No. 08A138

SUPREME COURT OF THE UNITED STATES

HERBERT J. HOFFMAN,

Applicant,

v.

MAINE DEPARTMENT OF SECRETARY OF STATE, *et al.*

SUPPLEMENT TO EMERGENCY APPLICATION FOR A STAY

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

This Court's stay of the Maine Supreme Court's judgment entitles Herbert Hoffman to a place on the 2008 general election ballot. Such a stay makes operative the decisions of the Hearing Officer, the Maine Secretary of State, and the Superior Court, each of which concluded that Hoffman qualified for ballot access. The Hearing Officer found that Hoffman had "a total of 4,038 valid signatures, which is more than the minimum required." Exh. D at 7. She recommended that the Secretary "determine that the challenge to the petition is not valid, and that there are sufficient signatures for the nomination of Herbert J. Hoffman." *Id.* The Secretary "adopt[ed] the Report and the recommendations of the Hearing Officer and reject[ed] the challenge to [Hoffman's] petitions." Exh. C. The Superior Court affirmed the Secretary's decision. *See* Exh. B at 10. The Maine Supreme Court's decision calls for the Superior Court's judgment to be vacated. With a stay, however, the Superior Court's judgment remains in effect and requires the Secretary to restore Hoffman's rightful spot on the ballot.

Norman v. *Reed*, 502 U.S. 279 (1992), is instructive. An electoral board granted ballot access but the Illinois Supreme Court reversed. Petitioners applied for a stay, and Justice Stevens "ordered the mandate of the Illinois Supreme Court to be 'stayed, or if necessary, recalled' pending further review by this Court." *Id.* at 287. The full Court then granted a stay, "thereby effectively reviving the Electoral Board's decision and permitting petitioners to run" in the 1990 election. *Id.* The Court's stay order said that the board's decision "is to remain in effect pending the timely filing and disposition" of a petition for certiorari. 498 U.S. 931 (1990). Here,

a stay would "revive" the decisions of the Secretary and the Superior Court.

If the Court concludes that a stay would *not* put Hoffman on the ballot, then Hoffman respectfully requests that the Court issue a *McCarthy* injunction directing the Secretary to place Hoffman's name on the ballot. *See McCarthy* v. *Briscoe*, 429 U.S. 1317 (1976) (Powell, J., in chambers). In *McCarthy*, Justice Powell ordered the Secretary of State of Texas to put Eugene McCarthy on the ballot as an independent presidential candidate. Texas had amended its election law to deny independent candidates any way to qualify for the ballot. The district court held that this was unconstitutional, but neither it nor the court of appeals granted relief. McCarthy filed a stay application with Justice Powell, who treated it as a request for an injunction and granted relief just three days later. *See id.* at 1317 n.1, 1323 n.4.

The question to be decided in *McCarthy*, as Justice Powell framed it, was "whether it would be *appropriate* to order Senator McCarthy's name added to the general election ballot as a remedy" for the constitutional violation. *Id.* at 1322 (emphasis added). Justice Powell reviewed the remedy question *de novo*. *See id.* at 1318 ("I have concluded that the courts below erred in failing to remedy a clear violation of the applicants' constitutional rights."); *id.* at 1322 (Accepting the lower courts' "findings of fact does not in this case require acceptance of the conclusion that violation of the applicants' constitutional rights must go unremedied.").

Tackling the remedy question, Justice Powell observed that in "determining whether to order a candidate's name added to the ballot as a remedy for a State's denial of access, a court should be sensitive to the State's legitimate interest" in

reserving the ballot for candidates with "demonstrate[d] community support." *Id.* Although McCarthy could not point to signatures on nomination petitions — since Texas had eliminated that procedure for independent candidates — Justice Powell said "a court may properly look to available evidence or to matters subject to judicial notice to determine whether there is reason to assume the requisite community support." *Id.* at 1323. He found that McCarthy had such support.

