ballot access, without more, to be enough to warrant this Court's review. *See, e.g.*, *Buckley*, 525 U.S. at 187; *Meyer* v. *Grant*, 486 U.S. at 416.

The Maine Supreme Court's decision is out of step with recent decisions of this Court and federal circuit courts striking down under the First Amendment state election laws that made it unnecessarily difficult for a candidate, party, or initiative proponents to obtain the number of signatures required to secure ballot access. This Court in *Buckley*, 525 U.S. 182 (1999), struck down three Colorado statutes requiring the circulators of initiative petitions to be registered voters and wear identification badges and requiring proponents of an initiative to report the names, addresses, and payments made to each circulator. The Seventh Circuit in *Krislov* v. *Rednour*, 226 F.3d 851 (7th Cir. 2000), *cert. denied*, 531 U.S. 1147 (2001), struck down an Illinois statute requiring a petition circulator to be a registered voter in the district or other political subdivision in which the candidate is seeking office. The First Circuit in *Pérez-Guzman* v. *Garcia*, 346 F.3d 229 (1st Cir. 2003), *cert. denied*, 541 U.S. 960 (2004), struck down a Puerto Rico statute requiring a lawyer to notarize every signature on a new political party's petition for ballot

access. The Sixth Circuit in *Citizens for Tax Reform* v. *Deters*, 518 F.3d 375 (6th Cir.), *petition for cert. filed* (U.S. Aug. 4, 2008) (No. 08-151), struck down an Ohio statute making it a felony to pay someone to gather signatures on a petition on any basis other than the time worked. And just last month the Ninth Circuit in *Nader* v. *Brewer*, 531 F.3d 1028 (9th Cir. 2008), struck down two Arizona statutes requiring circulators of nomination petitions to be Arizona residents and requiring nomination petitions to be filed at least 90 days before the primary election. It is also instructive to compare the Maine Supreme Court's decision to that of the United States District Court for the District of Maine in *On Our Terms '97 PAC* v. *Secretary of State of Maine*, 101 F. Supp. 2d 19 (D. Me. 1999). There, the District Court struck down 21-A M.R.S. § 904-A, which made it illegal to pay circulators of initiative and referendum petitions based on the number of signatures collected, despite the Secretary's defense of the statute as necessary to preserve the integrity of the petition process. Here, the Secretary does not even defend the rule applied to Hoffman.

In each of these cases, the court subjected the restrictions at issue to strict scrutiny and held that the restrictions failed such scrutiny. *See Buckley*, 525 U.S. at 205 (striking down the Colorado statutes because they "unjustifiably inhibit the circulation of ballot-initiative petitions"); *Krislov* v. *Rednour*, 226 F.3d at 866 ("It [the statute] cannot withstand exacting scrutiny because although it helps ensure that candidates have a modicum of support among the electorate, it is not narrowly tailored to serve this or any other compelling interest."); *Pérez-Guzman*, 346 F.3d at

247 ("[T]he lawyer notarization requirement is not narrowly drawn to advance a compelling state interest (and, thus, cannot withstand First Amendment scrutiny)."); *Citizens for Tax Reform*, 518 F.3d at 377 ("The provision * * * runs afoul of the First Amendment because it creates a significant burden on a core political speech right that is not narrowly tailored."); *Nader* v. *Brewer*, 531 F.3d at 1030 ("[T]he burdens are significant and * * * the state has not shown the requirements are sufficiently narrowly tailored to further compelling interests."); *On Our Terms '97 PAC*, 101 F. Supp. 2d at 26 ("The Secretary * * * falls short of demonstrating that the Statute is narrowly tailored to meet a compelling state interest."). The decision of the Maine Supreme Court in this case — both in its analytical approach and the result it reached — is glaringly inconsistent with the foregoing cases.

The prospects for certiorari are enhanced by the fact that the State of Ohio has just filed a petition for certiorari in *Citizens for Tax Reform* seeking review of the Sixth Circuit's decision to strike down on First Amendment grounds an Ohio statute regulating signature gathering. *See* Petition for Certiorari, *State of Ohio* v. *Citizens for Tax Reform*, No. 08-151 (filed Aug. 4, 2008). That petition increases the likelihood that the Court will grant Hoffman's petition for certiorari or at least hold his petition and GVR following the disposition of *Citizens for Tax Reform*.