Here, Hoffman has demonstrated likely merits success — the traditional showing asked of an applicant for preliminary relief. Indeed, just as in *McCarthy*, this case involves "a clear violation of the applicants' constitutional rights." *Id.* at 1318. Maine's election law imposes a severe burden on the First Amendment rights of expression, association, and voting, and thus is subject to strict scrutiny. Few election laws survive such review. The clarity of the First Amendment violation is confirmed by the fact that Maine's own Secretary of State opposed the invalidation of Hoffman's three petitions in their entirety — a result the Secretary rightly called "draconian," "absurd," and "unduly burdensome" on First Amendment rights. *Cf. McCarthy*, 429 U.S. at 1322 ("[T]he District Court properly characterized [the Texas law] as an 'incomprehensible policy' violative of constitutional rights."). Finally, Maine's law appears to be uniquely harsh. Hoffman's probability of success on the merits is thus high enough to warrant the "appropriate" remedy — ballot access. *Id.*

An order compelling the Secretary to place Hoffman's name on the ballot is the appropriate remedy. Hoffman has demonstrated "the requisite community support." *Id.* at 1323. Hoffman collected more than the 4,000 signatures required

under Maine law to earn a place on the ballot as a Senate candidate. There is no dispute that the 90 contested signatures — and even the three signatures of Adams, Flack, and Woods — are the genuine signatures of Maine voters who signed their names to register their support for Hoffman to appear on the ballot.

In sum, a stay entitles Hoffman to ballot access. If a stay, without more, does not put Hoffman on the ballot, then a *McCarthy* injunction should issue here. *See also Williams* v. *Rhodes*, 89 S. Ct. 1 (1968) (Stewart, J., in chambers) (ordering Ohio officials to place the names of candidates for President and Vice President on the ballot pending expedited merits review in view of the "exigent circumstances").

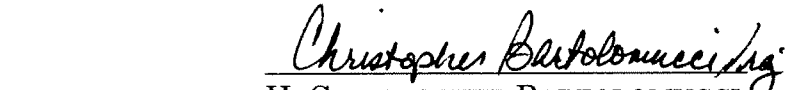
Fishman v. *Schaffer*, 429 U.S. 1325 (1976) (Marshall, J., in chambers), also supports granting an injunction. In *Fishman*, Justice Marshall was asked to issue an injunction ordering the State of Connecticut to place the Communist Party candidates for President and Vice President on the 1976 general election ballot. Justice Marshall stated that "there is no question of my power to grant such relief," *id.* at 1325-26, but he declined to exercise that power. His decision was based on the combination of three factors: First, "unlike *McCarthy*, the question [presented] is too novel and uncertain." *Id.* at 1329-1330. Second, "the applicants delayed unnecessarily in commencing this suit." *Id.* at 1330. Indeed, the district court found their suit "barred by laches." *Id.* at 1327. Third, "[t]he Presidential and overseas ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed." *Id.* at 1330.

Those factors work in Hoffman's favor here. Hoffman promptly sought a stay

in the court below and in this Court, and Maine's ballots have not been formatted or printed. Nor is Hoffman's claim "too novel and uncertain." While the Court has not considered a case precisely on all fours with this one, a straightforward application of this Court's ballot access cases reveals that Maine's law as applied here cannot survive review. Justice Marshall wrote *Fishman* in 1976, prior to this Court's decisions in *Anderson* v. *Celebreeze*, 460 U.S. 780 (1983), *Meyer* v. *Grant*, 486 U.S. 414 (1988), and *Buckley* v. *American Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), among many others. Unlike 1976, it is "now settled" that state election laws imposing severe burdens on speech are subject to strict scrutiny. *Buckley*, 525 U.S. at 192 n.12 (hyphen omitted). Maine's severe rule — which voids a nomination petition in its entirety and every valid signature on it if one signature is invalid due to a non-fraud "presence" violation — is not narrowly tailored to serve a compelling state interest. Not even the Secretary defends the rule. The Maine Supreme Court, in a very abbreviated review process (the court had only five days after receiving the parties' briefs to render its decision), decided the constitutional question against Hoffman, but the Secretary and the Superior Court sided with Hoffman. Surely a state election law need not be unconstitutional to a moral certainty before this Court will order a strongly supported candidate's name placed on the ballot.

Finally, the equities, if they come into play, favor granting relief. Hoffman and his supporters will be gravely harmed if he is left off the ballot. Their harm will greatly exceed the harm, if any, to the major party candidates from placing his name on the ballot. Putting Hoffman on the ballot does not take them off of it.

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 19, 2008

CERTIFICATE OF SERVICE

I, H. Christopher Bartolomucci, a member of the bar of this Court, hereby certify that on this 19th day of August, 2008, a copy of the foregoing Supplement to Emergency Application for a Stay 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.

Christopher Bartolomucci /rgj

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

Counsel for Applicant