Furthermore, this Court's review is warranted, and reasonably probable, because the Maine law applied to Hoffman in this case appears to be unique in its severity. Other States would not have voided Hoffman's petitions in their entirety

based on a non-fraud violation. *See, e.g., In re Nomination Petition of Tony Payton, Jr.*, 945 A.2d 162, 163 (Pa. 2008) ("Thus, a court cannot presumptively invalidate nomination signatures based on nothing more than the invalidity of other signatures obtained by the circulator."); *North West Cruiseship Ass'n of Alaska, Inc.* v. *State of Alaska*, 145 P.3d 573, 587 (Alaska 2006) (invalidating entire petition for a violation on one page "would be an absurd result and one that clearly would infringe upon the voters' right to an initiative"); *State ex rel. Donofrio* v. *Henderson*, 211 N.E.2d 854, 865 (Ohio Ct. App. 1965) (where circulator did not watch signatures being affixed, election board's view that "all other signatures were void [was] clearly an abuse of discretion and a misapplication of the election laws. The ten valid signatures should properly have been counted."); *In re Initiative Petition No. 272*, 388 P.2d 290, 293 (Okla. 1964) ("[I]n order to invalidate all signatures upon a pamphlet, more proof is required than the presence of a single false signature or of some false signatures on the sheet. Protestants must go further and establish intentional fraud, wilful misconduct or guilty knowledge on the part of those who circulated the questioned pamphlets. The element of conscious and deliberate fraud must be present."); *State ex rel. Jensen* v. *Wells*, 281 N.W. 99, 102 (S.D. 1938) ("But, in the absence of evidence of intentional fraud or guilty knowledge on the part of the circulator, it would be an unjust rule to deprive the honest signer of his right to have his signature counted, merely because some disqualified person signed") (quoting *State ex rel. McNary* v. *Olcott*, 125 P. 303, 307 (Or. 1912)); Ohio Rev. Code § 3501.38(F) ("[I]f a circulator *knowingly* permits an unqualified person to sign a

petition paper * * * that petition paper is invalid; otherwise, the signature of a person not qualified to sign shall be rejected but shall not invalidate the other valid signatures on the paper.") (emphasis added). We are not aware of any other state law or state court decision which, absent fraud or intentional misconduct, voids all valid signatures on a petition based on the presence of one invalid signature.

Finally, there is no prudential reason to avoid review. The constitutional issue was squarely presented to, and was expressly decided by, the court below. *See supra* at 11-13. In the Maine Supreme Court, Hoffman and the Secretary defended as correct the Superior Court's construction of § 354(9) as not requiring the voiding of the three petitions and also argued that adopting the construction urged by Knutson would render the statute unconstitutional. The Maine Supreme Court, however, adopted Knutson's construction and expressly ruled on the constitutional issue, holding that Knutson's construction "falls well within acceptable constitutional parameters." Exh. A at 11. The briefs that Hoffman and the Secretary filed in court below are attached as Exhibits J and K, respectively.

Although Hoffman's petition for a writ of certiorari is currently due on October 27, 2008, eight days before the election, in the interest of expedition, Hoffman stands ready to file his petition as soon as the Court may choose to direct. If the Court allows the certiorari process to run its ordinary course, the case will not be mooted by the election this November. *See, e.g.*, *Meyer* v. *Grant*, 486 U.S. at 417 n.2 (challenge to Colorado petition circulation law was not mooted by intervening election as controversy was "capable of repetition, yet evading review"); *Anderson* v.

Celebreeze, 460 U.S. at 784 n.3 ("Even though the 1980 election is over, the case is not moot."); *Storer* v. *Brown*, 415 U.S. at 737 n.8 ("The 1972 election is long over, * * * but this case is not moot, since the issues properly presented, and their effects on independent candidates, will persist as the California statutes are applied in future elections."). Thus, the Court may, if it so chooses, grant the stay that Hoffman seeks without accelerating the certiorari process.

CONCLUSION

For the foregoing reasons, Hoffman's emergency application for a stay of enforcement of the Maine Supreme Court's judgment should be granted.

Respectfully submitted,

H. CHRISTOPHER BARTOLOMUCCI
(Counsel of Record)
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

JOHN H. BRANSON
LAW OFFICE OF JOHN H. BRANSON, P.A.
183 Middle Street, 4th Floor
Post Office Box 7526
Portland, Maine 04112-7526
(207) 780-8611

OLIVER B. HALL
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294

Counsel for Applicant Herbert J. Hoffman

Dated: August 14, 2008

CERTIFICATE OF SERVICE

I, H. Christopher Bartolomucci, a member of the bar of this Court, hereby certify that on this 14th day of August, 2008, a copy of the foregoing Emergency Application for a Stay of Enforcement of the Judgment of the Supreme Judicial Court of Maine Pending the Filing and Disposition of a Petition for a Writ of Certiorari was served by overnight delivery and electronic mail upon:

Jonathan S. Piper, Esq.
Daniel W. Walker, Esq.
Preti Flaherty
One City Center
Post Office Box 9546
Portland, Maine 04112-9546
(207) 791-3000

Counsel for John Knutson

G. Steven Rowe
Attorney General
Paul Stern
Deputy Attorney General
Phyllis Gardiner
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006
(207) 626-8800

Counsel for Department of the Secretary of State

I further certify that all parties required to be served have been served.

H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

Counsel for Applicant